debtor is substantial, the court commissioner may only preserve the status quo. Paradise v. Ridenour, 211 W 42, 247 NW 472.

See note to 231.19, citing Meyer v. Rief, 217 W 11, 258 NW 391.

A court commissioner could not direct the receiver to continue the operation of the business of the judgment debtor, that being foreign to the scope and purposes of supplementary proceedings, but the commissioner could direct the receiver to take possession and sell any "property" of the debtor not exempt from execution, to obtain proceeds to apply to the satisfaction of the judgment. A receiver's sale of leasehold rights of a judgment debtor in supplementary proceedings could be ordered and made without reserving an equity of redemption in the debtor. The debtor, having participated and acquiesced in all the proceedings prior to the sale, was estopped from asserting after the sale that no title ever vested in the receiver and that none could be conveyed by him because the order in question did not expressly mention the leasehold and there was no order expressly divesting the debtor of title or vesting title in the receiver or directing the debtor to convey to the receiver. U. S. Rubber Products, Inc. v. Twin Highway Tire Co. 233 W 234, 288 NW 179.

When, in supplementary proceedings, property claimed to belong to a judgment debtor is in the possession of another person claiming an adverse interest therein, such interest is recoverable only in an action by the receiver. A transfer or other disposition of such property may be restrained until a sufficient opportunity is given to the receiver to commence the action. A receiver stands in the shoes of the debtor and acquires at the time of appointment such rights of title and possession as the debtor may have in property. Nick v. Holtz, 237 W 407, 297 NW 387.

273.11 History: 1856 c. 120 s. 213; R. S. 1858 c. 134 s. 198; R. S. 1878 s. 3038; Stats. 1898 s. 3038; 1925 c. 4; Stats. 1925 s. 273.11; 1935 c. 541 s. 276; 1939 c. 476.

Where it was shown that a debtor was secreting property and refusing to apply it to the judgment, costs could be charged against him. Enders v. Smith, 122 W 640, 100 NW 1061.

CHAPTER 274.

Writs of Error and Appeals.

274.01 History: 1850 c. 193 s. 1, 2; 1858 c. 61 s. 2; R. S. 1858 c. 139 s. 31, 32; 1860 c. 264 s. 9; R. S. 1878 s. 3039; Stats. 1898 s. 3039; 1913 c. 400; 1925 c. 4; Stats. 1925 s. 274.01; 1935 c. 541 s. 277; 1943 c. 261, 505; 1943 c. 553 s. 37; 1951 c. 342; Sup. Ct. Order, 17 W (2d) xviii; 1969 c. 339 s. 27.

Comment of Judicial Council, 1963: The time for appeal from both judgments and appealable orders is 6 months, but the time may be reduced to 3 months in either case, by service of notice of entry of judgment. [Re Order effective Jan. 1, 1964.]

The time for appealing may be lessened as to judgments already rendered, if reasonable time be left for appeal; otherwise, such an act has no effect on the limitation. Smith v. Packard, 12 W 371.

An appeal in the name of town supervisors may be dismissed by virtue of a resolution by the electors at a special town meeting. State ex rel. Mitchell v. Supervisors, 58 W 291, 17 NW 20.

Unless the record shows that an appeal was perfected within the time limited and in the manner prescribed the court cannot entertain it. The time cannot be extended. Munk v. Anderson, 94 W 27, 68 NW 407.

An appeal by a guardian ad litem of minor defendants will not be dismissed because not perfected within the time limited, nor will leave to perfect it be denied because not applied for within such time. Tyson v. Tyson, 94 W 225, 68 NW 1015.

An appeal taken too late will be dismissed. Pereles v. Leiser, 123 W 233, 101 NW 413.

Where the evidence as to the time within which an appeal was taken is conflicting, the doubt will be resolved in favor of the validity of the appeal. In re Clark, 135 W 437, 115 NW 387.

Failure to object to an appeal, or even express consent of all parties that an appeal may be taken, will not confer jurisdiction on an appellate court if, in fact, there is no right to appeal. A judgment annulling a marriage is a judgment in a civil action, and a right to such appeal is given by sec. 3039, Stats. 1919. Hempel v. Hempel, 174 W 332, 181 NW 749, 183 NW 258.

The remedy for an erroneous dismissal of an action by the guardian of an infant was an appeal by the infant; and where the dismissal was on the merits because a previous judgment for the same cause had been obtained in a justice's court, the infant was barred from bringing a new action after reaching his majority to set aside the justice's judgment as fraudulent even though the justice's judgment was fraudulent. Zastrow v. Milwaukee E. R. & L. Co. 183 W 436, 198 NW 275.

An appeal cannot be taken until a judgment is perfected by the taxation of costs, but the time within which an appeal may be taken commences at the time the judgment is entered. Netherton v. Frank Holton & Co. 189 W 461, 207 NW 953.

In the absence of a statutory provision, an appeal itself operates as a supersedeas. David Adler & Sons Co. v. Maglio, 198 W 24, 223 NW 89.

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.

A pronouncement by the trial 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, 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 to the supreme court at any time within 6 months. Neither an order of the circuit court reversing the judgment of the civil court and dismissing the plaintiff's complaint, and directing 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, defeated the plaintiff's right to have the record brought up for review under his timely appeal from the judgment of the circuit court. Zbikowski v. Straz, 236 W 161, 294 NW 541.

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

An order vacating a judgment was effective for the purpose until it was reversed and the judgment reinstated, and the time during which the judgment was vacated could not be 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.

Where the court further considered a matter after signing a judgment dated December 16, and concluded on January 3, to enter the judgment as originally drawn, and the court after hearing the plaintiff's motion ordered that the date of the judgment be corrected to read January 3, the correct date of the entry of judgment is held to be January 3. Randall v. Beidle, 239 W 285, 1 NW (2d) 71.

A "special proceeding," such as the vacation of a plat, terminates by order and not by judgment, in respect to the time within which an appeal may be taken under 274.01 and 274.04, Stats. 1941. 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 a statute providing for an appeal. In re Fish, 246 W 474, 17 NW (2d) 558.

A determination, denying a motion to vacate a confirmation of a foreclosure sale and the sheriff's deed and to grant the defendant more time for redeeming the mortgaged premises, was an "order" and not a "judgment," in respect to the time within which an appeal could be taken. Kling v. Sommers, 252 W 217, 31 NW (2d) 206.

The right to appeal and to do it timely is not affected by the fact that notice of entry of a judgment or order is, or is not served. Olson v. Milwaukee Auto. Ins. Co. 266 W 106, 62 NW (2d) 549, 63 NW (2d) 740.

See note to 270.49 (generally), citing Steinfeldt v. Pierce, 2 W (2d) 138, 85 NW (2d) 754.

See note to 251.09, citing Graff v. Roop, 7 W (2d) 603, 97 NW (2d) 393.

274.01 controls as to the time limit for appeals from county court in civil matters. 324.04 applies to traditionally probate jurisdiction. Oremus v. Wynhoff, 19 W (2d) 622, 121 NW (2d) 161.

Where the conservation commission was the highest bidder at a foreclosure sale, it could appeal from an order refusing to confirm the sale. Gumz v. Chickering, 19 W (2d) 625, 121 NW (2d) 279.

See note to 270.53, citing Rachlin v. Drath, 26 W (2d) 321, 132 NW (2d) 581.

See note to 247.37, citing Holschbach v. Holschbach, 30 W (2d) 366, 141 NW (2d) 214.

An attempted appeal from a judgment of foreclosure and sale and various intermediate orders, not taken within 6 months of the respective dates of entry of each, was not timely on its face. Alsmeyer v. Norden, 30 W (2d) 593, 141 NW (2d) 177.

274.02 History: R. S. 1849 c. 104 s. 11; R. S. 1858 c. 139 s. 36; R. S. 1878 s. 3040; Stats. 1898 s. 3040; 1909 c. 114; 1925 c. 4; Stats. 1925 s. 274.02; 1935 c. 541 s. 278.

274.05 History: R. S. 1849 c. 104 s. 1, 6; 1858 c. 61 s. 1; R. S. 1858 c. 139 s. 25, 30; R. S. 1878 s. 3043; 1889 c. 239 s. 1; Ann. Stats. 1889 s. 3043, 3437a; Stats. 1898 s. 3043; 1925 c. 4; Stats. 1925 s. 274.05; 1935 c. 541 s. 281; 1949 c. 301; 1969 c. 255 s. 65.

Comment of Advisory Committee, 1949: The object of the addition to 274.05 is to prevent appeals and writs being used in habeas corpus proceedings for the purpose of delay and for permitting an accused to remain at liberty and even finally to defeat justice through loss or disappearance of evidence. [Bill 30-S]

On writs of error see notes to sec. 21, art. I; on appellate jurisdiction of the supreme court see notes to sec. 3, art. VII, and notes to 251.08; and on habeas corpus see notes to various sections of ch. 292.

Where there is no final judgment there can be no writ of error. Remington v. Cummings, 5 W 138.

Decision of a motion to set aside a judgment is a bar to a writ of error prosecuted on the same grounds. Second Ward Bank v. Upman, 14 W 596.

A writ is proper in an action for money paid though a judgment of discontinuance is entered. Howard v. Osceola, 22 W 454.

There can be no second writ in the same case. Zimmerman v. Turner, 24 W 483.

Appeal from an order refusing to vacate a judgment cannot be treated as a writ of error or appeal from the judgment. Planer v. Smith, 40 W 31.

A writ lies after judgment in any action at law in a court of record to correct some supposed mistake in the proceedings or judgment. It may be had in cases where the court can award a compulsory reference. The right to the writ is secured by the constitution. The statute does not attempt to restrict the functions of the writ. Buttrick v. Roy, 72 W 164, 39 NW 345.

A writ of error cannot be used to review judgments in equitable actions. Farmers Fire Ins. Co. v. Conrad, 102 W 387, 78 NW 582.

A writ of error issued to review a judgment does not bring up the orders made subsequent. J. L. Gates L. Co. v. Olds, 112 W 268, 87 NW 1088.

A petitioner in habeas corpus proceedings can have the order of the judge at chambers reviewed by the circuit court and if the ruling of the court is adverse to him may bring the matter to the supreme court by writ of error. In re Hammer, 113 W 96, 89 NW 111.

An order in habeas corpus proceedings remanding the prisoner and fixing bail is reviewable by writ of error. Heller v. Franke, 146 W 517, 131 NW 991.

Under 274.05 and 358.06, Stats. 1935, except as to review of an order or judgment discharging or remanding a person brought up by writ of habeas corpus, a writ of error issues only to review a final judgment or to review an order refusing to grant a new trial; and hence an order vacating a judgment against the defendant in a paternity proceeding and directing further proceedings is not reviewable by writ of error. If the trial court was without jurisdiction to enter the order in question, its action could be reviewed by certiorari or by writ of prohibition. Lang v. State ex rel. Bunzel, 227 W 276, 278 NW 467.

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

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 suing-out relator is entitled to a review 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 having custody of the prisoner, and whether the state may properly sue out the writ in its own name. Drewniak v. State ex rel. Jacquest, 239 W 475, 1 NW (2d) 899.

The supreme court had jurisdiction on a writ of error sued out by a sheriff to review a judgment discharging a defendant from custody on a writ of habeas corpus, regardless of whether a notice of writ of error was given to the defendant, where the writ was filed with the clerk of the circuit court, and his return was filed in the supreme court, and the defendant notified that the writ 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.

An order which commanded the sheriff to forthwith discharge the defendant from custody was an appealable order governed by 274.05, and not by the exclusionary effect of the more general 274.33 relating to appealable orders and judgments. Language in an order terminating a habeas corpus proceeding, "Let Judgment Be Entered Accordingly," is considered superfluous and does not have the effect of destroying the appealability of the order. Wolke v. Fleming, 24 W (2d) 606, 129 NW (2d) 841.

274.06 History: R. S. 1878 s. 3044; Stats. 1898 s. 3044; 1925 c. 4; Stats. 1925 s. 274.06; 1939 c. 66.

Editor's Note: Although searches have been made in the session laws for the period 1849-78, the antecedents of sec. 3044, R. S. 1878, have not been ascertained.

Bond is not required of the state on a writ of error in criminal proceedings. State ex rel. Isenring v. Polacheck, 101 W 427, 77 NW 708.

274.07 History: R. S. 1849 c. 104 s. 2, 3; R. S. 1858 c. 139 s. 26, 27; 1860 c. 96; 1872 c. 180; R. S. 1878 s. 3045; Stats. 1898 s. 3045; 1925 c. 4; Stats. 1925 s. 274.07; 1939 c. 66.

See note to sec. 21, art. I, citing Lombard v. Cowham, 34 W 300.

274.08 History: R. S. 1849 c. 104 s. 4; R. S. 1858 c. 139 s. 28; R. S. 1878 s. 3046; Stats. 1898 s. 3046; 1925 c. 4; Stats. 1925 s. 274.08; 1939 c. 66.

274.09 History: 1860 c. 264 s. 8; R. S. 1878 s. 3047; Stats. 1898 s. 3047; 1899 c. 63 s. 1; Supl. 1906 s. 3047; 1919 c. 183 s. 1; 1925 c. 4; Stats. 1925 s. 274.09; 1935 c. 541 s. 282; 1943 c. 505.

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. * * * [Bill 50-S, s. 282]

Editor's Note: Following the enactment of ch. 541, Laws 1935, decisions interpreting 274.09 were in conflict. In re Burke, 229 W 545, held that the amendatory statute changed the rule in Petition of Long, 176 W 361; but the contrary was held in In re Farmers Ex. Bank, 242 W 574. The Burke case was not cited in the later decision. The question became moot by the enactment of ch. 505, Laws 1943.

On appellate jurisdiction of the supreme court see notes to sec. 3, art. VII, and notes to 251.08.

1. Jurisdiction on appeal; the finality principle.
2. Who may appeal; parties; waiver.
3. Interlocutory judgments.
4. New matter on appeal.

1. Jurisdiction on Appeal; the Finality Principle.

An appeal before entry of judgment must be dismissed. Fehring v. Swineford, 33 W 550.

Courts cannot impose, as a condition of granting relief, a surrender of the right to appeal. Sobey v. Thomas, 37 W 568.

When a demurrer to a complaint or an answer has been overruled the party demurring may answer to the pleading demurred to without affecting his right to a review of the overruling order. Douglas County v. Walbridge, 36 W 643; Tronson v. Union L. Co. 38 W 202.

If there are two appeals to obtain what is attainable by a single appeal, one must be dismissed. In re Young, 22 W 205; Hopkins v. Hopkins, 39 W 166; Moe v. Moe, 39 W 308; Wisconsin River L. Co. v. Plumer, 49 W 668, 6 NW 320.

In appeal from a judgment void for want of jurisdiction of the circuit court to render it, the supreme court may reverse such judgment and remand the case for dismissal. Spaulding v. Milwaukee, L. S. & W. R. Co. 57 W 304, 14 NW 368, 15 NW 482.

An appeal cannot be taken from the writ of mandamus, but may be taken from the order or judgment granting it. State ex rel. Taylor v. Delafield, 64 W 218, 24 NW 905.

The court cannot restrict the appeal or confine it to one order. Eureka S. H. Co. v. Sloteman, 67 W 118, 30 NW 241.

In computing the time within which appeal can be taken the day on which judgment is entered should be excluded. Bennett v. Kuhn, 67 W 154, 29 NW 207, 30 NW 112.

An appeal will not lie until the costs are taxed. An appeal before that time will be dismissed. Joint Dist. v. Kemen, 68 W 246, 32 NW 42.

The right to appeal from an order sustaining a demurrer to a complaint is waived by filing an amended complaint. The correctness of such order cannot be questioned on the appeal from the judgment. Hooker v. Brandon, 75 W 8, 43 NW 741.

An appeal cannot be taken from an order denying a motion for judgment on the verdict after the latter has been set aside and a new trial ordered. Schweickhart v. Stuewe, 75 W 157, 43 NW 722.

An unauthorized appeal does not give the appellate court jurisdiction and an ex post facto consent by the officer who might have taken the appeal does not give jurisdiction. State v. Duff, 83 W 291, 53 NW 446.

An appeal, without a stay of proceedings, does not affect the judgment as a bar to another action. Smith v. Schreiner, 86 W 19, 56 NW 160.

An order and a subsequent order modifying it are regarded as a single order. Nash v. Meggett, 89 W 486, 61 NW 283.

That part of a judgment of foreclosure which orders a personal judgment for any deficiency after sale of the mortgaged premises is an integral part of the judgment and is appealable. (Gaynor v. Blewett, 86 W 399, 57 NW 44, applied.) Kane v. Williams, 99 W 65, 74 NW 570.

There can be no appeal from a finding of fact or conclusion of law. Tellett v. Albregtson, 160 W 487, 152 NW 152.

The removal of an action to the supreme court by appeal or writ of error deprives the trial court of jurisdiction. An order of the trial court, while the cause was pending in the supreme court, suspending sentence and placing the defendant on probation was void. State ex rel. Zabel v. Municipal Court, 179 W 195, 190 NW 121.

See note to 270.54, citing Application of Whitman, 186 W 434, 201 NW 812.

A judgment awarding defendants damages for an improvident temporary injunction was in the 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.

A motion to dismiss an appeal 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. Jefferson Gardens, Inc. v. Terzan, 216 W 230, 257 NW 154.

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

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

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 a review of the determination of a board of election canvassers in recount proceedings under the governing statute, 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 is not an appealable judgment or a final order. 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 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.

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 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. 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. In re Farmers & Traders Bank, 244 W 576, 12 NW (2d) 925.

Often 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 case by an appeal or otherwise. Northwestern Wis. Elec. Co. v. Public Service Comm. 248 W 479, 22 NW (2d) 472, 23 NW (2d) 459.

Under 274.09, Stats. 1947, the supreme court is bound to treat naturalization proceedings as an exercise of the judicial power and as an action or a special proceeding, so that an appeal lies to this court from an order of the circuit court denying an application for citizenship. Petition of Knuth, 253 W 381, 34 NW (2d) 273.

That part of a judgment which adjudged certain individuals appealing therefrom to have been guilty of contempt, but which imposed no penalty and reserved jurisdiction in the trial court to take further action, is not presently appealable. Wisconsin E. R. Board v. United A., A. & A. I. Workers, 271 W 556, 74 NW (2d) 205.

If a so-called judgment appealed from is not appealable, the supreme court is without jurisdiction to consider the merits of the controversy; and the fact that the question has not been raised is immaterial, since such failure does not confer jurisdiction. Northland Greyhound Lines v. Blinco, 272 W 29, 74 NW (2d) 796.

Where the trial court ordered a reduction of damages and judgment for the reduced amount unless plaintiff elected a new trial, and plaintiff did not so elect, plaintiff could appeal from the judgment when entered. He could not appeal from the order, since it was not an order for a new trial. DeLong v. Sagstetter, 16 W (2d) 390, 114 NW (2d) 788, 116 NW (2d) 137.

See note to 270.53, citing Last v. Puchler, 19 W (2d) 291, 120 NW (2d) 120.

274.09 (1) and 324.01, Stats. 1961, permit an appeal from an order or judgment to the supreme court from the county court, except where express provision is made for an appeal to the circuit court; and there is no statute authorizing appeals to the circuit court from county court contempt citations. State ex rel. Jenkins v. Fayne, 24 W (2d) 476, 129 NW (2d) 147.

274.09 (2), Stats. 1963, limits appeals to final orders and judgments of lower tribunals. An appeal from an order directing sale of real estate subject to a judgment of foreclosure is not a final order. An order confirming or denying confirmation of a sale is final and appealable. Alsmeyer v. Norden, 30 W (2d) 593, 141 NW (2d) 177.

Appeals from county court in non-probate matters go to the supreme court only when no provision is made for appeal to the circuit court. Appeal from a forfeiture determination in county court is only to the circuit court. Milwaukee County v. Caldwell, 31 W (2d) 286, 143 NW (2d) 41.

2. Who May Appeal; Parties; Waiver.

As to appeals by assignees not parties, in the name of the assignor, see Baasen v. Eilers, 11 W 277.

A stipulation for judgment is not a waiver of the right to appeal. Van Dyke v. Weil, 18 W 277.

Giving bail is not a waiver of appeal from an order refusing to vacate an order of arrest. Pratt v. Page, 18 W 337.

Accepting costs for a new trial is a waiver of the right to appeal. Cogswell v. Colley, 22 W 399.

Parties not joining in a motion cannot appeal from an order denying it. White v. Sherry, 37 W 225; Terry v. Chandler, 23 W 456.

A defendant, on appeal by a co-defendant having an adverse interest, though not a party, is a privy to the appeal, and may be admitted to all the rights possessed by respondents in the supreme court. Hunter v. Bosworth, 43 W 583.

A party having no interest cannot appeal. Amory v. Amory, 26 W 152 (one claiming as widow after divorce); Downer v. Howard, 47 W 476, 3 NW 1 (one claiming as heir who was simply assignee of the heir and who did not disclose such fact); McGregor v. Pearsons, 51 W 122, 8 NW 101 (wife of defendant in foreclosure who had conveyed her interest).

All parties interested in a judgment may join in an appeal therefrom though their interests be different. Kaehler v. Halpin, 59 W 40, 17 NW 868.

An administratrix may appeal from an order affecting the estate. Jefferson County Bank v. Robbins, 67 W 68, 29 NW 209 and 893.

Payment of a judgment is not a waiver of an appeal then pending or of the right to appeal or to bring a writ of error. Chapman v. Sutton, 68 W 657, 32 NW 683.

To justify dismissing an appeal on the ground that the litigation is settled by payment of the judgment the evidence must be conclusive that the payment was voluntary or made with a view to such settlement. Plano M. Co. v. Rasey, 69 W 246, 34 NW 85.

In an action against a county to set aside taxes a part of the taxes was held valid, and it was ordered that the plaintiff pay such part into court and that, upon doing so, it should have judgment enjoining the collection of the remainder. The plaintiff paid the required sum and judgment was thereupon entered adjudging the sum so paid to be in full satisfaction of all the taxes in question and enjoining the collection of any further sum. The county procured an order that the money be paid to its treasurer, and it was so paid. By accepting the money the county waived its

right to appeal from the judgment. Webster-Glover L. & M. Co. v. St. Croix County, 71 W 317, 36 NW 864.

An employment to defend an action pending in a trial court does not, under ordinary circumstances, authorize an attorney so employed to take an appeal. Hooker v. Brandon, 75 W 8, 43 NW 741.

Accepting the cost awarded by an order is a waiver of the right to appeal from the order. Smith v. Coleman, 77 W 343, 46 NW 664.

A receiver, being the agent of the court, cannot appeal from an order in an action unless the court authorizes him to do so. By accepting the advantage resulting from an order based upon the order complained of, a party who procured the subsequent order waives his right to appeal from the original order. McKinnon v. Wolfenden, 78 W 237, 47 NW 436.

A defendant who has or claims to have a lien subsequent to that being foreclosed cannot question a judgment if he has not answered, excepted or moved for a new trial and the record does not show that he had any interest in the premises. Shabanaw v. C. C. Thompson & Walkup Co. 80 W 621, 50 NW 781.

The law favors the right of appeal. Where a plaintiff obtains a less favorable judgment than he is entitled to and, upon condition that he pay into court for the use and benefit of the parties entitled thereto a sum mentioned, and it is recited in the judgment that such payment was made under protest, compliance with that condition in order to perfect the judgment is not a waiver of the right to appeal. (Webster-Glover L. M. Co. v. St. Croix County, 71 W 317, distinguished.) Hixon v. Oneida County, 82 W 515, 52 NW 445.

Acceptance of the money awarded by a portion of a judgment is a waiver of the right to appeal from the whole judgment, especially where the money accepted is exempt from execution and is paid to stop further litigation. Laird v. Giffin, 84 W 286, 54 NW 584.

If a controversy is wholly settled by an agreement of the parties the right of appeal is waived. Ray v. Hixon, 90 W 39, 62 NW 922.

The common council of a city which has removed an officer upon charges made by private citizens cannot appeal from an order made in certiorari proceedings to review its action. State ex rel. Kempster v. Common Council of Milwaukee, 90 W 487, 63 NW 751.

A creditor who demurs to another creditor's complaint may appeal from an order overruling the demurrer. Northwestern I. Co. v. Central T. Co. 90 W 570, 63 NW 752, 64 NW 323.

A guardian ad litem may appeal without leave of court if he deems that necessary to protect the interests of his ward. Tyson v. Tyson, 94 W 225, 68 NW 1015; In re Jones v. Roberts, 96 W 427, 71 NW 883.

Where an order requires a special administrator to pay to a guardian ad litem funds for obtaining witnesses in a will contest, and the proponent of the will is not a party, he cannot appeal from the order unless he appeared and moved to set it aside. In re McNaughton's Will, 135 W 24, 114 NW 849.

Where a new trial was granted unless defendant would stipulate to remit a part of the damages awarded by the jury on his counterclaim and allow a judgment for plaintiff for a certain sum the filing of such a stipulation was a waiver of defendant's right to appeal from the judgment. Agnew v. Baldwin, 136 W 263, 116 NW 641.

The right to appeal from an order opening a default and granting a new trial was waived by an acceptance of the costs allowed as a condition of such new trial by the party against whom the order was made. Feldmeier v. Springfield F. & M. Ins. Co. 171 W 377, 177 NW 583.

Where a guardian's payment of a judgment against an incompetent's estate was made without consulting the incompetent, his adult daughter, or his attorney, and without application for authority to waive the estate's right to appeal, and it was neither agreed between the parties nor intended by the guardian that there was to be any waiver of the right to appeal, the record did not warrant dismissal of the appeal from the judgment and was not waived. 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" when authorized by the court of appointment. Delaware v. Gray, 221 W 584, 267 NW 310.

A defendant, by proposing 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 admit that the evidence in the case supports such proposed findings, is not precluded from attacking the judgment. Berk v. Milwaukee Auto. Ins. Co. 245 W 597, 15 NW (2d) 834.

Where the mortgagor's sons (advancing 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 is confined to parties aggrieved in some appreciable manner. 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 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 determining the relative rights of creditors, and not involving an increase or diminution of the assets. In re Fidelity Assur. Asso. 247 W 619, 20 NW (2d) 638.

Where plaintiffs, appealing from judgments

awarding them overtime wages and containing no clause denying them overtime wages, accepted payment of and satisfied their judgments, they thereby waived their right to have the judgments reversed or modified. Uebelacher v. Plankinton Packing Co. 251 W 87, 28 NW (2d) 311.

Where a defendant did not serve on a codefendant any pleading demanding contribution on account of any judgment which the defendant might be compelled to pay, nor make any such demand at any time during the trial or afterward, and hence was not entitled to a judgment of contribution against the codefendant, he was not aggrieved by the judgment which discharged the codefendant from liability to the plaintiff, and was not entitled to appeal therefrom, since a party not aggrieved may not maintain an appeal. McCauley v. International Trading Co. 268 W 62, 66 NW (2d) 633.

3. Interlocutory Judgments.

On interlocutory judgments see notes to 270.54.

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

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 make reviewable an interlocutory judgment. Kickapoo Development Corporation v. Kickapoo Orchard Co. 231 W 458, 285 NW 354.

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

An "order" in partition, ordering the premises sold clear and free of a lease, is an interlocutory judgment, which is appealable. Wolfrom v. Anderson, 249 W 433, 24 NW (2d) 881.

After an order for the sale of land in a partition action, if an interlocutory judgment is entered under 270.54, an appeal lies from the interlocutory judgment. Gertz v. Gertz, 252 W 286, 31 NW (2d) 620.

In an action by former employes to enforce against an employer an arbitration award based on the employer's breach of a no-transfer-of-work clause in a collective-bargaining contract, an "order" which struck the employer's affirmative defense of no liability for loss of earnings beyond a certain date and determined other legal issues, and which directed that a referee's inquiry be made with respect to certain factual issues, in order to determine the amount of lost earnings which the employes were entitled to recover, was in fact an "interlocutory judgment" within 270.54, and hence was appealable under 274.09. Dehnart v. Waukesha Brew. Co. 21 W (2d) 583, 124 NW (2d) 664.

4. New Matter on Appeal.

The supreme court cannot, on the stipulation of the parties to an appeal, consider the right of a party to subrogation, where that issue has never been tried in the court below. Home Owners' Loan Corp. v. Papara, 235 W 184, 292 NW 281.

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.

Where the record does not disclose any request made by the appealing plaintiff's counsel to the trial court either for questions to be submitted in the special verdict or for the instructions to be given, the appellant is precluded from raising these questions on appeal. Van Wie v. Hill, 15 W (2d) 98, 112 NW (2d) 168. See also Crowder v. Milwaukee & S. T. Corp. 39 W (2d) 499, 159 NW (2d) 723.

See note to 247.101, citing Gauer v. Gauer, 34 W (2d) 451, 149 NW (2d) 533.

The failure to request inclusion of a question in a special verdict precludes a party from raising for the first time on appeal any error in respect thereto. Williams v. Milwaukee & S. T. Corp. 37 W (2d) 402, 155 NW (2d) 100.

Where defendant failed to object to certain special verdict questions with respect to defamatory statements challenged as duplicitous, and did not request additional questions, he thereby waived any right to complain that the questions submitted overlapped in that they grew out of the same facts and circumstances. Lisowski v. Chenenoff, 37 W (2d) 610, 155 NW (2d) 587.

Procedural inadequacy of supporting affidavits on motion for summary judgment could not be raised for the first time on appeal, and failure to object thereto in the trial court constituted waiver by the opposing party, rendering it proper for the supreme court to consider the legal issues insofar as they are relevant to sustaining or reversing the order denying the plaintiff's motion for summary judgment. West Side Bank v. Marine Nat. Ex. Bank, 37 W (2d) 661, 155 NW (2d) 587.

Alleged ambiguity in the record as to whether the abstract which had been continued by the sellers was actually tendered to the purchasers would not be resolved on appeal where the issue was not raised or otherwise explored at the trial. Anderson v. Nelson, 38 W (2d) 509, 157 NW (2d) 655.

The supreme court will not countenance the raising of issues for the first time on appeal. While this rule is "one of administration and not of power", there is no compelling reason to depart from the general practice in this case. McDonald v. Chicago, M., St. P. & P. R. Co. 38 W (2d) 526, 157 NW (2d) 553.

Injured passengers were not precluded from raising on appeal the question of applicability of the alternative provision of an automatic insurance clause because the trial court did not pass upon that question, since the trial court requested briefs on that issue and its written opinion reflected that the issue was considered although not passed upon. Luckett v. Cowser, 39 W (2d) 224, 159 NW (2d) 94.

Where errors in the court below were raised for the first time on appeal and it appeared that claimant had the opportunity to set forth objections to the trial court at the hearing on a motion, or in the form of a motion to review

the judgment, they would not be considered on appeal. Spitz v. Continental Cas. Co. 40 W (2d) 439, 162 NW (2d) 1.

Although no objection to giving an instruction was made until after rendition of the jury's verdict, the error (albeit nonprejudicial) was preserved for review, since it constituted a misstatement of the law. Menge v. State Farm Mut. Auto. Ins. Co. 41 W (2d) 578, 164 NW (2d) 495.

Whether the county court, in which the action was pending, had jurisdiction to grant dissolution of a corporation under 180.771, Stats. 1965, would not be considered on appeal where not raised in the trial court. Grognet v. Fox Valley Truck Service, 45 W (2d) 235, 172 NW (2d) 812.

274.10 History: 1860 c. 264 s. 1, 2; R. S. 1878 s. 3048; Stats. 1898 s. 3048; 1925 c. 4; Stats. 1925 s. 274.10; 1935 c. 541 s. 283; Sup. Ct. Order, 255 W vi.

Comment of Advisory Committee, 1949: In 274.10 "the party appealing" is changed to "a party appealing" because several parties may appeal in one case. The first to appeal is called the appellant; all others are called respondents, and, of course, this means that as against a particular appellant they are the respondents. [Re Order effective July 1, 1950]

Where a judgment is assigned and a creditors' action is brought by the assignee with the assignor and debtor as defendants and a receiver appointed and a settlement made between the plaintiff and the defendant who was indebted thereon, the assignor is not aggrieved and cannot appeal from the order approving the report of the receiver and discharging him. Bragg v. Blewett, 99 W 348, 74 NW 807.

In an action brought by materialmen against a city to recover the amount claimed to be due from the city to a contractor, plaintiffs were not aggrieved by making the contractor a party defendant to the action. Cook v. Menasha, 103 W 6, 79 NW 26.

The sheriff is a party aggrieved by an order discharging persons from custody on habeas corpus. State ex rel. Durner v. Huegin, 110 W 189, 85 NW 1046.

A defendant who owns a dam sought to be abated may appeal from an order sustaining a demurrer to a plea in abatement for defect of parties, which plea was interposed by interveners. Castle v. Madison, 113 W 346, 89 NW 156.

A person who has conveyed all his interest in property before the action and against whom no personal judgment is rendered cannot take an appeal. Schneider v. Weed, 123 W 488, 101 NW 682.

Where an action has been dismissed as to an appellant, he is not a party aggrieved by an order requiring his examination under sec. 4096, Stats. 1898. American F. P. Co. v. Winter, 147 W 464, 133 NW 595.

An insurer's liability to pay a judgment against an automobile driver gave it the right to appeal from the judgment against the driver, though the action against the insurer was dismissed. Grandhagen v. Grandhagen, 199 W 315, 225 NW 935.

"Where an order is made on stipulation of all the parties to an action, it cannot be appealed because no one is aggrieved. The only ground for review of such a settlement would be that some party was misled by fraud or false representations. That ground would have to be set up in motion papers to set aside the order." Buchberger v. Mosser, 236 W 70, 77, 294 NW 492, 495.

A party may not appeal from a judgment in his favor. 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 is a "party aggrieved" within the appeal statute if in his reasonable view the determination appealed from will not carry out the will. Estate of Satow, 240 W 622, 4 NW (2d) 147.

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. In re Fidelity Assur. Asso. 247 W 619, 20 NW (2d) 638.

The daughter and sole heir of a deceased insane ward was a "party aggrieved" so as to be entitled to appeal from an order of the county court settling the guardian's account and disposing of the property without probate proceedings. Guardianship of Barnes, 271 W 6, 72 NW (2d) 384.

An order directing that certain bond interest be allocated to the principal to amortize the premium paid in the purchase of bonds in a testamentary trust was in favor of remaindermen and hence their guardian ad litem was not a "party aggrieved" and could not appeal therefrom. Will of Allis, 6 W (2d) 1, 94 NW (2d) 226.

The word "aggrieved" refers to a substantial grievance, a denial of some personal or property right or the imposition of a burden or obligation. Where, under terms of the indemnification portion of a release executed to an interpleaded defendant by plaintiff, it would be plaintiff's obligation to pay expenses incurred by such defendant remaining in the case as a party defendant, plaintiff was a "party aggrieved" by an order denying such defendant's motion for summary judgment dismissing a cross complaint filed against him, and hence the plaintiff was entitled to appeal therefrom. Lewandowski v. Boynton Cab Co. 7 W (2d) 49, 95 NW (2d) 823.

A person may be a "party aggrieved" by a judgment or order and entitled to appeal even though he is not a named party in the suit. Miller v. Lighter, 21 W (2d) 401, 124 NW (2d) 460.

274.11 History: R. S. 1858 c. 139 s. 4, 15; 1860 c. 264 s. 3, 4, 21; R. S. 1878 s. 3049, 3052; 1883 c. 49; Ann. Stats. 1889 s. 3042a, 3049, 3052; Stats. 1898 s. 3049, 3052; 1925 c. 4; Stats. 1925 s. 274.11, 274.15; 1935 c. 541 s. 284, 286; Stats. 1935 s. 274.11; 1939 c. 66; Sup. Ct. Order,

245 W x; Sup. Ct. Order, 255 W vi; 1959 c. 189; Sup. Ct. Order, 17 W (2d) xviii.

Comment of Advisory Committee, 1949: (1) is made clearer. Instead of speaking of persons who are generally adverse to appellant we speak of persons who are adverse to him upon his appeal. There is an illustration of this in the recent case (Daanen v. McDonald, 254 W 440) where the appeal was from an order and where it was held that a co-defendant who certainly was adverse to appellant in the sense that they might be contestants over contribution was not adverse to him on the appeal because he had no interest in the subject matter of that appeal. "Adversity" is used in connection with the subject matter of the appeal; and the "adverse parties" are those who are adverse to the appellant in that limited sense. [Re Order effective July 1, 1950]

A mistake of the clerk in filing a notice of appeal, so that it appeared to have been taken after the time had run, will not invalidate the appeal if it was actually taken in time. Moyer v. Strahl, 10 W 83.

An undertaking to pay all damages and costs on appeal, not containing the words "not exceeding $250" is good. Johnson v. Noonan, 16 W 687.

It is too late to move to dismiss an appeal for want of an undertaking after a cause has been submitted by appellant in the absence of respondent. White v. Polleys, 20 W 504.

The notice must be served on the clerk and transmitted by him to the appellate court in order to give the latter jurisdiction. Yates v. Shepardson, 37 W 315.

A notice of appeal by an executor from a judgment construing a will should be served on the other parties in the action who are adversely interested. Wheeler v. Hartshorn, 40 W 83.

A notice not signed and not shown by the record to have been served by appellant is insufficient. Eaton v. Manitowoc County, 42 W 317.

A notice mailed to the attorney and clerk on the last day for appealing, not received until after the period for appealing had expired, is of no effect. Stevens v. Wheeler, 43 W 91.

Where it is attempted to take one appeal from 2 judgments, a statement in the notice that appellant appeals from the whole and every part thereof refers to both judgments. Olinger v. Liddle, 55 W 621, 13 NW 703.

The appellant may appeal from as many orders as he likes, if appealable, and the court from which the appeal is taken cannot restrict the scope of the appeal. Eureka S. H. Co. v. Sloteman, 67 W 118, 30 NW 241.

The notice of appeal from an order or judgment need not expressly state that it is "from the whole thereof." Irvin v. Smith, 68 W 220, 31 NW 909.

If a notice specifies that the appeal is "taken from the judgment" and describes it, and from a designated part of it, the appeal is from the whole judgment. German M. F. Ins. Co. v. Decker, 74 W 556, 43 NW 500.

In an appeal in replevin the same sureties executed an undertaking for delivery of the property, and another undertaking for the costs of the appeal. They were the same persons against whom the judgment had been rendered. But an undertaking to stay execution must have other sureties, in order to give the respondent additional security to that resulting from his judgment. Lee v. Lord, 75 W 35, 44 NW 771.

An undertaking to pay all costs and damages does not stay proceedings. Neuman v. State, 76 W 112, 45 NW 30.

A notice of appeal not directed to or served on the clerk of the court is wholly inoperative. North Hudson B. & L. Asso. v. Childs, 86 W 292, 56 NW 870.

On appeal by a mortgagor from an order confirming a sheriff's sale, the purchaser is an adverse party and must be served with notice of appeal. Rogers v. Shove, 98 W 271, 73 NW 989.

The consent of the respondent that an undertaking, which on exception by him had been held insufficient, might be signed by a new surety and when so signed be deemed satisfactory, is a waiver of any irregularity. Ellis v. Allen, 99 W 598, 74 NW 537, 75 NW 949.

An undertaking that the appellant would pay the judgment, if affirmed, as well as the costs and damages on the appeal, was sufficient, and the supreme court obtained jurisdiction and could allow the first undertaking to be withdrawn and a new one substituted. Stolze v. Manitowoc T. Co. 100 W 208, 75 NW 987.

Where the supreme court is the only court to which an appeal could be taken, the notice is sufficient although it does not state to what court the appeal is taken. Messmer v. Block, 100 W 664, 76 NW 598.

It is not necessary that service of notice upon the clerk be by copy, but the filing of the notice by the clerk sufficiently shows its service. Willey v. Clark, 105 W 22, 80 NW 102.

Where an appeal has been perfected under sec. 3049, Stats. 1898, the appellate court becomes invested with jurisdiction and the trial court has no authority to order the notice of appeal and undertaking stricken from the files. Congregation of Immaculate Conception v. Hellstern, 105 W 632, 81 NW 988.

More than one judgment cannot be brought up upon one appeal, and where the causes of action against insurance companies were united under sec. 2609a, Stats. 1898, the judgments there given should be appealed from separately. Montgomery v. American C. Ins. Co. 106 W 543, 82 NW 532.

Sec. 3049, Stats. 1898, is not limited to cases where the appealable order and the judgment can be disposed of together. McElroy v. Minnesota P. H. Co. 109 W 116, 85 NW 119.

Where a notice fails to state that the appeal is from part of the judgment, it will not be dismissed, but the matter will be disposed of in the discretion of the court in imposing costs. Porath v. Reigh & Salentine Co. 112 W 433, 88 NW 315.

Where an appeal is had from proceedings under sec. 4713, Stats. 1898, whereby the compensation of an attorney is fixed, the attorney is the one on whom the notice should be

served. Green Lake County v. Waupaca County, 113 W 425, 89 NW 549.

The term "adverse party" does not mean merely the opposite party on the record. It does not extend beyond parties having some substantial interest in sustaining the decision challenged by the appeal. Harrigan v. Gilchrist, 121 W 127, 99 NW 909.

Where each appellant appeals separately from the judgment, a bond that appellants would pay all damages that might be awarded against them not exceeding $250 was insufficient, as there should have been an undertaking for the payment not to exceed $250 as to each appellant. Harrigan v. Gilchrist, 121 W 127, 99 NW 909.

A notice of appeal need not be directed to the clerk of the court, but if it is filed with him it is sufficient. Zahorka v. Geith, 129 W 498, 109 NW 552.

If an appeal be not perfected within the time prescribed by statute the supreme court acquires no jurisdiction. Munk v. Anderson, 94 W 27, 68 NW 407; Haessly v. Secor, 135 W 548, 116 NW 175.

Where the justification of sureties was insufficient, a correction might be made after a motion to dismiss the appeal on that ground and after the time had expired within which an appeal might be taken. Ady v. Barnett, 142 W 18, 124 NW 1061; Kuehn v. Nero, 145 W 256, 130 NW 56.

Attorneys prosecuting an action of tort under a contract for contingent fees are not parties to the action, and are not authorized to furnish the undertaking on appeal. State ex rel. Malouf v. Merrill, 165 W 138, 161 NW 375.

A notice of appeal addressed to and served upon a defendant in whose favor a verdict was directed, by a defendant against whom judgment was rendered, made the former a party to the appeal and the effect of the judgment as to him may be considered. Bakula v. Schwab, 167 W 546, 168 NW 378.

Where separate actions were combined for the purposes of trial, and judgments entered in each action, a single notice of appeal is irregular, and 2 notices entitled in each action should be served noticing the appeal from each judgment. Fox v. Koehnig, 190 W 528, 209 NW 708.

274.11 and 274.12, Stats. 1927, must be read together in determining whether an appeal from only part of a judgment wholly stays proceedings thereon. David Adler & Sons Co. v. Maglio, 198 W 24, 223 NW 89.

Where an appeal notice recited that it was from an order dated November 27, 1928, instead of the correct date of the order, November 26, 1928, this was a technical error which did not mislead anyone and it could be disregarded. Obenberger v. Obenberger, 200 W 318, 228 NW 492.

Where a person possesses a substantial interest adverse to a judgment, he may appeal, though his name does not appear in litigation. A police officer, to whom a judgment debtor paid a bribe, who was brought into an action in supplementary proceedings, and who was directed to pay over money to a receiver, was a "real party in interest" having a 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.

See note to 274.32, citing Wenzel & Henoch Construction Co. v. Wauwatosa, 226 W 10, 275 NW 552.

Where the plaintiff attempted to appeal from a judgment in favor of several defendants, one of whom died after the judgment was entered, service of the notice of appeal on the decedent or on his executor was necessary. Stevens v. Jacobs, 226 W 198, 275 NW 555, 276 NW 638.

Under a statute requiring appeal from an order to be taken within 60 days from entry thereof, where the order was entered October 26, the appeal bond was dated December 20, surety did not justify until January 20, the bond was not filed until January 24, and appellants made no showing that sureties could not have justified at the proper time, or that failure to file the appeal bond in time resulted from mistake or accident, the appeal must be dismissed. In re Stanley's Will, 228 W 530, 280 NW 685.

Under 274.11, Stats. 1937, the purchaser of real estate at a receiver's sale is a necessary party to an appeal from an order confirming the sale. Haas v. Moloch F. & M. 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 should be 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, Stats. 1941, on whom a notice of appeal was required to be served to render the appeal effective, but service of notice 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 271.11, 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. 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 on whom notice of appeal was required to be served to render such appeal effective. Will of Steindorff, 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 274.11 (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, 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 jurisdiction to correct the appeal in other respects as provided in 269.51 (1). Kitchenmaster v. Mutual Auto. Ins. Co. 248 W 335, 21 NW (2d) 727.

Failure to serve on a necessary adverse party 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 was not an adverse party on whom it was necessary, under 274.11 (1), to serve a notice of appeal from a judgment admitting a 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 entered his appearance for the estate in the proceedings on the motion. Will of Kaebisch, 249 W 629, 26 NW (2d) 268.

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.

Under 274.11 a plaintiff, appealing from a judgment, must serve the notice of appeal on his coplaintiffs bound with him by the judgment and appearing in the action, to give the supreme court jurisdiction; and such requirement was not satisfied by a notice of appeal signed by an attorney as attorney for all of the plaintiffs where, although such attorney had also represented the other plaintiffs on the trial, they did not join in the appeal and did not appeal. Donny v. Chain of Lakes Cheese Co. 254 W 85, 35 NW (2d) 333.

When the plaintiff (respondent on appeals taken by certain of the defendants) appealed from that part of the judgment which dismissed her complaint as against one of the defendants and his insurance carrier, she became an "appellant" to whom 274.11 (1) applied as if she were the original appellant, so that where she failed to serve her notice of appeal on all of the parties who were bound with her by the judgment, no jurisdiction was conferred on the supreme court and her appeal must be dismissed. Miles v. General Cas. Co. 254 W 278, 36 NW (2d) 66.

Where certain defendants appealed only from that part of an order increasing the plaintiff's damages and ordering judgment against them with option to the plaintiff for a new trial against them, and they did not appeal from that part or remainder of the order dismissing the plaintiff's complaint against certain other defendants, such other defendants were not "adverse parties" on whom a notice of appeal was required to be served by the appealing defendants. Daanen v. MacDonald, 254 W 440, 37 NW (2d) 39.

In an action in which a defendant was represented on his cross complaint against a codefendant only by his personal attorneys, who did not appeal, a notice of appeal by the attorneys for his insurance carrier, stating that he and it appealed from so much of the judgment as adjudged recovery in favor of the plaintiff and against them, and from so much of the judgment as might be adverse to them, cannot be construed to cover that part of the judgment awarding 70% of his damages to such defendant on his cross complaint against such codefendant, and hence that part of the judgment cannot be disturbed although it is determined on appeal that the negligence of such defendant was not a cause but that the negligence of such codefendant was the sole proximate cause of the accident involved. Walton v. Blauert, 256 W 125, 40 NW (2d) 545.

Where the plaintiff served notice of appeal from a judgment with an undertaking for the payment of appeal costs and damages, and later took a separate appeal, without any costs undertaking or waiver thereof, from an order denying an extension of time for serving a bill of exceptions, the appeal from the order must be dismissed as not perfected. Berkemeyer v. Milwaukee Auto. Ins. Co. 256 W 386, 41 NW (2d) 303.

On the claimant's appeal from a judgment confirming an order of the industrial commission dismissing his application for workmen's compensation against his employer and the employer's compensation carrier, the interest of the compensation carrier, which appeared in the action, was adverse to the claimant's interest, so that the claimant was required by 274.11 (1) to serve notice of appeal on such adverse party and within the 30-day period allowed by 102.25 (1); since claimant failed to

do so, his appeal must be dismissed. Service of notice of appeal within the statutory period allowed therefor is an absolute prerequisite of appeal, and no relief from failure in this respect is authorized by 274.32. Falk v. Industrial Comm. 258 W 109, 45 NW (2d) 161.

Where at the time of an appeal the action had been dismissed by stipulation as to certain defendants, they were no longer parties on whom notice of appeal was required to be served. Central Refrigeration, Inc. v. Monroe, 259 W 23, 47 NW (2d) 438.

Under 274.11 (1), a defendant automobile liability insurer, appealing from a judgment in an action for injuries sustained in a collision, was required to serve the notice of appeal on its codefendant insured, who appeared in the action and was bound by the judgment, and its failure to do so requires the dismissal of its appeal. Rucinski v. Kuehl, 268 W 382, 68 NW (2d) 1.

An erroneous settlement of a bill of exceptions is not ground for the dismissal of an appeal. Where the notice of appeal and bond for costs were served within 6 months after judgment, the appeal was perfected in time notwithstanding failure to file the originals with the clerk of the court. Blaisdell v. Allstate Ins. Co. 1 W (2d) 19, 83 NW (2d) 886.

Although the affidavit of service of the notice of appeal did not state that such notice was served on the clerk of court, the notice of appeal, bearing the filing stamp of the clerk, in itself constituted service on the clerk. The respondents' counsel, by participating in the appeal and not moving to dismiss the appeal, thereby waived any defective service of the notice of appeal. United States v. Klebe T. & D. Co. 5 W (2d) 392, 92 NW (2d) 868.

See note to 274.33, on miscellaneous principles, citing Sicchio v. Alvey, 10 W (2d) 528, 103 NW (2d) 544.

274.11 (4) authorizes the court to review an appealable order or portions thereof as to which no notice of appeal has been served, if the parties appear before the court and argue the merits without noting any objection to its jurisdiction. Asen v. Jos. Schlitz Brewing Co. 11 W (2d) 594, 106 NW (2d) 274.

The consent of certain parties to be bound by a judgment appealed from, and their waiver of the service of the notice of appeal, were sufficient to give the supreme court personal jurisdiction of them. Town of Madison v. City of Madison, 12 W (2d) 100, 106 NW (2d) 264.

See note to 274.33, on miscellaneous principles, citing Estate of Baumgarten, 12 W (2d) 212, 107 NW (2d) 169.

Where the appeal is from an order for entry of judgment, participation by the appellee as to the merits of the review of the judgment waives the objection that the order was not appealable. Baumgarten v. Jones, 21 W (2d) 467, 124 NW (2d) 609.

"Under sec. 274.11 (4), this court has jurisdiction of the subject matter of an appeal upon the entry of an appealable judgment. Under sec. 269.51, dealing with the waiver of irregularities and lack of jurisdiction on appeal, we have held that the formalities involved in an appeal, such as proper notice, relate only to the question of this court's jurisdiction over the parties, not the subject matter of the appeal. The language in Jaster v. Miller (1955), 269 Wis. 223, 69 NW (2d) 265, * * * to the effect that parties cannot either by failure to raise the question or by consent confer jurisdiction upon this court to review an order which is not appealable has been qualified by the amendment to sec. 274.11 (4) and by recent decisions of this court. It is now established that although no proper notice of appeal has been served if an appealable order or judgment has been entered a respondent by participating in this court in the review of the merits of the judgment without making an appropriate and timely objection to the jurisdiction over his person waives the objection." August Schmidt Co. v. Hardware D. M. F. I. Co. 26 W (2d) 517, 521-522, 133 NW (2d) 352, 355.

Timely appeal from an order which sustained defendants' demurrer to the complaint and granted leave to amend deprived the trial court of jurisdiction to thereafter dismiss the complaint because of plaintiffs' failure to amend within the time allowed. Szafranski v. Radetzky, 31 W (2d) 119, 141 NW (2d) 902.

The notice of appeal must be served and filed within the time limited or it will be dismissed. Failure to file within the time cannot be corrected under 274.32. Bublitz v. Matulis, 34 W (2d) 23, 148 NW (2d) 64.

After mortgage foreclosure and sale, where the purchaser did not appear at the hearing to confirm the sale it was not necessary to serve him with a notice of mortgagor's appeal. Hales Corners S. & L. Asso. v. Kohlmetz, 36 W (2d) 627, 154 NW (2d) 329.

274.11 (4) authorizes the supreme court to review an appealable order or portions thereof as to which no notice of appeal has been served, if the parties appear before the court and argue the merits without noting any objection to its jurisdiction. Vande Hei v. Vande Hei, 40 W (2d) 57, 161 NW (2d) 379.

274.11 (4), Stats. 1967, which in effect authorizes the supreme court to review an appealable order or portions thereof as to which no notice of appeal has been served, if the parties appear before the court and argue the merits without noting any objection to its jurisdiction, does not confer jurisdiction on the supreme court to review a nonappealable order or judgment. Henry v. Beattie, 40 W (2d) 704, 162 NW (2d) 613.

Where an appeal was taken from a decision of the trial court, and was not taken from the judgment decreeing specific performance in the action (an appealable judgment), but respondents did not make an appropriate objection to jurisdiction over their person, the supreme court had jurisdiction to examine the appeal as an appeal from the judgment. Winton v. Gersmehl, 45 W (2d) 211, 172 NW (2d) 809.

274.115 History: Sup. Ct. Order, 17 W (2d) xviii; Stats. 1963 s. 274.115.

Comment of Judicial Council, 1963: New provision whereby the time for service of a transcript is related to notice of appeal rather than notice of entry of judgment (see com-

ment to s. 270.535). [Re Order effective Sept. 1, 1963]

See note to 274.117, citing Estate of Reynolds, 24 W (2d) 370, 129 NW (2d) 251.

274.117 History: 1860 c. 264 s. 12; 1872 c. 36 s. 1; R. S. 1878 s. 2874, 2875; Stats. 1898 s. 2873m, 2874, 2875; 1907 c. 547; 1925 c. 4; Stats. 1925 s. 270.44 to 270.46; 1927 c. 473 s. 49c; Sup. Ct. Order, 204 W viii; Stats. 1931 s. 270.44; Sup. Ct. Order, 254 W vi; Sup. Ct. Order, 255 W v; Sup. Ct. Order, 275 W vi; Sup. Ct. Order, 17 W (2d) xviii; Stats. 1963 s. 274.117.

Comment of Advisory Committee, 1948: Sections 270.43 and 270.44 relate to bills of exceptions. There is conflict in their language. This revision reconciles that conflict but is submitted in the belief that it is a restatement of the law without change of substance. 270.43 provides that a proposed bill must contain the "proceedings had and the evidence given on the trial and the rulings * * * not otherwise appearing of record, *or so much thereof as may be material to questions desired to be raised on review.*" 270.44 provides that a proposed bill must "include all testimony * * * *as shown by the transcript of the reporter's notes,* unless the parties * * * stipulate otherwise." The conflict is in the italicized words found in the 2 quotations above. 270.44 calls for a transcript of the reporter's notes. 270.43 does not necessarily. It is satisfied by including "so much * * * as may be material to questions * * * raised on review." The minimum of "so much" may be very small. Chapter 264, laws of 1860, is the origin of 270.43; and chapter 547, laws of 1907, is the origin of 270.44. The later statute, by implication, repealed the earlier, to the extent of the conflict. This revision proceeds on that rule of statutory construction. As revised, 270.43 authorizes a bill of exceptions, directs what is to become of the bill and its effect; and 270.44 gives the details for settling the bill. 270.48 applies "If the trial judge shall die, remove from the state, or become incapacitated to act." [Re Order effective July 1, 1949]

Comment of Advisory Committee, 1949: If there are only 2 parties in interest the present rule works all right. Under the present rule for joinder of parties, it occurs that 3 or more parties are adverse to one another. 270.44 is amended to cover such situations. [Re Order effective July 1, 1950]

Comment of Judicial Council, 1963: Verbal changes and the requirement that the transcript must be served on each adverse party who has appeared. This section is moved from the chapter on judgments to the chapter on appeals. [Re Order effective Sept. 1, 1963]

Editor's Note: 270.44 and 270.47, Stats. 1947, and antecedent statutes provided for a "bill of exceptions". By Supreme Court Order effective September 1, 1963, which renumbered and otherwise amended the two sections, the term "transcript of the reporter's notes" was substituted for "bill of exceptions" in 274.117 and the requirement as to a "bill of exceptions" was omitted from 270.535. For notes of decisions construing 270.47 and antecedent statutes see Wis. Annotations, 1960.

A judge cannot be compelled to incorporate instructions which it is claimed he gave; he is to settle the bill according to his recollections and knowledge; and a verdict cannot be resorted to to impeach such settlement. State ex rel. Roe v. Noggle, 13 W 380.

A motion to strike out the bill because not filed within the proper time cannot be made in the supreme court. Castleman v. Griffin, 13 W 535.

Notice of settlement of a bill is waived by consent to signing. Estabrook v. Messersmith, 18 W 545.

Where the judge, after signing the bill, wrote upon it that "the whole charge given to the jury" was to be inserted therein, this not referring on its face to a written charge, was a fatal defect. Oliver v. Town, 24 W 512.

The circuit court has jurisdiction, notwithstanding a change of judges, to strike out, at any time before an appeal is taken, a bill improperly settled. Oliver v. Town, 24 W 512.

In case of conflict between the record proper and the bill the former prevails. Hogan v. State, 36 W 226.

Signing a bill conclusively determines the regularity of all preliminary proceedings on appeal. If not properly settled the remedy is by motion to strike out. Bergenthal v. Fiebrantz, 48 W 435, 4 NW 89.

A statement in the bill that a certain cause of action was not insisted upon is a verity. Murphy v. Martin, 58 W 276, 16 NW 603.

Documentary evidence presented on the trial without objection will be considered in evidence and may be included in the bill. Bull v. Christenson, 61 W 576, 21 NW 521.

A stipulation by counsel in the record to the effect that the bill contains all the evidence estops them from denying the fact. Strong v. Stevens Point, 62 W 255, 22 NW 425.

A motion to remit the record and order the judge to incorporate the evidence into the bill was denied, the only error complained of being in the charge. In such case the defendant could not be benefited by including the evidence. Spensley v. Lancashire Ins. Co. 62 W 443, 22 NW 740.

The amendments to the bill should be incorporated and the bill as finally settled be fairly written out. Killops v. Stephens, 66 W 571, 29 NW 390.

If, after the time for settling a bill has expired, the bill is sent back on the application of one of the parties for correction it is open to amendments proposed by either party to make it conform to the facts. State v. Clark, 67 W 229, 30 NW 122.

If a bill has been settled and signed and deposited with the clerk it does not fail to be a part of the record because he omitted to indorse it "filed." McDonald v. State, 80 W 407, 50 NW 185.

Irregularities in settling a bill are not ground for dismissing an appeal if the errors material for the determination are apparent without the bill. Schraer v. Stefan, 80 W 653, 50 NW 778.

A bill of exceptions may be prepared and signed after an appeal has been taken and return made, and the bill may be transmitted to the supreme court by supplemental return, and used on the hearing. Davis & Rankin B.

& M. Co. v. Riverside B. & C. Co. 84 W 262, 54 NW 506.

Where errors alleged to have occurred in the taxation of costs were small and nearly offset by errors in favor of the complaining party the court could refuse to have the record remitted. Moore v. Ellis, 89 W 108, 61 NW 291.

If the motion to remit a bill for correction is made after the time at which a bill could be settled as a matter of right, the discretion of the court will be exercised in acting thereupon; and if the motion is not made until the cause is reached for argument it will not be granted unless the case is a strong one. Moore v. Ellis, 89 W 108, 61 NW 291.

The supreme court cannot make a new bill; so far as that court is concerned the facts set out in a bill are verities. Deuster v. Milwaukee S. R. Co. 89 W 191, 61 NW 766.

If the amendments allowed are not incorporated so as to form a complete document the court will exercise the power of its own motion and strike out the bill. King v. Farmington, 90 W 62, 62 NW 928.

An order taxing costs is not reviewable by the supreme court unless the evidence is preserved in a bill of exceptions. Feske v. Adams, 132 W 365, 112 NW 456.

Where appeal was from a final judgment founded upon interlocutory findings and order, and there was no bill of exceptions relating to the interlocutory findings, such findings were conclusive. Laing v. Williams, 135 W 253, 115 NW 821.

In the absence of a bill of exceptions the supreme court cannot say whether the findings are warranted by the evidence, or whether a new trial should have been ordered because of newly-discovered evidence. Statkawicz v. Laguna, 155 W 304, 143 NW 677.

After a bill of exceptions had been signed by the trial judge, he filed with the clerk of the trial court a further certificate stating that the bill of exceptions was incomplete in certain particulars. This last certificate was sent up as a supplemental return, but the supreme court could refuse to regard it as a part of the record. Shortle v. Sheill, 172 W 53, 178 NW 304.

In the absence of a bill of exceptions, an appeal presents no question upon the facts. Dornfield v. Thompson, 177 W 4, 187 NW 683.

Arguments of counsel are not part of the record unless objections thereto and the rulings thereon are incorporated in a bill of exceptions. Caryl v. Buchmann, 177 W 241, 187 NW 993.

Sec. 2873, Stats. 1915, requires the trial judge to sign the bill of exceptions, and the jurisdiction of the trial court or judge for this special purpose continues as to all matters relating to the settlement and signing of the bill, which would necessarily include the power to make an order extending the time. An outside judge who tried the case may, when outside of the judicial district, make an order extending the time for settling the bill of exceptions. McCormick v. State, 181W 261, 194 NW 347.

An order extending the time for settling a bill of exceptions, made long after the judgment was rendered and constituting no part of the judgment, can be reviewed by appeal from that order only, and not under 274.12. Scaramelli & Co. v. Courteen S. Co. 194 W 520, 217 NW 298.

Where there is no bill of exceptions the only question for review on appeal is whether the judgment is sustained by the pleadings and finding. Edleman v. Kidd, 65 W 18, 26 NW 116; McDermott v. Chicago, M. & St. P. R. Co. 91 W 38, 64 NW 430; Shannon v. Dorsinski, 134 W 68, 114 NW 129; Parke, Austin & Lipscomb v. Sexauer, 204 W 415, 235 NW 785. See also Fidelity & D. Co. v. Madson, 202 W 271, 232 NW 525.

Generally no error will be considered on appeal which was not assigned or presented to the trial court. Marshall & Ilsley Bank v. Voigt, 214 W 27, 252 NW 355.

Although the trial judge erred in excluding from evidence the deposition of the plaintiff, taken on adverse examination before the trial, and offered at the close of the defendants' case after cross-examination of the plaintiff on parts thereof, the supreme court cannot presume that his adverse examination, not in the bill of exceptions, contained anything contradictory of or not covered by his testimony, and hence cannot assume that the error was prejudicial. Demochitz v. Wells, 214 W 599, 253 NW 790.

In the absence of a bill of exceptions preserving the evidence on which the order was based, the supreme court will not review an order fixing the amount payable to a receiver as profits derived from a lease. A. J. Straus Paying Agency v. Terminal W. Co. 220 W 85, 264 NW 249.

An affidavit and copies of highway proceedings taken from town records, which had been incorporated in a bill of exceptions after judgment entered, and appeal taken, must be struck from the bill, since they were improperly incorporated. State v. Maresch, 225 W 225, 273 NW 225.

No bill of exceptions is needed in an appeal from a summary judgment where the order for judgment makes reference to the affidavit and documents used upon the motion for the order and no oral testimony was taken. Barneveld State Bank v. Rongve, 228 W 293, 280 NW 295.

The record of proceedings before the commissioners on an appeal to the county judge from the town board's order laying out a highway is not part of the record of, or properly returnable by, the board on certiorari to review such order. State ex rel. Paulson v. Town Board, 230 W 76, 283 NW 360.

Without a bill of exceptions, stipulated facts, not incorporated in the findings, are not a part of the record. Beck v. First Nat. Bank of Madison, 238 W 346, 298 NW 161.

Without a bill of exceptions, it must be assumed that there was evidence in the record below supporting the verdict favorable to the insured as to the specific matters submitted to the jury and other evidence supporting the trial court's finding of conspiracy, and in such situation it must be held that the judgment for the insurer notwithstanding the verdict is supported by the findings and that the findings are supported by the evidence. Bobczyk v. Integrity Mut. Ins. Co. 239 W 196, 300 NW 909.

In the absence of a bill of exceptions, the judgment must be affirmed if the special verdict supports the judgment. Singer v. Horn, 240 W 310, 3 NW (2d) 383.

Although this section (before amendment by Supreme Court Order effective July 1, 1945) by its terms applied to "actions" only, nevertheless it has been the common practice under the authority of this section to settle bills of exceptions in special proceeding where there has been a trial on an issue of fact. In re Henry S. Cooper, Inc. 240 W 377, 2 NW (2d) 866.

The supreme court, in the absence of a bill of exceptions on an appeal from an order dismissing an alternative writ of mandamus, is limited to determining whether the order is sustained by the pleadings and the findings. State ex rel. Ferebee v. Dillett, 240 W 465, 3 NW (2d) 699.

Issues on appeal, as to whether a judgment was warranted by facts found by the trial court, must be determined on such matters of fact as are stated in the court's findings, where there is no bill of exceptions; but such rule is not applicable to statements which constitute in reality conclusions of law on facts which are undisputed or rightly found by the court, and as to all such matters the court's determination is subject to review and to reversal, if erroneous, even though there is no bill of exceptions. Elkhorn Production Credit Asso. v. Johnson, 251 W 280, 29 NW (2d) 64.

Where there is no bill of exceptions on an appeal, the case is before the supreme court for decision on the record brought before it. Garcia v. Chicago & N. W. R. Co. 256 W 633, 42 NW (2d) 288.

As to presumptions on appeal, in the absence of a bill of exceptions, see Dunn v. Dunn, 258 W 188, 45 NW (2d) 727.

In the absence of a bill of exceptions on appeal, the supreme court cannot review the findings to determine whether the evidence supports them. Hensle v. Carter, 264 W 537, 59 NW (2d) 455.

In the absence of a bill of exceptions, an appeal from a judgment dismissing a complaint for damages, alleging that the defendant attorney had signed a stipulation in behalf of the plaintiff without authority to do so, is before the supreme court on the pleadings, charge to the jury, verdict and judgment, and the court cannot go further than these in considering the appellant's claims of error. Harvey v. Hartwig, 264 W 639, 60 NW (2d) 377.

Where an order determined that petitioners, who claimed to be assignees of part of an escheated estate, were not entitled thereto under 318.03 (4), and the order shows that it was made after full hearing, it will not be reversed in the absence of a bill of exceptions or of proof in the record in support of petitioner's claims. Estate of Niemczyk, 266 W 512, 64 NW (2d) 193.

Defendant cannot complain that a proper transcript was not prepared, his counsel having signed the stipulation settling the bill of exceptions. State v. Perlin, 268 W 529, 68 NW (2d) 32.

In the absence of a bill of exceptions, the supreme court must presume that the evidence sustains the findings of the trial court, and the only question in such case is whether the judgment appealed from is in accordance with the findings. Estate of Wallace, 270 W 636, 72 NW (2d) 383.

Affidavits, orders, and proceedings after judgment do not affect it, form no part of the record in the absence of a bill of exceptions making them such, and cannot be considered on appeal, although included in the return. In the absence of a bill of exceptions, the award of damages must be presumed to be supported by the evidence. Rode v. Sealtite I. Mfg. Corp. 3 W (2d) 286, 88 NW (2d) 345.

The filing of a properly worded affidavit of prejudice is a condition precedent to challenging on appeal the refusal of the trial judge to honor such affidavit, and hence the supreme court may decline to consider any issue grounded on the filing of an affidavit not made a part of the record on appeal. Long Investment Co. v. O'Donnell, 3 W (2d) 291, 88 NW (2d) 674.

Where appellant served a proposed transcript of the stenographer's notes more than 3 months after serving his notice of appeal, and the court had not entered an order extending the time within which service could be made, approval of the transcript by the trial court without notice to respondent (who moved promptly to strike) was a nullity, since the judge must act upon proof of timely service. Estate of Reynolds, 24 W (2d) 370, 129 NW (2d) 251.

274.118 History: Sup. Ct. Order, 17 W (2d) xix; Stats. 1963 s. 274.118.

If no testimony is preserved on appeal, the supreme court is powerless to review a question of fact dependent upon it or to determine the sufficiency of the evidence to support the findings or the verdict; but where the question raised is one of law, discussed and decided in the written opinion of the trial court which is a part of the record on appeal, the question may be considered on review within the limitations of the record. Gray v. Wisconsin T. Co. 30 W (2d) 237, 140 NW (2d) 203.

274.119 History: Sup. Ct. Order, 17 W (2d) xix; Stats. 1963 s. 274.119.

Comment of Judicial Council, 1963: Revised procedure for approving the transcript if the trial judge is not available. Provisions came partly from 270.48. [Re Order effective Sept. 1, 1963]

274.12 History: 1915 c. 219 s. 8; Stats. 1915 s. 3049a; 1925 c. 4; Stats. 1925 s. 274.12; 1929 c. 94; Sup. Ct. Order, 245 W x; Sup. Ct. Order, 255 W vi.

Comment of Advisory Committee, 1944: 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 3049a, 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. 3049a 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. 3049a [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 2 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. 3049a, 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. [Re Order effective July 1, 1945]

Comment of Advisory Committee, 1949: (1) permits an adverse party as defined in 274.11 to review any rulings prejudicial to him by serving notice to review. This permits the adverse party to have a review of any rulings adverse to him provided they affect the judgment, order or portion thereof appealed from.

(2) permits any party regardless of the element of adversity to review any error, the correction of which would support the judgment or order appealed from. This limits his rights to the judgment, order or portion thereof appealed from but, of course, this is all that the nonappealing party would be interested in in any case.

(3) requires all but adverse parties to appeal within the limited time or waive the right to reversal or modification of a judg-

ment, order or portion thereof appealed from. Here again it will be noticed that the waiver applies only to the judgment, order or portion thereof appealed from and does not affect judgments, orders or portions thereof not appealed from.

(4) applies to any party whether adverse or not and requires both as against the appellant or any other party that there be an appeal if it is desired to review orders, judgments or portions thereof not included in the appeal of another party.

(5) is intended to make it plain that whoever appeals must proceed in all things as though he were the first or only party who appealed. [Re Order effective July 1, 1950]

Sec. 3049a, Stats. 1915, will not be construed as entitling a cojudgment defendant, not appealing, to a review of alleged errors against him upon his serving upon the appellant a notice stating in what respect he asks for review. He must be interested adversely to the appellant and must also take an appeal in his own behalf. Lezala v. Jazek, 170 W 532, 175 NW 87, 176 NW 238.

Each respondent served waives his right to appeal unless he perfects his own appeal within 30 days after being so served. But a failure to take his own appeal within 30 days does not raise an absolute bar to his appeal. It merely puts him in default, which default may be set aside by the supreme court. And when a defendant brings into the trial court a defendant who will be liable to him if he is held liable to the plaintiff, he should, upon an appeal by the plaintiff, take an appeal from that part of the judgment which dismisses his cross complaint. American W. Co. v. McManus, 174 W 300, 181 NW 235, 183 NW 250.

Where the court changed an answer of the jury freeing the defendant of negligence and held he was guilty of negligence as a matter of law, and from such action of the court no appeal was taken and no application to review made under sec. 3049a, the matter is not before the court. Clifton v. Smith, 188 W 560, 206 NW 923.

A respondent cannot have review of adverse rulings on an appeal from a void order, the court taking jurisdiction only to reverse the order. Borowicz v. Hamann, 189 W 212, 207 NW 426.

A respondent who failed to serve a notice for review cannot have the relief sought, although there was a good faith understanding with opposing counsel that the case would be considered as though notice had been served. Broadway-Wisconsin I. Co. v. Sentinel Co. 192 W 338, 212 NW 646.

Where a taxpayer appealed from part of a judgment sustaining an assessment of income tax, and the respondent tax commission served notice to review part of the same judgment, and the supreme court reversed the judgment, thus disposing of the case, that part of the judgment before the court on the notice of review, being erroneous, must be reversed so that it may not stand as a precedent. Oconto County v. Tax Commission, 193 W 488, 214 NW 445.

Where the court granted defendant a new trial unless plaintiff elected to remit a specified amount from the damages awarded, though in a measure obtaining the relief of a new trial, defendant did not receive the full benefit of the order granting it, because of the plaintiff's appeal; but in any event the statute is construed to permit the respondent to have a review of the entire situation to avert the possibilities of an unnecessary second trial. Johnson v. Rudolph Wurlitzer Co. 197 W 432, 222 NW 451.

An appeal from a judgment or a part thereof by one party brings to the supreme court all matters affecting parties jointly or severally bound thereby, not merely the part appealed from. David Adler & Sons Co. v. Maglio, 198 W 24, 223 NW 89.

Where an entire record has been brought up for review, the court must consider the entire record, to determine whether the right result was reached. Milwaukee W. F. Co. v. Industrial Comm. 179 W 223, 190 NW 439; Wisconsin F. & M. Co. v. Capital City C. Co. 198 W 154, 223 NW 446.

Appeal from part of a judgment brings up the entire judgment, which accords respondent the right of review of rulings of which he complains by serving notice upon appellant. Seyfert v. Seyfert, 201 W 223, 229 NW 636.

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 Comm. 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. 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.

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

In the absence of a motion to review on defendant's appeal from an order granting plaintiff a new trial, the 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, the trial court's findings and the evidence could not be reviewed. Vinograd v.

Travelers' Protection Asso. 217 W 316, 258 NW 787.

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.

An 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 the latter served no notice of appeal on the former, must be dismissed as waived in the former case or as ineffectual in the 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 274.12 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.

Where an employe had brought no action to set aside an award of the industrial commission, did not appeal from the judgment affirming the award, and did not serve any notice to review the judgment until after the case had been set for hearing in the supreme court, he was not entitled to a review of the award. Milwaukee News Co. v. Industrial Comm. 224 W 130, 271 NW 78.

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 30 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 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. Cedar Point Asso. v. Lenney, 232 W 434, 287 NW 686.

The term "party" as used in 274.12 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. 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. 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 274.12, 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 defend-

ant'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 finding as to negligence of the interpleaded defendant insured. A review of such ruling was essential to determining whether there was liability for contribution on the part of the insurer. 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 not be restored by the trial court. Ledvina v. Ebert, 237 W 358, 296 NW 110.

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 274.12 served on the appellant by the respondent, the respondent's contentions asserting error in the findings cannot be entertained. 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 must be 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 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, is not entitled to a review of such finding. Witkowski v. Menasha, 242 W 151, 7 NW (2d) 612.

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. Jones v. Pittsburgh Plate Glass Co. 246 W 462, 17 NW (2d) 562.

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. Estate of Sweeney, 247 W 376, 19 NW (2d) 849.

The purpose of 274.12, in granting to a respondent the privilege of having a review of rulings of which he complains by serving a motion to review, is to enable a party who is adversely interested in an appeal to secure a review of alleged errors prejudicially affecting him. In re Fidelity Assur. Asso. 247 W 619, 20 NW (2d) 638.

Where parties interested in establishing that a decedent died intestate appealed from a judgment (in its entirety) which admitted a later will to probate and denied probate of an earlier will and was based in part on a determination that the earlier will was revoked by the destroyed later will, testified to by a witness over objection, questions as to the admissibility of such testimony and the validity of the conclusion and judgment based thereon were involved on such appeal, so that a review sought in relation to the trial court's rulings in those respects by respondents, interested in establishing the earlier will, was within the authorized purpose and scope of a motion to review under 274.12. And other parties, as beneficiaries under both wills, were "adverse parties" who, having appeared in the proceeding, were, under 274.11 (1), properly served with notice of appeal, and thereby became "appellees," entitled, under 274.12, by motion to review, to have a review of rulings unfavorable to them and involved in the judgment, and were not required to take their own appeal in order to have such review. (Ledvina v. Ebert, 237 W 358, and other cases, distinguished.) Estate of Sweeney, 248 W 607, 22 NW (2d) 657, 24 NW (2d) 406.

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.

Where certain defendants appealed only from that part of an order increasing the plaintiff's damages and ordering judgment against them with option to the plaintiff for a new trial against them, the plaintiff-respondent, on motion to review, could not have a review of another part of the order which dismissed his complaint against certain other defendants, but the plaintiff would be required to perfect his own appeal as to them in order to have a review of such other part of the order. Daanen v. MacDonald, 254 W 440, 37 NW (2d) 39.

On a timely petition, the defendants-respondents were entitled to have a review of the trial court's rulings which denied affirmative relief demanded in the defendants' answer. Ross v. Kunkel, 257 W 197, 43 NW (2d) 26.

On an appeal from an order overruling demurrers to the plaintiff's amended complaint, the plaintiff-respondent can, without notice, have a review of alleged errors the correction of which would support the order appealed from, but the plaintiff's contention that an order requiring its original complaint to be made more definite and certain was an abuse of discretion is not within the scope of such appeal and cannot be considered. State

v. Golden Guernsey Dairy Cooperative, 257 W 254, 43 NW (2d) 31.

On the plaintiff's appeal from a judgment entered on the verdict after the trial court had lost jurisdiction to review its order granting a new trial, such order for a new trial, which was erroneous, is set aside on the defendant's motion for review, under (2) and the judgment appealed from, entered on a verdict supported by the evidence, is affirmed. Wegner v. Chicago & N. W. R. Co. 262 W 402, 55 NW (2d) 420.

Under the provisions of 274.12 (2), on an appeal by the state from an order granting a new trial in a criminal case, the defendants are entitled to a review of any errors, the correction of which would support the order appealed from, without the necessity of the defendants filing a notice of review. State v. Biller, 262 W 472, 55 NW (2d) 414.

Where the plaintiff appealed from the whole of an order granting a new trial because of excessive damages, the defendant-respondent's request for a review of that part of the order denying the defendant's motions objecting to the jury's findings of negligence, which request was served more than 30 days after the service of the plaintiff's notice of appeal on the defendant but before the case was set for hearing in the supreme court was timely. Flatley v. American Auto. Ins. Co. 262 W 665, 56 NW (2d) 523.

On the plaintiff motorist's appeal from a judgment dismissing the complaint, the defendant railroad company's contention that the evidence does not support the jury's finding that a lantern signal given by the railroad flagman constituted an invitation to the motorist to enter the crossing, if correct, would merely support the judgment appealed from, so that the railroad company may have a review of such contention under 274.12 (2) without having served a motion to review. Pargeter v. Chicago & N. W. R. Co. 264 W 250, 58 NW (2d) 674, 60 NW (2d) 81. See also Strahlendorf v. Walgreen Co. 16 W (2d) 421, 114 NW (2d) 823.

The time for serving on an appellant a motion of an adverse respondent for a review of rulings prejudicial to him is governed by 274.12 (1) and not by 274.12 (4). Youngerman v. Thiede, 271 W 367, 73 NW (2d) 494.

Under 274.12 (2) where the complaint properly raised a certain issue in the trial court, the plaintiff, as respondent on appeal, was entitled to raise such issue on appeal without the necessity of filing any motion for review, since the point raised by him supported the judgment appealed from. Johnson v. Green Bay Packers, 272 W 149, 74 NW (2d) 784.

On appeal from an order vacating a judgment, where respondent had not made a timely appeal from the original judgment, his motion to review the original judgment must be denied, since such a motion cannot reach back to the judgment. Hooker v. Hooker, 8 W (2d) 331, 99 NW (2d) 113.

Where the plaintiff, as respondent on an appeal taken by the defendants, requested a review of the portion of an order granting a new trial, but no appeal had been taken by the defendants from such portion of the order, then, 274.12 (1) under which plaintiff proceeded did not authorize a request for review but, instead, the plaintiff's proper remedy was to appeal pursuant to 274.12 (4). Ason v. Jos. Schlitz Brew. Co. 11 W (2d) 594, 106 NW (2d) 269.

Where an order was entered overruling a defendant's demurrer to a certain cause of action, and the defendant appealed therefrom, but did not appeal from those portions of the order sustaining its demurrer to other causes alleged in the complaint, the plaintiffs' remedy as to the portions of the order from which such defendant did not appeal was to appeal under 274.12 (4), and their request for a review under 274.12 (1) was insufficient. Where a respondent requests a review of a portion of an appealable order not appealed from, and the appellant does not object, and both fully argue the questions raised, then 274.11 (4) authorizes the review; but where the appellant did not object to the request for review, but its brief contained no discussion of the questions which the respondents sought to review, and little, if any, of the oral argument was devoted to them, it is deemed that the portions of the order not appealed from are not before the supreme court. Plesko v. Allied Inv. Co. 12 W (2d) 168, 107 NW (2d) 201.

Where the respondents' notice of cross appeals was served on the same day as the defendants' notice of appeal, and performed the functions of the motions to review authorized by 274.12 (1), the supreme court will treat such cross appeals as motions to review, and will consider that 274.12 (1) did not preclude the respondents' presentation of their issues by cross appeal within the time limited for motion to review. Crossman v. Gipp, 17 W (2d) 54, 115 NW (2d) 547.

Where defendant store owner impleaded the escalator manufacturer and filed a cross complaint against it, but the trial court granted a nonsuit thereon, and the plaintiffs appealed from a judgment against them, the defendant store owner, instead of serving a "notice of review" to "review" that part of the judgment dismissing the cross complaint, should have cross-appealed against the manufacturer and labeled its notice of review a "notice of appeal," but, since the plaintiffs appealed from the whole judgment and duly served notice thereof on both the defendant store owner and the escalator manufacturer, and since this conferred personal jurisdiction on the supreme court, the defendant store owner is deemed to have proper standing here to obtain a review of the merits of the trial court's determination on the cross complaint. Turk v. H. C. Prange Co. 18 W (2d) 547, 119 NW (2d) 365.

Plaintiff's acceptance of an option to accept a reduced amount of damages instead of a new trial limited to damages precludes his seeking a review of the trial court's determination of damages when he appeals. When an opposing party appeals, the party who has accepted the option to take judgment for a reduced amount of damages may nevertheless have a review on appeal of the trial court's determination of the damage issue. If it is determined on such review that no error was committed by the trial court's disposition of the damage issue, such acceptance of judgment for the reduced amount will be affirmed

unless the result of the principal appeal requires otherwise. Plesko v. Milwaukee, 19 W (2d) 210, 120 NW (2d) 130.

The respondent husband is concluded from raising on appeal an issue with respect to loss of consortium, where he failed to serve and file any timely notice for review upon appellant as required by 274.12 (1). Kavis v. Kroger Co. 26 W (2d) 277, 132 NW (2d) 595.

On appeal from the order construing a will, the respondent could not by motion to review pursuant to 274.12 (1), attack the validity of a subsequent order extending appellant's time to appeal, since she did not seek any reversal or modification of the order construing the will which appellant appealed from, but a reversal of the extension order. The trial court's order extending the appellant's time to appeal being an appealable order, it was incumbent upon respondent under 274.12 (4) to separately appeal therefrom in order to attack the same upon appellate review. Estate of Seliger, 27 W (2d) 323, 134 NW (2d) 447.

Where the respondent failed to serve and file timely notice for review as required by 274.12 (1), he was precluded from raising the issue of inadequacy of the judgment from which appellant had appealed. Tom Welch Accounting Service v. Walby, 29 W (2d) 123, 138 NW (2d) 139.

Defendant, complaining that the damage award was excessive, was entitled as respondent on appeal to a review of that question, notwithstanding his failure to file a cross appeal or notice of review, since that contention sustained the order appealed from which granted him a new trial on the issue of damages. Zelof v. Capital City Transfer, Inc. 29 W (2d) 384, 139 NW (2d) 1.

Where respondent moved for a directed verdict and for judgment notwithstanding the verdict but the trial court ordered a new trial, respondent cannot be heard on appeal to ask for a change in the verdict where he did not appeal or ask for a review. McPhillips v. Blomgren, 30 W (2d) 134, 140 NW (2d) 267.

Review of action of the trial court in setting aside an award for past pain and suffering was not precluded by plaintiff's failure to serve the notice required by 274.12 (1), for if the supreme court were to determine that the jury award should be reinstated, the correction of the claimed error would merely support the judgment appealed from and under 274.12 (2), no notice of review in such a case is required. Rivera v. Wollin, 30 W (2d) 305, 140 NW (2d) 748.

The state having demurred to the complaint objecting to the personal jurisdiction of the court on the basis of sovereign immunity (the demurrer being sustained on other grounds) did not, by failing to except in its notice of cross appeal to the trial court's erroneous assumption that it had personal jurisdiction over the state, thereby waive its objection to that defense, for the question of jurisdiction was one arising upon the record proper and was accordingly preserved for review without specific exception. Kenosha v. State, 35 W (2d) 317, 151 NW (2d) 36.

The Rivera case. 50 MLR 158.

274.13 History: 1860 c. 264 s. 5; R. S. 1878 s. 3050; Stats. 1898 s. 3050; 1925 c. 4; Stats. 1925 s. 274.13; Sup. Ct. Order, 275 W viii; 1963 c. 429.

A stipulation by attorneys that a printed case shall be filed as the return on appeal and shall constitute the record cannot take the place of a return by the clerk. Webster v. Stadden, 8 W 225.

The appellate court will dismiss an appeal of its own motion where the return does not include a notice or undertaking, and when there is no certificate that the papers returned are the original or copies, or are transmitted pursuant to an appeal. Shewey v. Manning, 14 W 448.

An appeal will be dismissed for want of a proper certificate. Dill v. White, 37 W 617.

The court has no power to amend the record returned by the trial court though it can order a further return or remit it for correction. Hay v. Lewis, 39 W 364.

On an appeal from an order the return must show that it contains either the originals (or copies in case of substitution) of all papers used upon the motion. Carpenter v. Shepardson, 43 W 406.

If the minutes of the court and testimony were used on an application to the circuit court for an order they should be in the record on an appeal from such order. Bunn v. Valley L. Co. 63 W 630, 24 NW 403.

The papers in a case appealed from a county court were returned thereto after an order had been made by the circuit court. After their return notice of an appeal from such order was given, and the circuit court ordered its clerk to make a return of certified copies of the papers and records before it on the hearing as the return to the supreme court. This the circuit court had power to do. Reed v. Wilson, 75 W 39, 43 NW 560.

Detached papers without a clerk's certificate will not be recognized. Davis & Rankin B. & M. Co. v. Cupp, 89 W 673, 62 NW 520.

A return on appeal from an order which recites that it was made on a verified complaint and certain affidavits in opposition thereto and which makes reference to other evidence, without showing of what it consisted, cannot be reviewed. Glover v. Wells & Mulrooney G. Co. 93 W 13, 66 NW 799.

On appeal from an order all essential papers must come to the appellate court under the certificate of the trial court. Hoffman & Billings M. Co. v. Burdick, 95 W 342, 70 NW 470.

Where a motion is made in a garnishment action upon an affidavit which refers to the complaint and other papers in the principal action and an appeal is taken from an order based upon such affidavit, such papers in the principal action must be included with the appeal. Schomberg H. L. Co. v. Engel, 114 W 273, 90 NW 177.

On an appeal from an order the certificate of the clerk should show that the papers transmitted are the original papers which are used upon the application for the order, or if copies of such papers are introduced that such copies were allowed by the trial court. Tenney v. Madison, 99 W 539, 75 NW 979; Superior C. L. Co. v. Superior, 104 W 463, 80 NW 739; Ryan v. Philippi, 108 W 254, 83 NW 1103; Madden v. Kinney, 114 W 528, 90 NW 449.

The requirement that the certificate of the clerk enumerate the papers transmitted on appeal from an order does not apply where an appeal is taken from a judgment, and on such appeal orders involving the merits and necessarily affecting the judgment may be considered without any certificate of the clerk referring to them specially. Garvin v. Crowley, 116 W 496, 93 NW 470.

A certificate that the papers returned were all the papers filed is insufficient where the order appealed from recites that it is based on affidavits of numerous persons. Milwaukee T. Co. v. Sherwin, 121 W 468, 98 NW 223, 99 NW 229.

Where the appeal has been properly taken but the return is defective a reasonable opportunity will be afforded to perfect the return, and the court may on its initiative exercise its authority if necessary to sufficiently perfect the record to enable it to decide the appeal upon its merits. Colle v. Kewaunee, G. B. & W. R. Co. 149 W 96, 135 NW 536.

Oral testimony taken by a court reporter upon the hearing of a motion does not become a part of the record upon the mere certificate of the reporter. Will of Bilty, 171 W 20, 176 NW 220.

Where an order appealed to the supreme court recited the papers upon which it was made and those papers were certified up, the return was sufficient. Christian v. Great Northern R. Co. 171 W 266, 177 NW 29.

A statement of a fact by a trial judge in his decision on a motion for a new trial is part of the record. Caryl v. Butchmann, 177 W 241, 187 NW 993.

In reviewing an order denying a new trial depositions taken by the losing party are considered as a part of the original papers used on the motion for the new trial which are to be returned with the order from which the appeal is taken. Wujcik v. Globe & Rutgers Fire Ins. Co. 189 W 366, 207 NW 710.

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.

On a writ of error to review a judgment discharging a convict from custody on a writ of habeas corpus, the only record to be returned to the supreme court is the record made in the habeas corpus proceeding, and the court can only consider that record. Kushman v. State ex rel. Panzer, 240 W 134, 2 NW (2d) 862.

An unidentified, unauthenticated, and unlabeled fugitive paper sent up with the record on appeal, which could be a copy of the judge's minutes, is not properly in the record, and the supreme court cannot consider such paper for any purpose. Urban v. Trautmann, 249 W 264, 24 NW (2d) 619.

Under the rules of practice in the supreme court the bond or undertaking on appeal must be returned to the supreme court as part of the record, but there is no such requirement as to a deposit of cash or bonds in lieu of the undertaking or bond. Gateway City Transfer Co. v. Public Service Comm. 253 W 229, 32 NW (2d) 134.

Where written motions after verdict, and a written decision thereon, are of record here, it is immaterial that they are not incorporated into the bill of exceptions, and the supreme court may properly review the evidence on appeal although the motions are not so incorporated. Jaster v. Miller, 269 W 223, 69 NW (2d) 265.

The affidavits of the defendant's counsel and the divorce counsel reciting certain facts not appearing of record, made and filed after the entry of an order adjudging the defendant in contempt for refusal to comply with the provisions of a divorce judgment, and not made a part of the bill of exceptions, did not become a part of the record on an appeal from the order, and hence the supreme court may not consider them. Howard v. Howard, 269 W 334, 69 NW (2d) 493.

In the absence of a bill of exceptions, the supreme court can consider only whether the pleadings and findings sustain the judgment appealed from. Town of Madison v. City of Madison, 269 W 609, 70 NW (2d) 249.

The supreme court is bound by the record brought up on an appeal, and such record is not to be enlarged by supplemental matter which neither the trial court, acting within its jurisdiction, nor the supreme court, acting within its jurisdiction, has ordered incorporated in the record. Vredenburg v. Safety Device Corp. 270 W 36, 70 NW (2d) 226.

The charge to the jury properly constitutes part of the record brought up on appeal, without the necessity of being incorporated in a bill of exceptions. Klassa v. Milwaukee Gas Light Co. 273 W 176, 77 NW (2d) 397; Jolitz v. Graff, 13 W (2d) 190, 108 NW (2d) 567.

It is the duty of a lawyer taking an appeal to personally supervise the making up of the record and its certification and transmittal to the supreme court, and he should not be permitted to escape the responsibility resulting from a faulty record being transmitted by attempting to blame the clerk of the trial court for such failure. Estate of Eannelli, 274 W 193, 80 NW (2d) 240; State ex rel. Brill v. Mortenson, 6 W (2d) 325, 94 NW (2d) 691, 96 NW (2d) 603.

The supreme court will not consider material not properly before it on appeal and, with no bill of exceptions, the court cannot consider an appellant's recitation of alleged facts nor the conclusions which he draws from them where they differ from the findings or are not supported by any findings. In the absence of a bill of exceptions, the supreme court must assume that the evidence sustains the findings, and the only question on appeal is whether the judgment entered is in accordance with the findings. Madison v. Chicago, M. St. P. R. Co. 2 W (2d) 467, 87 NW (2d) 251.

Where the action of the circuit court on an appeal from the civil court is based wholly on the return made and certified by the clerk of the civil court, such return, together with the order and judgment of the circuit court, constitutes the record on appeal to the supreme court and there is no need of a bill of exceptions. Orlandini v. Gunsburg, 4 W (2d) 156, 89 NW (2d) 840.

Where it sufficiently appeared that an answer and plea and exemplified copies of

papers were among the papers filed and used on a motion and on which an order was based, the same were properly included in the record brought up on an appeal from the order, without being incorporated in a bill of exceptions. Brazy v. Brazy, 5 W (2d) 352, 92 NW (2d) 738.

274.14 History: 1860 c. 264 s. 21; R. S. 1878 s. 3051; Stats. 1898 s. 3051; 1925 c. 4; Stats. 1925 s. 274.14; 1935 c. 389; 1935 c. 520 s. 9; 1935 c. 541 s. 285; 1939 c. 66; 1967 c. 184.

274.16 History: 1909 c. 429; Stats. 1911 s. 3052m; 1917 c. 341; 1925 c. 4; Stats. 1925 s. 274.16; 1935 c. 541 s. 287; 1939 c. 66.

Under the facts supported by the evidence in this case the duty of the trial judge was not so plain as a matter of law as to justify issuing a writ of mandamus compelling him to issue a certificate. State ex rel. Schultz v. Halsey, 149 W 551, 136 NW 285.

274.17 History: 1860 c. 264 s. 22; R. S. 1878 s. 3053; Stats. 1898 s. 3053; 1925 c. 4; Stats. 1925 s. 274.17.

Compliance with secs. 3049 and 3053, R.S. 1878, after execution levied on chattels stays all further proceedings on the judgment, but does not recall the execution or release the levy. Tilley v. Washburn, 91 W 105, 64 NW 312.

The supreme court cannot grant a motion to set aside the service of an amended summons and complaint made after an appeal has been perfected and a stay bond made and served unless the stay order was violated thereby. Wechselberg v. Michleson, 103 W 410, 79 NW 412.

An execution on a money judgment could be stayed by appellants as a mattter of right only by executing an undertaking. 274.11 (2) and (3), as to deeming an appeal perfected on the service of bond for costs, or the deposit of money, and 274.14 for alternatives by deposit or waiver in situations where an appellant "is required to give bond," have no application. Wilhelm v. Hack, 234 W 213, 290 NW 642.

"In the absence of positive provisions of the statute to the contrary, an appeal perfected as the law requires, does *proprio vigore* stay proceedings under the order appealed from. * * * In the absence of specific statutory direction to the contrary, an appeal operates as a supersedeas. * * * Applicable to many sets of facts there are statutory directions to the contrary, whereby the appeal does not stay proceedings under the order or judgment unless security is given by the appellant. Sec. 274.17 to 274.33, inclusive, Stats. 1949, direct that the execution of judgments in various matters shall not be stayed unless the appellant gives bond. In matters not within those statutes the pre-existing law, that the appeal itself operated as a stay, continues in force." Slabosheske v. Chikowski, 273 W 144, 153, 77 NW (2d) 497, 502. See also Spellman v. Ruhde, 28 W (2d) 599, 607, 137 NW (2d) 425, 430.

274.18 History: 1860 c. 264 s. 23; R. S. 1878 s. 3054; Stats. 1898 s. 3054; 1925 c. 4; Stats. 1925 s. 274.18.

274.19 History: 1860 c. 264 s. 24; R. S. 1878 s. 3055; Stats. 1898 s. 3055; 1925 c. 4; Stats. 1925 s. 274.19.

274.20 History: 1860 c. 264 s. 25; R. S. 1878 s. 3056; Stats. 1898 s. 3056; 1925 c. 4; Stats. 1925 s. 274.20; 1935 c. 541 s. 288; 1939 c. 66.

In making an order staying execution the circuit judge could act upon his knowledge as to whether he had fixed the amount of the bond and the only facts which the execution debtor was required to show not with the knowledge of the presiding judge were whether after the amount was fixed the bond was given and the appeal perfected before the execution was issued. Harris v. Snyder, 113 W 451, 89 NW 660.

274.21 History: 1860 c. 264 s. 26; R. S. 1878 s. 3057; Stats. 1898 s. 3057; 1925 c. 4; Stats. 1925 s. 274.21; 1935 c. 541 s. 289; 1939 c. 66.

Where a judgment directed the payment of a deficiency by defendant and his wife, and the judgment was reversed as to the wife alone, the sureties in the joint undertaking of husband and wife were liable for such deficiency. Van Dyke v. Weil, 18 W 277.

The terms of the order as to the bond are in the discretion of the court. Nash v. Meggett, 89 W 486, 61 NW 283.

274.22 History: 1860 c. 264 s. 27; R. S. 1878 s. 3058; Stats. 1898 s. 3058; 1925 c. 4; Stats. 1925 s. 274.22.

A defendant who appeals from an injunction is entitled to a writ of mandamus to compel the trial judge to fix a bond staying execution pending the appeal. State ex rel. Boysa v. Fritz, 192 W 358, 212 NW 655.

274.23 History: 1860 c. 264 s. 27; R. S. 1878 s. 3059; Stats. 1898 s. 3059; 1925 c. 4; Stats. 1925 s. 274.23.

Mandamus will lie to compel the circuit judge to fix the amount of the bond before the appeal has been taken. Northwestern Mut. Life Ins. Co. v. Park H. Co. 37 W 125.

The supreme court will grant a stay of proceedings pending an appeal where the trial court has refused to stay the execution of an order appointing a receiver of a corporation. Within the limitation that an appeal is taken and prosecuted in good faith and that reasonable security is given a stay of proceedings is a matter of right. Janesville v. Janesville W. Co. 89 W 159, 61 NW 770.

The failure of the trial court to require that the bond, given by the defendants on their appeal from a judgment enjoining them from futher violation of a regulatory order of the plaintiff department of agriculture, should provide for the recovery of any losses sustained by third parties was not an abuse of discretion. State ex rel. Dept. of Agriculture v. Marriott, 235 W 468, 293 NW 154.

The stay provided for on giving the bond stays nothing but the "execution" of the judgment, and since the only part of a judgment requiring "execution" is that part which awards costs, the bond 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 un-

dertaking may be "to such further effect" as the court directs confers on trial courts broad equitable powers. Carpenter Baking Co. v. Bakery S. D. Local Union, 237 W 24, 296 NW 118.

Where a judgment gave plaintiff the option to reacquire patent rights upon payment of certain expenses within 60 days, 274.23 did not prevent the tolling of the 60-day period by timely appeal within the period even though no undertaking was filed. Spellman v. Ruhde, 28 W (2d) 599, 137 NW (2d) 425.

274.24 History: 1860 c. 264 s. 18; R. S. 1878 s. 3060; Stats. 1898 s. 3060; 1925 c. 4; Stats. 1925 s. 274.24.

Where no stay is obtained the action may proceed as if no appeal from the order had been taken; and for this purpose either the supreme court or trial court may order substitution of copies for the original return. Douglas County v. Walbridge, 36 W 643.

The supreme court will not, on affirming the order striking out an answer, give further time for appellant to comply with its conditions but will leave that matter with the court below. Whereatt v. Ellis, 68 W 61, 31 NW 762.

After an appeal from an order is taken the court below has power to amend it where there has been no stay of proceedings. But the appellant has the right to have the appeal determined as the order was before amendment. Kelly v. Chicago & Northwestern R. Co. 70 W 335, 35 NW 338.

The proper place to apply for a stay of proceedings is in the trial court. Hill v. Gates County, 112 W 482, 88 NW 463.

An appeal from an order refusing to quash a writ of mandamus, overruling a demurrer to the relation and giving the defendant time to plead, does not operate to stay proceedings except as provided in sec. 3060, Stats. 1915, and where, pending such appeal, the trial court entered an interlocutory judgment awarding the writ and commanding the comptroller to countersign a warrant for a refund of excessive taxes he was not authorized by sec. 925-269m to disobey the writ; neither did said section operate to stay proceedings pending the appeal unless a stay was specifically ordered. State ex rel. Pabst Brew. Co. v. Kotecki, 164 W 69, 159 NW 583.

Under a statute requiring appeal from an order to be taken within 60 days from entry thereof, where the order was entered October 26, the appeal bond was dated December 20, the surety did not justify until January 20, the bond was not filed until January 24, and appellants made no showing that sureties could not have justified the proper time, or that failure to file the appeal bond in time resulted from mistake or accident, the appeal must be dismissed. In re Stanley's Will, 228 W 530, 280 NW 685.

During the pendency of an appeal from an order sustaining a demurrer to a complaint and ordering judgment in an action to enjoin the enforcement of a money judgment obtained against the appellants in a prior action, the circuit court had jurisdiction to enter judgment dismissing the complaint, in the absence of an order staying the proceedings. Nickoll v. North Avenue State Bank, 236 W 588, 295 NW 715.

274.25 History: 1860 c. 264 s. 19; 1861 c. 139 s. 2; R. S. 1878 s. 3061; Stats. 1898 s. 3061; 1925 c. 4; Stats. 1925 s. 274.25.

Where a bond is given to obtain the continuance of a temporary injunction pending an appeal from the order, the plaintiff's right to continue the injunction did not become absolute and irrevocable, but the respondent could give a bond as provided in sec. 3061, R. S. 1878, and secure the dissolution of the injunction. Tenney v. Madison, 99 W 539, 75 NW 979.

Sec. 3061, Stats. 1898, refers to the requirements upon which the appeal is taken to an order continuing the injunction, but the right of appeal or the time within which such right must be exercised is not affected by it. Milwaukee E. R. & L. Co. v. Bradley, 108 W 467, 84 NW 870.

On denial of motion to vacate a temporary injunction and for stay of proceedings pending appeal, the court may order that the temporary injunction continue in force upon the giving of a bond to abide any final judgment. St. Hyacinth Congregation v. Borucki, 141 W 205, 124 NW 284.

274.26 History: R. S. 1878 s. 3062; Stats. 1898 s. 3062; 1919 c. 142; 1925 c. 4; Stats. 1925 s. 274.26; 1935 c. 541 s. 290; 1939 c. 66.

A town is a "municipal corporation" within sec. 3062, R. S. 1878. Miller v. Jacobs, 70 W 122, 35 NW 324.

Sec. 3062, Stats. 1898, does not allow a city comptroller to appeal without giving bond. State ex rel. Jordan v. Bechtner, 132 W 632, 113 NW 42.

274.26, Stats. 1931, providing that service of notice of appeal by a state board stays execution of an order appealed from, is inapplicable to prohibitive orders, such as an order staying the public service commission's suspension of security broker's license. Halsey, Stuart & Co. v. Public Service Comm. 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 regulatory order, pending the determination of the defendants' appeal from such judgment, 274.26 did not stay the judgment. State ex rel. Dept. 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. 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.

274.26 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. State ex rel. Madison v. Walsh, 247 W 317, 19 NW (2d) 299.

Where a declaratory judgment merely adjudicated as to the validity or invalidity of competing ordinances for the annexation of certain territory in a town, and did not thereby order anything further to be done or not to be done, such declaratory judgment required no execution or other process in aid thereof, and hence a portion of a separate order, purporting to stay the "execution" of such declaratory judgment pending final disposition of the various annexations on appeal therefrom to the supreme court, was without meaning or effect, although intended to have the effect of maintaining the status quo in the disputed territory pending determination of the appeal. 274.26 did not operate to stay the execution of the declaratory judgment in question further than as to the issuance of an execution for costs and disbursements, since such declaratory judgment otherwise required no execution or other process in aid thereof. Brown Deer v. Milwaukee, 8 W (2d) 631, 99 NW (2d) 860.

274.27 History: R. S. 1878 s. 3063; Stats. 1898 s. 3063; 1925 c. 4; Stats. 1925 s. 274.27; 1935 c. 541 s. 291; 1939 c. 66.

Revisers' Note, 1878: A new section, the object and reason of which is manifest. It is taken from the new revision of New York, in substance.

274.28 History: 1860 c. 264 s. 29, 32; R. S. 1878 s. 3064; Stats. 1898 s. 3064; 1925 c. 4; Stats. 1925 s. 274.28.

Revisers' Note, 1878: Sections 29 and 32, chapter 264, Laws 1860, combined with verbal amendment, and an expression of the power declared to exist in the supreme court by the case of the Northwestern M. L. Ins. Co. v. Park H. Co. 37 W 125. The decision and this declaration will probably render the occasion for its exercise rare.

The supreme court or a justice may stay proceedings in a civil case pending appeal only when the trial court neglects or refuses to make any order, not wholly discretionary, necessary to enable the appellant to stay proceedings. State v. Tyler, 238 W 589, 300 NW 754.

274.29 History: 1860 c. 264 s. 30; R. S. 1878 s. 3065; 1891 c. 116; Stats. 1898 s. 3065; 1925 c. 4; Stats. 1925 s. 274.29.

If the justification is defective the remedy is by motion, in which case a new undertaking would be ordered. Parish v. Eager, 15 W 532.

If the sureties are not qualified the appeal will be dismissed on motion, unless the appellant file a sufficient undertaking within a prescribed time. Smith v. Chicago & Northwestern R. Co. 19 W 89.

An undertaking signed by a practicing attorney is of no effect. Branger v. Buttrick, 30 W 153.

Each of the sureties must be a resident householder or freeholder in this state; otherwise the appeal will be dismissed unless the defect be supplied within a specified time with costs of motion. Ulrich v. Farrington M. Co. 69 W 213, 34 NW 89.

An undertaking in proper form should not be stricken from the files because the sureties are irresponsible; exception should be taken to their sufficiency in the manner pointed out. Lee v. Lord, 75 W 35, 44 NW 771.

If the affidavit conforms to the statute an appeal will not be dismissed because it is alleged that the sureties are insufficient. Johnston v. King, 83 W 8, 53 NW 28.

An undertaking sufficiently identifies the judgment appealed from if it gives the title of the case correctly and the amount of the judgment, although the blank for the day of the month on which judgment was rendered is unfilled. Johnston v. King, 83 W 8, 53 NW 28.

On appeal from a judgment for $394 where the undertaking was to the effect that the appellant would pay costs and damages awarded against him on appeal not exceeding $250, and that he would pay the judgment if affirmed, and each surety justified in the sum of $394, the undertaking was insufficient and the appeal must be dismissed. Bliss v. Rosenkrans, 125 W 532, 104 NW 746.

274.30 History: 1860 c. 264 s. 28; R. S. 1878 s. 3066; Stats. 1898 s. 3066; 1925 c. 4; Stats. 1925 s. 274.30.

An appeal from an order vacating a judgment leaves the latter in full force and a sale thereunder will not be set aside. Aetna Life Ins. Co. v. McCormick, 20 W 265.

After reversal of a judgment the circuit court cannot take any proceeding before remittitur. Trowbridge v. Sickler, 48 W 424, 4 NW 563.

An appeal from all or part of a judgment deprives the trial court of all jurisdiction, unless statute authorizing appeal reserves to such court certain jurisdiction or authority over its judgment. David Adler & Sons Co. v. Maglio, 198 W 24, 223 NW 89.

274.31 History: 1859 c. 155 s. 1; 1860 c. 264 s. 31; 1876 c. 151; R. S. 1878 s. 3067; Stats. 1898 s. 3067; 1925 c. 4; Stats. 1925 s. 274.31; 1935 c. 541 s. 292; 1939 c. 66.

274.32 History: 1860 c. 264 s. 17; R. S. 1878 s. 3068; Stats. 1898 s. 3068; 1925 c. 4; Stats. 1925 s. 274.32.

Noticing a cause for argument is perhaps a waiver of the right to except to sureties. Grant v. Connecticut Mut. Life Ins. Co. 28 W 387.

The appeal from a judgment directing payment of money, execution of which had been stayed, having been dismissed because not prosecuted, execution for costs on appeal issued out of the supreme court was returned

unsatisfied. Action might thereupon be maintained against the sureties to recover the whole amount for which they were liable, although no execution for the collection of judgment had issued. Hallam v. Stiles, 61 W 270, 21 NW 42.

Where the failure of a guardian ad litem to perfect an appeal resulted from a mistake the court could retain the record to enable him to serve the undertaking, file it in the trial court and have it certified by an amended return. Tyson v. Tyson, 94 W 225, 68 NW 1015.

The accidental omission from an undertaking of the penal sum required by the terms of the order may be cured by filing a proper undertaking. Tenney v. Madison, 99 W 539, 75 NW 979.

Where an undertaking has been given which is broader than the statute requires, it was competent for the court to allow the first undertaking to be withdrawn and a new one substituted. Stolze v. Manitowoc T. Co. 100 W 208, 75 NW 987.

Where the respondent's name was omitted from the undertaking and the wrong defendant named as mortgagor in an appeal from judgment of foreclosure, it is sufficient to give the court jurisdiction and an amended undertaking might be attached. Rockman v. Ackerman, 109 W 639, 85 NW 491.

Where an undertaking on separate appeals by various appellants only provided for the payment of costs not to exceed $250 in all, the defect could be cured either by filing a proper undertaking in the trial court or by allowing the defect to be cured in the supreme court. (Tyson v. Tyson, 94 W 225, 68 NW 1015, approved.) Harrigan v. Gilchrist, 121 W 127, 99 NW 909.

Where it appears from the papers sent to the supreme court that the decision of the lower court could not be reversed if they were properly certified, the matter will not be allowed to be corrected. Milwaukee T. Co. v. Sherwin, 121 W 468, 98 NW 223, 99 NW 229.

A widow's appeal from denial of an allowance pending administration will not be dismissed, as not perfected, since, if not perfected, it would be the court's duty to stay proceedings to permit it to be perfected. In re Sullivan's Estate, 200 W 590, 229 NW 65.

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 was duly authorized by the trial court. Delaware v. Gray, 221 W 584, 267 NW 310.

Under 274.32 the supreme court may grant to an appellant, who served a notice of appeal in compliance with 274.11 and within the time for appeal limited by 274.01 and who filed an appeal bond with the clerk of court but who never served it on the respondent, permission to serve a copy of the appeal bond on the respondent after the time for appeal has expired. Wenzel & Henech Constr. 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.

On motion to dismiss an appeal for appellant's 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 the rules of practice of the supreme court or 274.32, the appeal could be dismissed. Pick v. Pick, 245 W 496, 15 NW (2d) 850.

When a proper notice of appeal is served and filed within the statutory time, the supreme court acquires jurisdiction and could then, under authority of 274.32, permit the appellant to do any other act necessary to perfect the appeal. Gateway City Transfer Co. v. Public Service Comm. 253 W 229, 32 NW (2d) 134.

274.33 History: 1860 c. 264 s. 10; R. S. 1878 s. 3069; 1895 c. 212; Stats. 1898 s. 3069; 1915 c. 219 s. 9; 1925 c. 4; Stats. 1925 s. 274.33; 1935 c. 39; 1935 c. 541 s. 293; 1943 c. 505; Sup. Ct. Order, 271 W x; 1959 c. 226; Sup. Ct. Order, 15 W (2d) vii; 1967 c. 26.

Editor's Note: In connection with the amendatory legislation of 1895 see Gianella v. Bigelow, 92 W 267, 65 NW 1030, and Evans v. Curtiss, 98 W 97, 73 NW 432. In connection with the 1956 amendment of 274.33 (3) making orders determining jurisdiction appealable see Petition in Inland Steel Co. 174 W 140, 182 NW 917. On the rule before the 1963 amendment adding subsection (3m) see Raether v. Filer & Stowell Mfg. Co. 155 W 130, 143 NW 1035. See also ch. 315, Laws 1959, which designated the several branches of the civil court of Milwaukee county as branches of the county court of that county.

On appellate jurisdiction of the supreme court see notes to sec. 3, art. VII, and notes to 251.08; on the classification of remedies see notes to 260.03; and on appeals from county courts see notes to 324.01.

1. Applicability of statutory rules in effect until 1895.
2. Orders not appealable under 274.33 (entire).
3. Orders appealable under 274.33 (1).
4. Orders not appealable under 274.33 (1).
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6. Orders not appealable under 274.33 (2).
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8. Orders not appealable under 274.33 (3).
9. Orders appealable under 274.33 (4).
10. Orders not appealable under 274.33 (4).
11. Miscellaneous principles.

1. Applicability of Statutory Rules in Effect Until 1895.

In the following cases, all governed by sec. 10, ch. 264, Laws 1860, or sec. 3069, R. S. 1878, and decided prior to the enactment of the amendatory legislation of 1895, orders were held to be appealable: Johnson v. Eldred, 13 W 482 (order refusing to set aside a judgment and allow defendant to answer); Western Bank of Scotland v. Tallman, 15 W 92 (order refusing to change the venue); Carney v. La Crosse & M. R. Co. 15 W 503 (order denying a motion to set aside a judicial sale); Jessup v. City Bank of Racine, 15 W 604 (order setting aside a sale upon a judgment of foreclosure); In re Fleming, 16 W 70 (order, made in a special proceeding, directing the election of railroad company directors); Ballston Spa Bank v. Marine Bank, 18 W 490 (order discharging a person from process for contempt for refusing to answer questions properly put upon examination in supplementary proceedings); Dole v. Northrop, 19 W 249 (order allowing amendment of the answer, after the lapse of several terms of court and after a judgment had been entered); Collins v. Case, 25 W 651 (order directing a receiver to invest certain funds in his hands); Noonan v. Orton, 28 W 386 (order requiring the appellants to permit inspection and to give copies of certain papers and documents); Lamonte v. Pierce, 34 W 483 (order refusing to set aside a previous order granting an attachment against defendant as for contempt); Witter v. Lyon, 34 W 564 (order vacating an order to show cause); Wood v. Blythe, 42 W 300 (order vacating an order made by a court commissioner, extending the time for settling a bill of exceptions, and staying proceedings); Wisconsin C. R. Co. v. Cornell Univ. 49 W 162, 5 NW 331 (order condemning land for the use of a railroad company); In re Orton, 54 W 379, 11 NW 584 (order disbarring an attorney); Sloane v. Anderson, 57 W 123, 13 NW 684, 15 NW 21 (order refusing to vacate a judgment by confession); Carney v. Gleissner, 62 W 493, 22 NW 735 (order denying a petition, by a person not a party to an action of replevin, to be made a party); Milwaukee & N. R. Co. v. Strange, 63 W 178, 23 NW 432 (order refusing to set aside an order condemning land); Winninghoff v. Wittig, 64 W 180, 24 NW 912 (order consolidating 2 actions); Morse v. Stockman, 65 W 36, 26 NW 176 (order denying an application to be made a party in a special proceeding); State ex rel. Drury v. Supervisors, 67 W 274, 30 NW 360 (order setting aside the service of an alternative writ of mandamus); Nichols v. Crittenden, 74 W 459, 43 NW 105 (order denying to a defendant a copy of the complaint); Wadleigh v. Standard L. & A. Co. 76 W 439, 45 NW 109 (order denying an application for withdrawal of a removal petition and bond); Donkle v. Milem, 88 W 33, 59 NW 586 (order opening a judgment and permitting a defendant to serve an answer); Cooper v. Waterloo, 88 W 433, 60 NW 714 (order striking a cause from the calendar because plaintiff did not make a third person a defendant); Weber v. Weber, 90 W 467, 63 NW 751 (order made in an action appointing a receiver to wind up the business of a firm).

In the following cases, all governed by sec. 10, ch. 264, Laws 1860, or sec. 3069, R. S. 1878, and decided prior to the enactment of the amendatory legislation of 1895, orders were held to be not appealable: Fairchild v. Dean, 13 W 329 (order denying a motion to allow a judgment by confession to be signed nunc pro tunc); Waldo v. Rice, 18 W 405 (order refusing to dismiss a cause for want of prosecution); Reed v. Lueps, 30 W 561 (order refusing to dismiss a cause for want of prosecution); Orton v. Noonan, 32 W 104 (order setting aside service because of illegibility of copy of complaint); In re Will of Kneeland, 40 W 344 (order striking cause from calendar for want of notice of trial); Bassett v. Jenkins, 41 W 197 (order granting a continuance); Felt v. Amidon, 48 W 66, 3 NW 825 (order staying proceedings in an action until a party shall pay the costs adjudged against him on an appeal to the supreme court); Peeper v. Peeper, 53 W 507, 10 NW 604 (order staying proceedings in a partition suit until determination of interest of respective parties by county court); Germantown F. Mut. Ins. Co. v. Dhein, 57 W 521, 15 NW 840 (order denying a motion, not upon the merits, but for want of prosecution); Conan v. Follis, 61 W 224, 20 NW 912 (order adjudging that a second undertaking and deposit, to supply supposed deficiencies in a former undertaking, were not in time); Sowards v. Stephens, 64 W 5, 24 NW 409 (order made on appeal from justice's court, directing that a cause stand upon the calendar until next term); Andrews v. Paschen, 67 W 413, 30 NW 712 (order denying a motion to set aside an attachment of corporate property in an action for dissolution of a corporation); Bradley v. Cramer, 67 W 415, 30 NW 622 (order denying a motion to strike cause from calendar for want of notice of filing of remittitur); Horicon S. Club v. Gorsline, 73 W 196, 41 NW 78 (order striking a cause from the calendar because prematurely noted for trial); Shenners v. West Side S. R. Co. 74 W 447, 43 NW 103 (order refusing to make the plaintiff elect with respect to the counts of a complaint); Smith v. Shawano County, 77 W 672, 49 NW 95 (order modifying certain findings of fact and conclusions of law and refusing to modify others); Nash v. Meggett, 89 W 486, 61 NW 283 (order, made after judgment of foreclosure and pending an application for a receiver, restraining defendant from collecting rents until the further order of the court); and Whitefoot v. Leffingwell, 90 W 182, 63 NW 82 (order denying a motion to strike a cause from the calendar).

2. Orders Not Appealable Under 274.33 (entire).

In the following cases, all decided after the enactment of the 1895 amendatory legislation, orders were held to be not appealable under the several provisions embodied in 274.33: Smith v. Scott, 93 W 453, 67 NW 705 (order denying a motion to bring in additional parties defendant); Cook v. Menasha, 95 W 215, 70 NW 289 (order denying a motion to vacate an order for the bringing in of additional parties); Kunze v. Kunze, 95 W 264, 70 NW 162 (order vacating a notice of lis pendens); Ledebuhr v. Grand Grove of Druids, 97 W 341, 72 NW 884 (order setting aside a default judg-

ment against a mutual benefit society and staying proceedings); Evans v. Curtiss, 98 W 97, 73 NW 432 (order changing the venue of an action); O'Connell v. Smith, 101 W 68, 76 NW 1116 (order setting aside a petition for mechanic's lien); Latimer v. Central Elec. Co. 101 W 310, 77 NW 155 (order denying defendant's motion to set aside the summons and complaint for the want of proper service); Latimer v. Julius Andrae & Sons Co. 101 W 311, 77 NW 1119 (order refusing to grant a change of venue); Port Huron E. & T. Co. v. Rude, 101 W 324, 77 NW 177 (order which opened a default judgment and allowed a defendant to plead); In re Minnesota & Wisconsin R. Co. 103 W 191, 78 NW 753 (order denying petitioner's motion to dismiss a petition in condemnation proceedings); State ex rel. Gray v. Common Council, 104 W 622, 80 NW 942 (order denying a motion to require amendment of a return to a writ of certiorari); State ex rel. Fuller v. Circuit Court, 108 W 77, 83 NW 1115 (order setting aside a judgment of foreclosure because no notice of lis pendens had been filed); Cullen v. Hanisch, 114 W 24, 89 NW 900 (order refusing to require plaintiff to give security for costs); Waukesha County Ag. Soc. v. Wisconsin C. R. Co. 117 W 539, 94 NW 289 (order denying a motion for a change in the place of trial); Horlick's M. M. Co. v. A. Spiegel Co. 155 W 201, 144 NW 272 (order directing a witness not to answer a question); Prochnow v. Northwestern I. Co. 156 W 408, 145 NW 1098 (order sustaining a plea in abatement and dismissing the complaint); Wildes v. Franke, 157 W 189, 146 NW 1119 (order of the circuit court affirming an order of the civil court vacating a default judgment); Baumgarten v. Matchette, 157 W 230, 146 NW 1119 (order of the circuit court affirming an order of the civil court suppressing an examination of the defendant until after the serving and filing of a complaint); State ex rel. Schumacher v. Markham, 162 W 55, 155 NW 917 (order requiring that a complaint be made more definite and certain); Seymour S. Bank v. Rettler, 166 W 450, 166 NW 40 (order permitting amendment of the answer); Puhr v. Chicago & Northwestern R. Co. 168 W 101, 169 NW 305 (order for judgment dismissing an action as to one defendant); Walters v. Eakins, 172 W 626, 179 NW 781 (order setting aside a stipulation); Rohloff v. Folkman, 174 W 504, 182 NW 735 (order requiring severance of causes of action improperly joined); Schroeder v. Arcade T. Co. 175 W 79, 184 NW 542 (order bringing in a new party to an action); Brust v. First Nat. Bank, 176 W 14, 186 NW 214 (order denying a motion for change of venue); Tetley, Sletten & Dahl v. Rock Falls M. Co. 176 W 400, 187 NW 204 (order refusing to set aside the service of a summons); Kratche v. Civil Court, 179 W 270, 191 NW 507 (order refusing to strike out the name of a party plaintiff); Weiler v. Herzfeld-Phillipson Co. 189 W 554, 208 NW 599 (order directing the entry of judgment); Kearney v. Morse, 199 W 150, 225 NW 729 (order vacating a portion of a judgment in a divorce action, making final division of property and directing a hearing); Hanson v. Custer, 203 W 55, 233 NW 642 (order vacating a previous order which dismissed an action for want of prosecution); Kelm v. Kelm, 204 W 301, 235 NW 787 (order vacating a judgment of divorce by default); Hargraves v. Hoffman, 205 W 84, 236 NW 556 (order vacating a judgment on cognovit); Manns v. Marinette & Menominee P. Co. 205 W 349, 238 NW 624 (order under ch. 32 appointing commissioners in a condemnation proceeding); Cottrill v. Pinkerton, 206 W 218, 239 NW 442 (order overruling a plea in abatement); Larson v. Hanson, 207 W 485, 242 NW 184 (portions of an order denying motions to change answers to questions of the special verdict, for judgment on the verdict as changed, and for judgment notwithstanding the verdict); Cooper v. Commercial Cas. Ins. Co. 209 W 314, 245 NW 154 (interlocutory adjudication which in effect was merely an order overruling a plea in abatement); Stoneman v. Breyfogle, 211 W 5, 247 NW 337 (order, after verdict and before judgment, denying a new trial); Wendt v. Dick, 219 W 230, 262 NW 576 (order of the county court denying a defendant's motion for dismissal of an appeal from justice's court); A. J. Straus Paying Agency v. Terminal W. Co. 220 W 85, 264 NW 249 (order, in a foreclosure action, authorizing a receiver to execute an agreement extending a lease of mortgaged premises); McKey v. Egeland, 222 W 490, 269 NW 245 (order vacating a judgment dismissing an action for failure to file security for costs within the time prescribed); In re Norcor M. Co. 223 W 463, 271 NW 2 (order, in receivership proceedings, reviewing and confirming a prior order allowing claims, from which prior order no appeal was taken); Baker v. Onsrud, 227 W 450, 278 NW 870 (order granting a new trial unless the plaintiff or defendant should consent to a judgment less than the verdict, under which the defendant so consented); Klitzke v. Herm, 242 W 456, 8 NW (2d) 400 (order entered in a pretrial conference had under 269.65 and specifying the issues for trial); Chris Schroeder & Sons Co. v. Lincoln County, 244 W 178, 11 NW (2d) 665 (order denying a motion for change of venue and order granting a motion to have the complaint made more definite and certain); Eva Club, Inc. v. Rupp, 244 W 587, 13 NW (2d) 88 (order for nonsuit in an action of replevin); Central Urban Co. v. Milwaukee, 245 W 576, 15 NW (2d) 859 (order requiring amendment of a complaint so as separately to state several causes of action); State ex rel. Koch v. Retirement Board, 247 W 334, 19 NW (2d) 187 (order denying a motion to strike portions of a petition for a writ of mandamus and order denying a motion to amend a motion to quash an alternative writ of mandamus by pleading additional statutes of limitation); Morrison v. Steinfort, 254 W 89, 35 NW (2d) 335 (order denying a motion to make a complaint more definite and certain); Garfield Inv. Co. v. Oconomowoc, 254 W 500, 36 NW (2d) 695 (order which had been vacated by the trial court on its review thereof under 269.46 (3)); Neitge v. Severson, 256 W 628, 42 NW (2d) 149 (order denying defendants' motion to dismiss an action in the circuit court on the ground that the circuit court should not have assumed jurisdiction, because the county court was competent to render adequate relief);

Veitch v. Schlepp, 262 W 565, 55 NW (2d) 914 (order reciting that the defendants "are liable" for double the rental value of the farm for a certain period, "the amount * * * to be determined by the court in due course", the recital being only the expression of an intention which the court might never implement); State ex rel. Ampco Metal, Inc. v. O'Neill, 273 W 530, 78 NW (2d) 921 (order denying a private trial and a sealed record, in an action for the protection of trade secrets); Brown Deer v. Milwaukee, 274 W 50, 79 NW (2d) 340 (order vacating a previous order dismissing the action as to certain parties, and reinstating them as parties defendant); Cross v. Leuenberger, 274 W 393, 80 NW (2d) 468 (order vacating a judgment entered on default of a party); Barrows v. Kenosha, 275 W 124, 81 NW (2d) 519 (order made prior to any appointment of or award by commissioners in a condemnation proceeding instituted by property owners under ch. 32); Niedbalski v. Cuchna, 3 W (2d) 57, 88 NW (2d) 30 (order relieving certain defendants from the default in serving their answers); Quality Outfitters v. Risko, 4 W (2d) 341, 90 NW (2d) 638 (order refusing to review a decision of a judge concerning an issue of jurisdiction of a court commissioner in a discovery examination); Blooming Grove v. Madison, 5 W (2d) 73, 92 NW (2d) 224 (order to strike portions of a pleading); Tonn v. Reuter, 6 W (2d) 498, 95 NW (2d) 261 (original order of substitution of attorneys); State v. McDonald L. Co. 9 W (2d) 206, 100 NW (2d) 701 (order denying an application by one who was already a party to an action to implead some third party); Alsmeyer v. Norden, 14 W (2d) 451, 111 NW (2d) 507 (order denying a motion to strike a case from the calendar); Herman Andrae Elec. Co. v. Packard Plaza, 16 W (2d) 44, 113 NW (2d) 567 (order providing for trial, on the sole issue of defendants' liability for miscellaneous items, in an action for the foreclosure of a mechanic's lien); State Dept. of Public Welfare v. LeMere, 17 W (2d) 240, 116 NW (2d) 173 (order giving the plaintiff the option of amending its complaint within 30 days, but directing that if the plaintiff did not exercise the option judgment be entered dismissing the complaint); Olson v. Augsberger, 18 W (2d) 197, 118 NW (2d) 194 (order for judgment and order denying a motion to review and modify the judgment); Jezo v. Jezo, 19 W (2d) 78, 119 NW (2d) 471 (order permitting the plaintiff in an action for legal separation to amend his complaint to assert a cause of action for property division and that portion of such order fixing attorney fees); August Schmidt Co. v. Hardware D. M. F. I. Co. 26 W (2d) 517, 133 NW (2d) 352 (order granting defendants' motion for a judgment dismissing the complaint); Glomstead v. Chicago & N. W. Ry. 40 W (2d) 675, 162 NW (2d) 630 (order denying a motion to strike a portion of a complaint); Bohlman v. Mutual Ind. Co. 42 W (2d) 454, 167 NW (2d) 196 (order denying a motion to dismiss based on lapse of time).

3. Orders Appealable Under 274.33 (1).

In the following cases orders were held to be appealable under the provision embodied in 274.33 (1): Allard v. Smith, 97 W 534, 73 NW 50 (order refusing to compel a justice of the peace to make a return necessary to the trial of a case appealed from the justice's court); Mason v. Ashland, 98 W 540, 74 NW 357 (order dismissing, for want of jurisdiction, an appeal from the disallowance of a claim by a city council); Finlay v. Prescott, 104 W 614, 80 NW 930 (order dismissing an appeal from a justice's court); Ashland v. Whitcomb, 114 W 99, 89 NW 866 (order striking from the calendar, when the effect is to determine whether there is any action pending); Milwaukee C. Co. v. Flagge, 180 W 274, 193 NW 69 (order assessing damages on a surety bond); Subacz v. Subacz, 183 W 427, 198 NW 372 (order refusing to vacate a judgment of divorce entered upon default and refusing to allow defendant to plead); Hartberg v. American F. S. Co. 212 W 104, 249 NW 48 (order denying the claim of an intervenor to property, in sequestration proceedings brought by the judgment creditor); Olen v. Waupaca County, 238 W 442, 300 NW 178 (the circuit court's adjudication affirming the county court's erroneous determination dismissing a petition, in an eminent domain proceeding, for the appointment of commissioners); Wolfrom v. Anderson, 249 W 433, 24 NW (2d) 881 (order confirming a sale in partition clear and free of a lease, order disallowing the lessee's claim under the lease, and order denying a motion to set aside the confirmation of the sale, all entered after the interlocutory judgment ordering the sale); Stanley C. Hanks Co. v. Scherer, 259 W 148, 47 NW (2d) 905 (order refusing to substitute the assignee of a judgment as plaintiff and to permit him to sue over on the judgment, and order discharging the judgment of record); Waddell v. Mamat, 271 W 176, 72 NW (2d) 763 (order quashing a substituted service made pursuant to 85.05 (3), Stats. 1951, on a nonresident motorist involved in an accident in Wisconsin); Kimmel v. Kimmel, 9 W (2d) 485, 101 NW (2d) 666 (order denying an application by one who is already a party to an action to implead a third party); Russell v. Johnson, 14 W (2d) 406, 111 NW (2d) 193 (order dismissing a complaint without prejudice, but with conditions for recommencement); Newberger v. Pokrass, 27 W (2d) 405, 134 NW (2d) 495 (order dismissing the complaint as against the insurer, resulting from the trial court's sustaining of a plea in abatement); D'Angelo v. Cornell P. P. Co. 33 W (2d) 218, 147 NW (2d) 321 (order sustaining a motion for plea in abatement dismissing a cross complaint of one defendant against another and continuing the action against a third).

4. Orders Not Appealable Under 274.33 (1).

In the following cases orders were held to be not appealable under the provision embodied in 274.33 (1): Cook v. McComb, 91 W 445, 65 NW 181 (order directing a plaintiff in ejectment, as a condition of judgment, to pay a certain sum to defendant); Reinhardt v. Fire Asso. of Penn. 93 W 452, 67 NW 701 (order denying a motion to dismiss an appeal to the circuit court); Johns v. Northwestern M. R. Asso. 94 W 431, 69 NW 160 (order denying a motion to introduce additional evidence or for

a new trial, where the case has been remitted from the supreme court for further proceedings); Milbauer v. Schotten, 95 W 28, 69 NW 984 (order refusing to compel plaintiff to elect between the causes of action he had set up); St. Patrick's Congregation v. Home Ins. Co. 101 W 155, 76 NW 1125 (order denying a motion to set aside a justice court judgment on the ground of lack of jurisdiction); Allen v. Boberg, 108 W 232, 84 NW 421 (order discharging a defendant stockholder who has paid into court the amount of his liability); Mills v. Conley, 110 W 525, 86 NW 203 (order denying a motion for judgment on a special verdict); Benolkin v. Guthrie, 111 W 554, 87 NW 466 (order refusing to dismiss for failure to pay the state tax); Sutton v. Chicago, St. P., M. & O. R. Co. 114 W 647, 91 NW 121 (order directing a judgment of dismissal because the case had not been brought to trial within the statutory period); Maxon v. Gates, 118 W 238, 95 NW 92 (order denying a motion to dismiss for want of jurisdiction); Flannigan v. Lindgren, 122 W 445, 100 NW 818 (order in a mandamus action denying relator's application for an order prescribing the questions to be tried by a jury); Wiesmann v. Shanley, 124 W 431, 102 NW 932 (order striking out, as irrelevant, portions of a complaint); Lamoreux v. Williams, 125 W 543, 104 NW 813 (order appealed from at a time when no actual controversy existed); Putney v. Milwaukee L. H. & T. Co. 126 W 658, 105 NW 1066 (order denying a motion to dismiss an appeal from an award of commissioners in condemnation proceedings); Land & S. Co. v. South Milwaukee, 127 W 284, 106 NW 850 (order made in an action to set aside an invalid assessment for taxes, staying proceedings and ordering a reassessment); Butteris v. Miffin M. Co. 133 W 343, 113 NW 642 (order denying a motion for judgment on a special verdict); Mash v. Bloom, 133 W 662, 114 NW 99 (order denying costs); Gooding v. Doyle, 134 W 623, 115 NW 114 (order striking out, as irrelevant, portions of an answer); Wagner v. Racine County, 161 W 364, 154 NW 372 (order consolidating actions); Notbohm v. Pallange, 168 W 225, 169 NW 557 (order denying a new trial); Gill v. Hermann, 168 W 589, 171 NW 76 (order refusing to dismiss an action); Lancaster v. Borkowski, 179 W 1, 190 NW 852 (order denying a motion for judgment on the pleadings); Motowski v. People's Dentists, 183 W 477, 198 NW 465 (order requiring plaintiff to make a complaint more definite and certain and to pay defendant's costs); Ovitt v. Schumekosky, 184 W 618, 200 NW 375 (order refusing to dismiss the complaint on the ground that the plaintiff is not the real party in interest); Ajax R. Co. v. Western P. Co. 185 W 74, 200 NW 668 (order directing a receiver to sell the assets of a corporation); Thomsen v. Gennrich, 186 W 76, 202 NW 168 (order directing a receiver to execute a deed); Borowicz v. Hamann, 189 W 212, 207 NW 426 (order denying a motion for a new trial or for relief from a special verdict); Gilbert v. Hoard, 201 W 572, 230 NW 720 (order striking out a portion of an answer not pleaded as a separate defense); Jones v. United States F. & G. Co. 210 W 6, 245 NW 650 (order denying application of defendant to bring in an additional defendant allegedly liable); Schlesinger v. Schroeder, 210 W 403, 245 NW 666 (order denying a motion for summary judgment); Direct Service Oil Co. v. Wisconsin I. & C. Co. 218 W 426, 261 NW 215 (order overruling defendant's motion for judgment dismissing the complaint and for judgment for defendant on a counterclaim); Manas v. Central S. & I. Corp. 221 W 381, 266 NW 780 (order denying defendant's motion for a judgment of dismissal and granting plaintiff's motion to set for trial an alleged fraud issue); Witzko v. Koenig, 224 W 674, 272 NW 864 (order granting a motion for summary judgment); First Wisconsin Nat. Bank v. Pierce, 227 W 581, 278 NW 451 (order striking portions of a counterclaim); Schleif v. Karass, 260 W 391, 51 NW (2d) 1 (order extending the time for defendants to answer the complaint, and relieving them from their default because of their failure to answer); Bolick v. Gallagher, 266 W 208, 63 NW (2d) 93 (order striking out a portion of an answer not pleaded as a separate defense); Willing v. Porter, 266 W 428, 63 NW (2d) 729 (order refusing to enter a default judgment and allowing a defendant to answer); Jaster v. Miller, 269 W 223, 69 NW (2d) 265 (order for judgment, as well as findings of fact and conclusions of law); Britz v. Chilsen, 273 W 392, 78 NW (2d) 896 (order striking out, as irrelevant, portions of a pleading); Mitler v. Associated Contractors, 3 W (2d) 331, 88 NW (2d) 672 (order for entry of judgment); Kubly v. Halsted, 8 W (2d) 6, 98 NW (2d) 442 (order dismissing an order to show cause why an order should not be entered setting aside an order denying defendant's motion for summary judgment); Russell v. Johnson, 14 W (2d) 406, 111 NW (2d) 193 (order denying a motion for change of venue and order denying a challenge to the jury array); Lentz v. Northwestern Nat. Cas. Co. 19 W (2d) 569, 120 NW (2d) 722 (order directing the entry of judgment for plaintiffs on their submission of proof of damages, if any); Buenger v. Buenger, 22 W (2d) 451, 126 NW (2d) 21 (order enlarging the time for filing a summons and complaint in a divorce action); Dombrowski v. Tomasino, 24 W (2d) 16, 127 NW (2d) 786 (order which afforded the plaintiff, who was in default in replying to a counterclaim, the option of suffering the default judgment which was sought in the counterclaim or avoiding such judgment by the payment of terms and the filing of a reply within a fixed period of time); Travelers Ins. Co. v. Fidelity & Cas. Co. of N.Y. 24 W (2d) 38, 128 NW (2d) 71 (order sustaining a demurrer with leave to plead over or amend the pleading); Hale v. Lee's Clothiers and Jewelers, Inc. 37 W (2d) 269, 155 NW (2d) 51 (order denying a motion for review of an order denying a motion for summary judgment); Seventy-Six Peachtree Corp. v. Miller, 41 W (2d) 410, 164 NW (2d) 278 (order denying a motion for consolidation of actions).

5. Orders Appealable Under 274.33 (2).

In the following cases orders were held to be appealable under the provisions embodied in 274.33 (2): Ellis v. Southwestern L. Co. 94 W 531, 69 NW 363 (order denying petition of an intervenor for the payment to him of a

fund paid into court after judgment); Lewis v. Chicago & Northwestern R. Co. 97 W 368, 72 NW 976 (order made after the reversal of a judgment against a garnishee requiring plaintiff to restore to the garnishee the money collected on such judgment); Purcell v. Kleaver, 98 W 102, 73 NW 322 (order refusing to vacate a judgment entered on cognovit); State ex rel. Chicago & Northwestern R. Co. v. Oshkosh, A. & B. W. R. Co. 100 W 538, 77 NW 193 (order appointing commissioners in condemnation proceeding); Union Nat. Bank v. Mills, 103 W 39, 79 NW 20 (order allowing compensation of a receiver and directing payment of money in his hands); National D. Co. v. Seidel, 103 W 489, 79 NW 744 (order denying an application for intervention); State ex rel. Meggett v. O'Neill, 104 W 227, 80 NW 447 (final order in a civil contempt proceeding); Green Lake County v. Waupaca County, 113 W 425, 89 NW 549 (order refusing to review the taxation of expenses in a criminal action where a change of venue was had); Wisconsin M. & F. Ins. Co. Bank v. Durner, 114 W 369, 90 NW 435 (order confirming a report as to damages sustained by reason of an injunction); Deuster v. Zillmer, 119 W 402, 97 NW 31 (order setting aside a judgment of a justice's court pending an appeal); In re Salter, 127 W 677, 106 NW 684 (order incorporating a village); In re Dancy Drainage Dist. 129 W 129, 108 NW 202 (order in drainage proceedings refusing confirmation); Frame v. Plumb, 135 W 24, 114 NW 849 (order requiring a special administrator to pay to a guardian ad litem funds from the estate to procure the attendance of witnesses upon the trial of a will contest); State ex rel. Cazier v. Turner, 145 W 484, 130 NW 510 (order denying a writ of ne exeat); Griswold v. Barden, 146 W 35, 130 NW 952 (order confirming a foreclosure sale); Rix v. Sprague C. M. Co. 157 W 572, 147 NW 1001 (order denying a motion made by defendant, after a judgment by default, to set aside the service of the summons and all subsequent proceedings on the ground that the service was void); Black v. Whitewater C. & S. Bank, 188 W 24, 205 NW 404 (order denying defendant's motion to offset a judgment on an application made after judgment); In re Voluntary Assignment of Tarnowski, 191 W 279, 210 NW 836 (order discharging a debtor after an assignment for the benefit of creditors); Harvey v. Harvey, 201 W 378, 230 NW 79 (order denying a motion made on the ground of evidence discovered subsequent to trial); Milwaukee E. C. & M. Corp. v. Feil M. Co. 201 W 494, 230 NW 607 (order denying a motion to amend a judgment that damages sustained by the issuance of a temporary injunctional order may be determined by the court); State ex rel. Williams v. Shaughnessy, 202 W 537, 232 NW 861 (order denying an application to expunge from the court record derogatory matters in a grand jury report); Bangor v. Hussa C. & P. Co. 208 W 191, 242 NW 565 (order denying a motion for a new trial in a condemnation proceeding under ch. 197, upon the ground of misconduct affecting the jury and their verdict); Brown v. Loewenbach, 225 W 425, 274 NW 434 (order granting a one-year extension of the period of redemption from a judgment of foreclosure upon condition that the mortgagor pay all the taxes and interest then due and to become due); Morris v. P. & D. Gen. Contractors, Inc. 236 W 513, 295 NW 720 (order extending the time for settling a bill of exceptions); Milwaukee A. Schools of Beauty Culture v. Patti, 237 W 277, 296 NW 616 (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 sequestration of the property of a judgment debtor in supplementary proceedings); Newlander v. Riverview R. Co. 238 W 211, 298 NW 603 (order directing that a mortgage trustee, who had bid in the mortgaged property at a foreclosure sale, be authorized to enter into a contract for the sale of the premises); Hartwig v. Harvey, 250 W 478, 27 NW (2d) 363 (order denying an application by one, not a party to an action, to be permitted to intervene in the action); In re Brand, 251 W 531, 30 NW (2d) 238 (order made by a judge in an insanity proceeding under ch. 51); Will of Greiling, 264 W 146, 59 NW (2d) 241 (order denying a petition, "without prejudice", for reimbursement for expenditures made by a widow in improving a homestead); State v. McDonald L. Co. 9 W (2d) 206, 100 NW (2d) 701 (order denying the application of one, not a party to an action, to be permitted to intervene in the action); Kimmel v. Kimmel, 9 W (2d) 484, 191 NW (2d) 666 (order denying a motion to require a husband to finance the wife's appeal from an order in a divorce action); State v. Lamping, 36 W (2d) 328, 153 NW (2d) 23 (order growing out of a court review of a special proceeding initiated by the public service commission under 30.03, Stats. 1963).

6. Orders Not Appealable Under 274.33 (2).

In the following cases orders were held to be not appealable under the provisions embodied in 274.33 (2): In re Schumaker, 90 W 488, 63 NW 1050 (order of reference in a proceeding to incorporate a village); Chambers v. Jacobia, 103 W 37, 79 NW 227 (order denying defendant's motion to vacate an order amending a final judgment); In re Aldrich, 114 W 308, 90 NW 173 (order denying the petition of an individual for removal of clerk of circuit court); Kingston v. Kingston, 124 W 263, 102 NW 577 (order appointing a referee under a statute governing a special proceeding); State v. Wisconsin T. Co. 134 W 335, 113 NW 944 (order refusing to exclude attorneys employed by private parties to appear for the state in an action to recover a penalty); Voss v. Stoll, 141 W 267, 124 NW 89 (intermediate order in a proceeding to revive an action as to a deceased party); Sioux L. Co. v. Ewing, 148 W 600, 135 NW 130 (order appointing a commissioner to take depositions to perpetuate testimony); Milwaukee C. Co. v. Flagge, 170 W 492, 175 NW 777 (order refusing to suppress or prohibit an adverse examination); Grinwald v. Mayer, 207 W 416, 241 NW 375 (order denying a stay on summary application after judgment); Riedel v. Northwestern Mut. Life Ins. Co. 211 W 149, 246 NW 569 (order amending the summons in a divorce action to bring in other defendants, permitting plaintiff to file an amended supplemental com-

plaint and requiring defendants to answer, entered after the entry of judgment in favor of the plaintiff); A. J. Straus Paying Agency, Inc. v. Caswell B. Co. 227 W 353, 277 NW 648 (order denying the petition of a bondholder to intervene in an action for the foreclosure of mortgage by trustees for bondholders); Pessin v. Fox Head Waukesha Corp. 230 W 277, 282 NW 582 (order denying a motion to have a judgment amended and entered in the name of the plaintiff's alleged assignee); Fronhaefer v. Richter, 237 W 282, 296 NW 588 (order fixing the time and place of a mortgage foreclosure sale, entered after judgment of foreclosure); Mayerhoff v. Roxy T. Corp. 248 W 322, 21 NW (2d) 733 (order of the circuit court reversing a judgment of the civil court and remanding the cause to the trial court to take further evidence, if deemed necessary, and to make findings of fact and conclusions of law); Stobbe v. Atkinson, 4 W (2d) 178, 90 NW (2d) 118 (order denying a motion by defendant for interpleader of a third person); Bartell Broadcasters, Inc. v. Milwaukee B. Co. 13 W (2d) 165, 108 NW (2d) 129 (order permitting a person to intervene in a pending action); Brody v. Long, 13 W (2d) 288, 108 NW (2d) 662 (order denying the application of persons, not parties in an action to quiet title to a parcel of land, to intervene in the action); State v. Chippewa Cable Co. 21 W (2d) 598, 124 NW (2d) 616 (order denying an application to bring additional parties into an action); Buckley v. Park Bldg. Corp. 27 W (2d) 425, 134 NW (2d) 666 (order opening or vacating a judgment); Henry v. Beattie, 40 W (2d) 704, 162 NW (2d) 613 (order vacating a judgment and permitting further proceedings); Fahrenkrug v. D. M. Builders, Inc. 41 W (2d) 416, 164 NW (2d) 281 (order denying defendants' motion to implead new parties defendants); Bergen v. Schrod, 44 W (2d) 19, 170 NW (2d) 698 (order which vacated a default judgment in plaintiff's favor).

7. Orders Appealable Under 274.33 (3).

In the following cases orders were held to be appealable under the provision embodied in 274.33 (3): L. A. Shakman & Co. v. Koch, 93 W 595, 67 NW 925 (order refusing to set aside a writ of attachment); Scott v. Board of School Directors, 103 W 280, 79 NW 239 (order sustaining a demurrer, which also denied a motion to strike out a demurrer as frivolous); Quayle v. Bayfield County, 114 W 108, 89 NW 892 (order dissolving an injunction and dismissing an action for want of equity); Wisconsin R. E. Co. v. Milwaukee, 151 W 198, 138 NW 642 (order requiring plaintiff to pay a special assessment as a condition of maintaining an action to restrain its collection); Kuryer Pub. Co. v. Messmer, 162 W 565, 156 NW 948 (order which so limited the scope of an adverse examination as to practically suppress it); Mechanical A. Co. v. A. Kieckhefer E. Co. 163 W 647, 159 NW 556 (order of the circuit court reversing a judgment of the civil court and ordering a new trial in the circuit court); Dunn v. Acme A. & G. Co. 168 W 128, 169 NW 297 (order continuing, but modifying, a court commissioner's restraining order); State ex rel. South Range v. Tax Comm. 168 W 253, 169 NW 555 (order granting a motion to supersede a writ of certiorari); State ex rel. Standard Oil Co. v. Hull, 168 W 269, 169 NW 617 (order granting a motion to quash a writ of mandamus); Moran v. Moran, 172 W 59, 178 NW 248 (order vacating a judgment of divorce and granting a new trial); Northern Wisconsin Co-op. T. Pool v. Oleson, 191 W 586, 211 NW 923 (order requiring plaintiff to allow an examination of its books and records, by defendant, under sec. 4183, Stats. 1921); Howard v. Lunaburg, 192 W 507, 213 NW 301 (order continuing, over an objection which was equivalent to a general demurrer, an action against the executrix of the deceased defendant); Danischefsky v. Klein-Watson Co. 209 W 210, 244 NW 772 (order dissolving an attachment); Slama v. Dehmel, 216 W 224, 257 NW 163 (order granting a motion to strike the answer); Goodman v. Wisconsin Elec. P. Co. 248 W 52, 20 NW (2d) 553 (order vacating a judgment entered after a trial on the merits in a stockholder's derivative action against a corporation); Hudson v. Graff, 253 W 1, 32 NW (2d) 253 (order requiring defendant to produce, under 269.57 (1), certain books and documents for the plaintiff's inspection and examination); Mahrle v. Engle, 261 W 485, 53 NW (2d) 176 (order refusing to dismiss a garnishment before execution issued); Vuchetich v. General Cas. Co. 270 W 552, 72 NW (2d) 389 (order enjoining the plaintiff from referring to the defendant automobile liability insurer during the trial of an action for injuries sustained in an automobile accident); Appleton v. Sauer, 271 W 614, 74 NW (2d) 167 (order denying to the defendant, in an action for violation of a city ordinance prohibiting the operation of an automobile while under the influence of intoxicating liquor, an inspection under 269.57 (1)); Condura C. Co. v. Milwaukee B. & C. T. Council, 8 W (2d) 541, 99 NW (2d) 571 (order which completely suppressed an adverse examination); Limberg v. Limberg, 10 W (2d) 63, 102 NW (2d) 103 (order for blood tests, where the jurisdiction of the court to issue the order was in question); First Wisconsin Nat. Bank v. Rische, 15 W (2d) 564, 113 NW (2d) 416 (order of the circuit court affirming an order of the civil court granting leave to bring an action on a judgment entered in the civil court); Van Voort v. Stern, 16 W (2d) 85, 114 NW (2d) 126 (order granting a motion to reopen a judgment nearly 2 years after notice of entry); Bloomquist v. Better Business Bureau, 17 W (2d) 101, 115 NW (2d) 545 (order refusing a temporary injunction); Town of Fond du Lac v. City of Fond du Lac, 22 W (2d) 525, 126 NW (2d) 206 (order modifying an injunction); Klotz v. Walthen, 31 W (2d) 19, 142 NW (2d) 197 (order determining that the circuit court has jurisdiction over the subject matter); Schroedel v. State Highway Comm. 32 W (2d) 305, 145 NW (2d) 217 (adverse ruling of the circuit court, in effect a final order, holding that jurisdiction of a condemnation commission under ch. 32 had been properly invoked); Bavarian Soccer Club, Inc. v. Pierson, 36 W (2d) 8, 153 NW (2d) 1 (order, entered upon a motion pursuant to 269.57 (1), directing the production and deposit of documents with the court); Stroup v. Career Acad. of Dental Tech. 38 W (2d) 284, 156 NW (2d) 358 (order deciding

in effect that the court has jurisdiction to proceed); Halldin v. Peterson, 39 W (2d) 668, 159 NW (2d) 738 (order in a malpractice action, made pursuant to 269.57 (1)); Dick v. Shawano Municipal Hospital, 43 W (2d) 430, 168 NW (2d) 824 (orders sustaining demurrers to a complaint).

8. Orders Not Appealable Under 274.33 (3).

In the following cases orders were held to be not appealable under the provision embodied in 274.33 (3): Gianella v. Bigelow, 92 W 267, 65 NW 1030 (order striking out a demurrer as frivolous); Jacobs v. Beebe, 95 W 389, 70 NW 468 (order refusing to vacate an order striking out a demurrer); Rossiter v. Aetna Life Ins. Co. 96 W 466, 71 NW 898 (order denying a stay of proceedings); Baines v. Janesville, 103 W 102, 79 NW 29 (order enjoining the obstruction of a street, entered in accordance with the directions and mandate of the supreme court); Steinberg v. Saltzman, 130 W 419, 110 NW 198 (order striking out a demurrer as irregular); Lemon v. Aronson, 166 W 146, 164 NW 820 (order of the circuit court affirming an order of the civil court which set aside a judgment therein and allowed a defense to be interposed); Milwaukee C. Co. v. Flagge, 170 W 492, 175 NW 777 (order refusing to suppress or prohibit an adverse examination); Bell L. Co. v. Northern Nat. Bank, 171 W 374, 177 NW 616 (order granting the application of defendant to make third persons parties defendant); Southern C. Co. v. Howard Cole & Co. 185 W 469, 201 NW 817 (order setting aside a stipulation suspending a trial, and granting a new trial); First Wisconsin Nat. Bank v. Carpenter, 218 W 30, 259 NW 836 (order denying a motion to strike an answer as frivolous); State ex rel. Finnegan v. Lincoln Dairy Co. 221 W 15, 265 NW 202 (order limiting the scope of an adverse examination); Old Port B. Co. v. C. W. Fischer Co. 228 W 62, 279 NW 613 (order vacating a default judgment); Hyslop v. Hyslop, 234 W 430, 291 NW 337 (order refusing to suppress an adverse examination and order limiting the scope of an adverse examination); McGeoch Bldg. Co. v. Dick & Reuteman Co. 241 W 267, 5 NW (2d) 804 (order confirming a ruling of a court commissioner requiring a defendant on an adverse examination to produce names and addresses of bondholders for use as evidence in connection with matters to be examined); Meyers v. Sohrweide, 254 W 389, 36 NW (2d) 584 (order of the circuit court affirming an order of the civil court overruling a demurrer to a complaint); Dobbert v. Dobbert, 264 W 641, 60 NW (2d) 378 (order limiting the adverse examination of the defendant, and striking from the subpoena for the examination a direction that he produce certain books and records of a corporation); Mitler v. Associated Contractors, 3 W (2d) 331, 88 NW (2d) 672 (order for entry of judgment); Condura C. Co. v. Milwaukee B. & C. Trades Council, 8 W (2d) 541, 99 NW (2d) 751 (order which refused to modify or dissolve an injunction); Trossen v. Burckhardt, 9 W (2d) 304, 100 NW (2d) 918 (order denying a motion for change of venue); Alsmeyer v. Norden, 14 W (2d) 451, 111 NW (2d) 507 (order, otherwise not appealable, entered by a particular judge after he had been named in an affidavit of prejudice); Szuszka v. Milwaukee, 15 W (2d) 241, 112 NW (2d) 699 (order denying a motion to dismiss an action and order denying a motion for judgment on the pleadings); Yaeger v. Fenske, 15 W (2d) 572, 113 NW (2d) 411 (order of the circuit court affirming an order of the civil court overruling a demurrer to a complaint); State v. Chippewa Cable Co. 21 W (2d) 598, 124 NW (2d) 616 (order granting a motion to strike a defense as sham or frivolous, based on affidavits which contradicted allegations in the defense attacked); Richie v. Badger State Mut. Cas. Co. 22 W (2d) 133, 125 NW (2d) 381 (order requiring the plaintiff to submit to a continuance of a pretrial adverse examination and to answer responsively certain certified questions); Travelers Ins. Co. v. Fidelity & Cas. Co. of N. Y. 24 W (2d) 38, 128 NW (2d) 71 (order sustaining a demurrer with leave to plead over or amend the pleading); Luedtke v. Luedtke, 29 W (2d) 567, 139 NW (2d) 553 (order refusing to honor an affidavit of prejudice).

9. Orders Appealable Under 274.33 (4).

In the following cases orders were held to be appealable under the provision embodied in 274.33 (4): State v. Kuick, 252 W 236, 31 NW (2d) 181 (order denying the plaintiff's application to settle a bill of exceptions); O'Hare v. Fink, 254 W 65, 35 NW (2d) 320 (order to show cause why the time for settling a bill of exceptions should not be extended).

10. Orders Not Appealable Under 274.33 (4).

In the following cases orders were held to be not appealable under the provision embodied in 274.33 (4): Jacobs v. Beebe, 95 W 389, 70 NW 468 (order refusing to vacate an order, made at chambers, striking out a demurrer as being frivolous); Fox River P. Co. v. International Brotherhood, 242 W 113, 7 NW (2d) 413 (order appointing an arbitrator under an arbitration agreement, entered pursuant to an order to show cause signed by the circuit judge and returnable before the circuit judge).

11. Miscellaneous Principles.

See note to sec. 3, art. VII, on appellate jurisdiction, citing Hubbell v. McCourt, 44 W 584.

The right to appeal from an intermediate order ceases on the entry of a judgment, and such order must thereafter be reviewed upon appeal from the judgment. Drake v. Scheunemann, 103 W 458, 79 NW 749.

An order denying a change of venue is not appealable; such order is reviewable on appeal from the judgment. Sanders v. German Fire Ins. Co. 126 W 172, 105 NW 787.

The right to appeal from an order overruling a demurrer is waived by filing an answer. Schlecht v. Anderson, 197 W 556, 222 NW 802.

On appeal from a non-appealable order, the supreme court acquires no jurisdiction for any purpose except to dismiss the appeal. Jones v. United States F. & G. Co. 210 W 6, 245 NW 650; Wendt v. Dick, 219 W 230, 262 NW 576. See also: Baker v. Onsrud, 227 W 450, 278 NW 870; Fox River P. Co. v. International Brotherhood, 242 W 113, 7 NW (2d) 413.

An order is not a "final order" within the meaning of 274.33 (2) if it does not end the controversy to which it relates and thus preclude any further steps therein. A. J. Straus Paying Agency, Inc. v. Caswell B. Co. 227 W 353, 277 NW 648.

A statute creating a right of appeal where one did not before exist does not apply to a final order made before its enactment. In re Farmers & Traders Bank, 244 W 576, 12 NW (2d) 925.

Where a document filed by the trial court ordered the modification of a divorce judgment to increase the wife's allowance for support and the document included an opinion which dealt with the power of the court to make the order retroactive but 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.

The right to appeal in civil proceedings is purely statutory, and does not exist at all except when, and then only to the extent, granted by statute; and the supreme court has no jurisdiction to entertain an appeal from a non-appealable order. First Wisconsin Nat. Bank v. Carpenter, 218 W 30, 259 NW 836; In re Brand, 251 W 531, 30 NW (2d) 238.

Defendants, by stipulating 10 days after an order for a new trial that a jury be struck and the case set down for trial, waived their right to appeal from such order. Peterson v. Kemling, 251 W 555, 30 NW (2d) 75.

A purported order entered on the petition of an administrator and stating the amount of unpaid alimony due to a wife at the time of her death, but adjudicating nothing, is neither an order nor a judgment, but is merely a finding of fact, from which no appeal lies. Razall v. Razall, 255 W 219, 38 NW (2d) 356.

Where a judgment is entered in the trial court in accordance with the mandate of the supreme court, an appeal from such judgment will be dismissed; and the same principle applies where the judicial act appealed from is an order rather than a judgment. Cross v. Leuenberger, 274 W 393, 80 NW (2d) 468.

All prior decisions of the supreme court which have held that the appealability of an order is ever dependent upon whether there has been an abuse of discretion are overruled. State v. McDonald L. Co. 9 W (2d) 206, 100 NW (2d) 701.

An order after judgment denying a motion to vacate the judgment and for a new trial is appealable, but an appeal from the judgment does not bring such order before the supreme court for review, in the absence of a statute providing otherwise. Sicchio v. Alvey, 10 W (2d) 528, 103 NW (2d) 544.

Even though the respondents on appeal have raised no issue with respect to whether the county court's memorandum decision constituted an appealable order, it is the duty of the supreme court to dismiss the appeal on its own motion if this court concludes that it is not; the enactment of 274.11 (4) by the 1959 legislature, extending the jurisdiction that may be conferred on this court by consent or waiver, not having abrogated such foregoing rule since the statute makes such extended jurisdiction contingent on the trial court's having entered an appealable order or judgment. Estate of Baumgarten, 12 W (2d) 212, 107 NW (2d) 169.

A defendant's motion to dismiss an action cannot be treated as a motion for summary judgment, so as to render an order denying such motion appealable under 274.33 (3), where no affidavit has been filed stating that the plaintiff's action "has no merit," as required by 270.635 (2). Szuszka v. Milwaukee, 15 W (2d) 241, 112 NW (2d) 699.

Parties cannot, either by failure to raise the question or by consent, confer jurisdiction on an appellate court to review an order which is not appealable. Szuszka v. Milwaukee, 15 W (2d) 241, 112 NW (2d) 699; Dombrowski v. Tomasino, 24 W (2d) 16, 127 NW (2d) 786. See also: Gilbert v. Hoard, 201 W 572, 230 NW 720; Jasper v. Miller, 269 W 223, 69 NW (2d) 265.

See note to 227.21, citing Ashwaubenon v. Public Service Comm. 15 W (2d) 445, 113 NW (2d) 412.

The restriction in 274.33 (3) on appeals from orders of the circuit court reversing or affirming an order of the civil court does not apply to orders of the types described in 274.33 (1) and (2). First Wisconsin Nat. Bank v. Rische, 15 W (2d) 564, 113 NW (2d) 416.

See note to 274.09, on jurisdiction on appeal, citing DeLong v. Sagstetter, 16 W (2d) 390, 114 NW (2d) 788, 116 NW (2d) 137.

See note to 274.11, citing Baumgarten v. Jones, 21 W (2d) 467, 124 NW (2d) 609.

See note to 274.05, citing Wolke v. Fleming, 24 W (2d) 606, 129 NW (2d) 841.

Where an order grants a new trial and makes other rulings on issues which will ultimately be reflected in the judgment, and a proper appeal is taken from such an order as an order granting a new trial, the appeal, and right of the respondent to have review of portions appealed from, may extend to other rulings contained in the order as well. McLaughlin v. Chicago, M., St. P. & P. R. Co. 31 W (2d) 378, 143 NW (2d) 32.

A motion to dismiss, made during the proceeding and at the time the order was made, constitutes a sufficient objection to sustain an appeal under 274.33. Bavarian Soccer Club, Inc. v. Pierson, 36 W (2d) 8, 153 NW (2d) 1.

Failure of the parties on appeal to raise an issue with respect to whether a circuit court's memorandum opinion constitutes an appealable order does not confer subject-matter jurisdiction on the supreme court, which is under a duty to dismiss the appeal on its own motion if it concludes that it is not. State ex rel. Hernandez v. McConahey, 42 W (2d) 468, 167 NW (2d) 412.

Appealable orders. Volz, 1940 WLR 579.

274.34 History: 1860 c. 264 s. 6, 11, 15, 16; 1872 c. 36 s. 2; R. S. 1878 s. 3070; 1893 c. 242 s. 2; Stats. 1898 s. 3070; 1925 c. 4; Stats. 1925 s. 274.34; 1927 c. 473 s. 49d; 1935 c. 541 s. 294.

Revisers' Note, 1898: To conform the section to the opinion of the court in Klein v. Valerius, 87 W 54, 62.

An order refusing a new trial, on motion made before judgment, is reviewable on ap-

peal from the judgment. Victor S. M. Co. v. Heller, 41 W 657.

Sec. 3070, R. S. 1878, does not apply to appeals from orders, but only from judgments. Breed v. Ketchum, 51 W 164, 7 NW 550.

An order refusing to change venue is brought up by an appeal from the judgment. Hewitt v. Follett, 51 W 264, 8 NW 177.

An appeal from a judgment dismissing a complaint brings up the order sustaining a demurrer upon which such judgment was based. Moritz v. Splitt, 55 W 441, 13 NW 555.

An order denying a new trial is reviewable on appeal from the judgment; but the supreme court is confined, on such review, to the record proper. Hoppe v. Chicago, M. & St. P. R. Co. 61 W 357, 21 NW 227.

Upon appeal from a final order settling the accounts of an assignee for creditors an intermediate order discharging an order that the assignee show cause why he should not pay a certain sum to a creditor and that he appear and submit to an examination and produce his books and accounts in court is reviewable. In re Baker, 72 W 395, 39 NW 764.

An order opening a default judgment and allowing defendant to answer does not involve the merits and necessarily affect a subsequent judgment in his favor on the pleadings. Donkle v. Milem, 88 W 33, 59 NW 586.

On appeal from a judgment interlocutory orders which do not involve the merits and necessarily affect the judgment will not be reviewed unless they are embraced in a bill of exceptions. Keller v. Gilman, 96 W 445, 71 NW 809.

Where a new trial is granted and defendant appeals only from the judgment the order granting such trial, unless made a matter of record, is not reviewable. Keller v. Gilman, 96 W 445, 71 NW 809.

An order sustaining a demurrer ore tenus and dismissing the complaint may be reviewed without a bill of exceptions on appeal from the judgment. Dow v. Deissner, 105 W 385, 80 NW 940, 81 NW 671.

Where a motion to set aside the verdict and grant a new trial was overruled, the supreme court could examine the correctness of such order upon appeal from the judgment. Morris v. National P. Society, 106 W 92, 81 NW 1036.

An order granting or refusing a provisional remedy must be reviewed, if at all, on direct appeal from the order and does not affect the merits of the action nor the judgment so as to render it reviewable under sec. 3070, Stats. 1898. Adkins v. Loucks, 107 W 587, 83 NW 934.

An order directing that a verdict be set aside and a new trial granted, unless the successful party consents to a reduction of the verdict, is an intermediate order which is reviewable on an appeal from the judgment. Hildebrand v. American F. A. Co. 109 W 171, 85 NW 268.

An order of the circuit court allowing a justice to attach his signature to the jurat and affidavit of prejudice nunc pro tunc may be reviewed without a bill of exceptions. Morrell v. Glasspoole, 111 W 292, 87 NW 301.

An order granting a motion to continue a case over the term on condition of payment of costs is not an intermediate order reviewable on appeal under sec. 3070. McMahon v. Snyder, 117 W 463, 94 NW 351.

An intermediate order striking out a stipulation submitting an action for mandamus is not reviewable on appeal from the judgment where such judgment was in fact based upon a motion to quash the alternative writ. State ex rel. Risch v. Board of Trustees, 121 W 44, 98 NW 954.

While an order denying a change of venue is not appealable, it is reviewable upon appeal from the judgment. Sanders v. German F. Ins. Co. 126 W 172, 105 NW 787.

An order for reference involves the merits and is reviewable on appeal from the judgment. Wilt v. Neenah C. S. Co. 130 W 398, 110 NW 177.

On an appeal from a judgment, orders made in the cause after judgment cannot be reviewed. Second Nat. Bank of St. Paul v. Larson, 80 W 469, 50 NW 499; Kozik v. Czapiewski, 136 W 70, 116 NW 640.

An order determining the provisions of the judgment upon the question of costs may be reviewed upon an appeal from the judgment without a bill of exceptions. (The language in Fowler v. Metzger S. Co. 131 W 633, 111 NW 677, indicating the contrary is overruled.) Jones v. Broadway R. Co. 136 W 595, 118 NW 170.

Sec. 3070 does not give the right to review one order upon an appeal from another. Jones v. Milwaukee E. R. & L. Co. 147 W 427, 133 NW 636.

An order granting a new trial cannot be reviewed on appeal from the judgment entered at the second trial, because such order does not involve the merits or affect the judgment. Bonnell v. Chicago, St. P. M. & O. R. Co. 158 W 153, 147 NW 1046.

Ordinarily, a motion to strike out parts of an answer is not one involving the merits or necessarily affecting the judgment, and does not appear upon the face of the record in the absence of a bill of exceptions, as the error in granting the motion may have been cured during the course of the trial by the admission or exclusion of testimony; but a motion to strike out a separate defense which challenges the legal sufficiency of facts alleged is in legal effect a demurrer, and the defendant is entitled to a review of the order striking such defense, though no exception was taken thereto. Wisconsin F. & F. B. Co. v. Southern S. Co. 188 W 383, 206 NW 204.

An order of the circuit court, setting aside an order of the railroad commission and remitting the record for further proceedings, is an intermediate order and reviewable on appeal from a final judgment. Milwaukee E. R. & L. Co. v. Milwaukee County, 189 W 96, 206 NW 201.

The supreme court may review a trial court's action in directing a verdict where the verdict recited it was rendered by the court's direction. Hansen v. Central-Verein G. U. G. 198 W 140, 223 NW 571.

On appeal from the judgment the court may, under 270.34, review an order overruling a demurrer to the complaint insofar as it "involves the merits and necessarily affects the judgment". Schlecht v. Anderson, 202 W 305, 232 NW 566.

A demurrer was reviewable where it involved the merits and affected the judgment upon an appeal from the judgment. Milwaukee County v. Milwaukee W. F. Co. 204 W 107, 235 NW 545.

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 order for the sale of land in a partition action was not appealable, but it would be reviewable as an "intermediate order" on an appeal from the judgment. Gertz v. Gertz, 252 W 286, 31 NW (2d) 620.

Although there was no appeal from that part of an order sustaining a demurrer which denied leave to the plaintiff to plead over, the determination denying leave to plead over is reviewable under the provisions of 274.34, on an appeal from a judgment dismissing the complaint pursuant to such order. Cohan v. Associated Fur Farms, Inc. 261 W 584, 53 NW (2d) 788.

274.34, conferring on the supreme court the power to review an intermediate order which involves the merits and necessarily affects the judgment, grants this power only on appeal from judgments and on writs of error, and on an appeal from an order in a cause, the supreme court lacks power to review a prior order in the cause. Pick Industries v. Gebhard-Berghammer, Inc. 262 W 498, 56 NW (2d) 97, 57 NW (2d) 519.

An appeal solely from a judgment approving the account of an administrator with the will annexed, and discharging him from further responsibility in the proceedings, did not bring up for review an order pertaining to his petition for the sale of real estate and denying the same. Estate of Rieman, 272 W 378, 75 NW (2d) 564.

Neither an order denying a motion for change of venue nor an order denying a challenge to the jury array is reviewable under 274.34, since this statute allows review of intermediate orders only on an appeal from a judgment, and the supreme court lacks the power to review a prior order on an appeal from an order, and the dismissal of the complaint without prejudice did not constitute a judgment. Russell v. Johnson, 14 W (2d) 406, 111 NW (2d) 193.

On appeal from a judgment dismissing a complaint, the supreme court can review an order sustaining a demurrer to the complaint. Last v. Puehler, 19 W (2d) 291, 120 NW (2d) 120.

274.35 History: 1860 c. 264 s. 7; R. S. 1878 s. 3071; Stats. 1898 s. 3071; 1925 c. 4; Stats. 1925 s. 274.35; 1935 c. 541 s. 295.

An order remanding the cause and actual remittal are sufficient, without formal remittitur. Brucker v. State, 19 W 539.

After the papers in a cause decided in the supreme court appeal, together with the judgment of the court, have been regularly remitted to the court below, the supreme court has lost jurisdiction and cannot recall the cause for a rehearing. Hopkins v. Gilman, 23 W 512.

The jurisdiction of the supreme court ceases upon remittitur. A motion to reinstate an appeal cannot be made thereafter. Estey v. Sheckler, 36 W 434.

On appeal by a single defendant judgment may be reversed as to all upon any error affecting all. Kopmeier v. Larkin, 47 W 598, 3 NW 373.

The supreme court may correct mistakes of the clerk in the judgment after the expiration of the 60 days. Pringle v. Dunn, 39 W 435.

The supreme court may not correct its own mistake, after the judgment term, unless on motion made within the term and carried over to the next term. Williams v. Williams, 55 W 300, 12 NW 465, 13 NW 274.

An appeal to the supreme court from a void judgment will not be dismissed, but the judgment will be reversed. Kidder v. Fay, 60 W 218, 18 NW 839.

If the judgment of the trial court allows an excessive rate of interest, and is modified after notice of an appeal is given and while the record is in such court, the reversal of the erroneous part of such judgment will only affect the question of costs; the remainder of the judgment will be affirmed. German Mut. F. F. Ins. Co. v. Decker, 74 W 556, 43 NW 500.

An order setting aside a verdict and granting a new trial means a new trial as to all the parties and all the issues, notwithstanding the verdict was in favor of one of the defendants. Duthie v. Washburn, 88 W 597, 60 NW 1053.

A motion in the nature of a motion for rehearing, if made within 60 days and while the record is in the appellate court, will not be dismissed for want of jurisdiction. Patten P. Co. v. Green Bay & M. C. Co. 93 W 283, 66 NW 601, 67 NW 432.

Upon reversal of a judgment in an action at law in which a jury trial has been waived, the supreme court is not limited to awarding a new trial as in cases tried by a jury, but, as in equity cases, may exercise the utmost freedom in directing the course to be pursued by the trial court. Hill v. American S. Co. 107 W 19, 81 NW 1024, 82 NW 691.

Where the trial court erroneously changes the answers to questions in a special verdict, the supreme court may order a new trial upon reversal. Blohowak v. Grochoski, 119 W 189, 96 NW 551.

Where a judgment of the circuit court has been reversed the cause should be remanded for a new trial only when it appears that such trial might result otherwise than in a judgment such as would have been rendered before had an error not been committed. Hay v. Baraboo, 127 W 1, 105 NW 654.

Under sec. 3071, Stats. 1898, it is the duty of the clerk of the supreme court to remit the papers in a case to the trial court within 60 days after the decision of the appeal, unless the court directs that they be retained to enable a party to move for a rehearing; and at

the expiration of the 60 days if no such direction has been given, or whenever, without disobedience of any rule or order of the court, the clerk actually transmits the papers within the 60 days and they are filed in the court below, the jurisdiction of the supreme court is terminated. Ott v. Boring, 131 W 472, 111 NW 833.

A new trial should follow a reversal only when necessary. Fleming v. Northern T. P. Mill, 135 W 157, 114 NW 841.

Where alternative motions were made and the decision by the trial court of the first motion made the consideration of the others unnecessary, such others did not drop out of the case but were to be considered where the decision of the first motion was erroneous. The supreme court may examine the record to discover if such other motions are to be considered and, if not, remand the case without a new trial. The supreme court may also remand the case to the lower court to consider such other motions and render judgment or grant a new trial in his discretion. Fleming v. Northern T. P. Mill, 135 W 157, 114 NW 841.

If the supreme court is equally divided the judgment of the lower court is necessarily confirmed. Hagenah v. Milwaukee E. R. & L. Co. 136 W 300, 116 NW 843. See also: Estate of Carter, 167 W 89, 166 NW 657; Federal Refrig. Mfg. Co. v. Crowley, 252 W 532, 32 NW (2d) 351; State v. Roggensack, 20 W (2d) 468, 122 NW (2d) 408; Coffee-Rich, Inc. v. McDowell, 25 W (2d) 99, 130 NW (2d) 203; and Smith v. State, 41 W (2d) 145, 163 NW (2d) 8.

A majority of the participating justices must agree on some one specific ground of error fatal to the judgment or it must be affirmed. In re McNaughton's Will, 138 W 179, 118 NW 997.

The supreme court is not limited in its consideration of an appeal to the reasons assigned by counsel for reversing or sustaining the trial court, but may consider any other ground within the evidence, and this should be done where justice clearly demands it. Andrzejewski v. Northwestern F. Co. 158 W 170, 148 NW 37.

When the mandate of the supreme court directs the entry of a final judgment in the court below, no proceeding can be taken in that court except to enter the judgment as directed. Smith v. De Wolf, 158 W 662, 149 NW 492.

Rules of practice heretofore existing which prevent a judgment terminating litigation in a case where the record is before the supreme court, and it is apparent that further proceedings would result only in further cost to the parties and the public, are abrogated and conflicting cases are overruled. Pietsch v. McCarthy, 159 W 251, 150 NW 482.

It being conceded by both parties that upon a further trial there could be no change in the testimony respecting a decisive issue, and the court having decided that issue upon the evidence adversely to the plaintiff, a reversal must be ordered with direction that a judgment dismissing the complaint be entered. Jacoby v. Chicago, M. & St. P. R. Co. 165 W 610, 161 NW 751, 164 NW 88.

A judgment against several parties remains conclusive against each one until reversed upon his appeal therefrom; and a reversal upon an appeal by one or more does not affect the judgment as to the nonappealing defendants. Lezala v. Jazek, 170 W 532, 175 NW 87, 176 NW 238.

Upon reversal for error in only one of 2 causes of action embraced in the judgment, the action will be remanded for retrial only as to the cause in which the error occurred. Neacy v. Milwaukee, 171 W 311, 176 NW 871.

In a contest over cross claims between the administratrix of a mother and the administratrix of her son, the circuit court adjudged that certain securities belonged to a living son. On the sole appeal of the administratrix of the son she urged that the securities should have been adjudged to belong to the mother's estate. The question could not be reviewed because the administratrix of the mother had not appealed. Estate of Salzwede, 171 W 441, 177 NW 586.

The supreme court may summarily affirm an order appealed from and remand the case to the trial court at once, where upon mere inspection of the record it is apparent that the appeal is frivolous. Strange v. Harwood, 172 W 24, 177 NW 862.

Where the trial court changed certain answers in the special verdict without passing on a pending motion for a new trial, the supreme court, on reinstating such answers upon an appeal from the judgment, could remand the case with instructions to pass on the motion for a new trial. Moody v. Milwaukee E. R. & L. Co. 173 W 65, 180 NW 266.

On defendant's appeal plaintiff cannot complain that he was required by the trial court to remit a part of the damages awarded by the jury, as a condition of judgment, where plaintiff had accepted the order, his remedy being to refuse to remit and appeal from the order granting a new trial. First W. T. Co. v. Schmidt, 173 W 477, 180 NW 832.

On an appeal from an order or judgment quashing an alternative writ of mandamus which should have been continued or made permanent, the supreme court acquires jurisdiction to determine all questions involved, even though the permanent writ has become unavailing at the time of the appeal. State ex rel. Hathaway v. Mirlach, 174 W 11, 182 NW 331.

After remand, a judgment in the lower court pursuant to the mandate is the judgment of the supreme court. Such a judgment is res adjudicata and cannot be evaded by the bringing of a new proceeding on the same facts. Will of Johnson, 178 W 620, 190 NW 434.

The remanding of a cause to the trial court for a rescission of a contract and an accounting as prayed for in defendants' counterclaim affords the relief to which they were entitled at the trial, and does not convert the accounting into an action for damages, and does not require payment to defendants, as recoverable damages, the cost of defending the action. Weinhagen v. Hayes, 179 W 62, 190 NW 1002.

The judgment of the trial court becomes, by affirmance, the judgment of the supreme court, and hence cannot be altered by the trial court when remitted. (State ex rel. Turner v. Circuit Court, 71 W 595, overruled.) State ex

rel. Zabel v. Municipal Court, 179 W 195, 190 NW 121.

Jurisdiction of the supreme court terminated under the peculiar circumstances stated in State ex rel. Zabel v. Municipal Court, 179 W 195, 190 NW 121.

Where, on an appeal from an order refusing an injunction pendente lite, the court determines that the party is entitled to a permanent injunction, it will direct judgment accordingly. Vanderwerken v. Superior, 179 W 638, 192 NW 60.

On appeal in condemnation proceedings a new trial could be ordered where, although no error appeared in the record, the court was satisfied from the amount of improvements on the premises, and the fact that there had been appreciation of land values, that the award was too small. Rojewski v. Joint School Dist. 180 W 135, 192 NW 379.

The supreme court cannot supply lacking findings required by the workman's compensation act, but must remand to the industrial commission for that purpose. Frank Martin-Laskin Co. v. Industrial Comm. 180 W 334, 193 NW 70.

An essential issue having been overlooked by inadvertance of counsel, and not litigated, the action, upon reversal, could be remanded for a new trial. Seaman v. McNamara, 180 W 609, 193 NW 377.

Where the only objection to the taxes claimed by a town in the court below involved the question of priority, the supreme court will not consider the objection that the town is not the real party in interest. In re Voluntary Assignment of the Milwaukee S. & W. Co. 186 W 320, 202 NW 693.

The supreme court on appeal had no power to entertain a motion to amend a complaint by setting up negligence of a fellow servant. Miller v. Paine L. Co. 202 W 77, 230 NW 702.

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 60 days from judgment or decision, notwithstanding the record is physically present in the clerk's office; and it also loses jurisdiction after 20 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, 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.

Where the supreme court directs a new trial of the issue of contribution between the defendant and the interpleaded defendant, and neither the defendant nor the interpleaded defendant claimed that the verdict was excessive, it is not necessary to direct a new trial on the issue of the liability of the defendant if a new trial could only result in a directed verdict against him and a reassessment of damages. 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 could be determined by the supreme court as if reformation was had. Fountain v. Importers and Exporters Ins. Co. 214 W 556, 252 NW 569.

If a judgment entered on remittitur does not follow the mandate of the supreme court, the remedy 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, could remand 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 the judgment of the supreme court, and the trial court has no power to 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 was 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 Elec. P. Co. 241 W 554, 6 NW (2d) 692.

The reversal of the judgment and the ordering of a new trial 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 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.

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. Auto. Ins. Co. v. Duel, 247 W 121, 19 NW (2d) 315.

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, 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.

Where the plaintiff's damages and her right to recover against one defendant were properly established, and the verdict was not inconsistent as to the plaintiff but only as to the 2 defendants, a judgment for the plaintiff against such defendant will be affirmed, and a new trial ordered only as between the defendants. Wojan v. Igl, 259 W 511, 49 NW (2d) 420.

The supreme court may affirm a judgment so far as it awards plaintiffs recovery against a defendant, and reverse it for a new trial of the issues between the defendants. Puccio v. Mathewson, 260 W 258, 50 NW (2d) 390.

Where the cause in an automobile collision case was remanded by the supreme court for a new trial as to contribution solely on the question of whether the negligence of one of the defendants was a proximate cause of the collision, but such question was not determined at the second trial because of the nature of the questions submitted in the special verdict and the jury's answers thereto, the cause may be remanded for a new trial, with specific directions regarding the submission of the special verdict. Schwellenbach v. Wagner, 263 W 95, 56 NW (2d) 827.

Trial and appellate courts may limit issues to be retried on a new trial when manifest justice demands it and such course can be pursued without confusion, inconvenience or prejudice to the rights of any party; but the determination should be made in the first instance by the trial court, so that the appellate court may have the benefit of his conclusion. Where it did not appear that the trial court was asked to limit the issues to be retried to the issues of negligence, and granted a new trial on all issues, including the issue of damages, its ruling will not be disturbed. Leonard v. Employers Mut. L. Ins. Co. 265 W 464, 62 NW (2d) 10.

Where a new trial is necessary, but has been refused by the trial court, the supreme court will limit the issues on the new trial so as to exclude an issue already determined and not affected by the error. Olson v. Milwaukee Auto. Ins. Co. 266 W 106, 62 NW (2d) 549, 63 NW (2d) 740.

Where the trial court correctly sustained demurrers to complaints but on an incorrect ground, and as a result the plaintiffs appealed to the supreme court instead of pleading over, the plaintiffs may be afforded the opportunity to serve amended complaints. Cross v. Leuenberger, 267 W 232, 65 NW (2d) 35, 66 NW (2d) 168.

Where a mandate directs the entry of a particular judgment, it is the duty of the trial court to proceed as directed, but the trial court may determine any matters left open and, in the absence of specific directions, is generally vested with a legal discretion to take such action, not inconsistent with the order of the upper court, as seems wise and proper under the circumstances. Fullerton L. Co. v. Torborg, 274 W 478, 80 NW (2d) 461.

Where the supreme court held in its decision on a former appeal that the action of the trial court in sustaining a demurrer to a complaint and in affording opportunity to file an amended complaint was correct, and entered a mandate affirming the order appealed from, the supreme court thereby affirmed the entire order, which included a right to plead over, and such decision and mandate did not preclude the plaintiffs from later serving and filing an amended complaint in the trial court. Walley v. Patake, 274 W 580, 80 NW (2d) 916.

Where plaintiff elected to appeal from an order sustaining a demurrer instead of pleading over, the order, otherwise affirmed, will be modified so as to grant the privilege of pleading over. Reque v. Milwaukee & S. T. Corp. 7 W (2d) 111, 95 NW (2d) 752, 97 NW (2d) 182.

When there is a failure to make findings of fact and conclusions of law, the supreme court on appeal may adopt one of 3 courses: (1) Affirm the judgment if clearly supported by the preponderance of the evidence, (2) reverse if not so supported, or (3) remand for the making of findings and conclusions. (Wallis v. First Nat. Bank, 155 W 533, cited.) State ex rel. Skibinski v. Tadych, 31 W (2d) 189, 142 NW (2d) 838. See also: Walber v. Walber, 40 W (2d) 313, 161 NW (2d) 898; Jacobs v. Jacobs, 42 W (2d) 507, 167 NW (2d) 238; and Dittman v. Nagel, 43 W (2d) 155, 168 NW (2d) 190.

Although the trial court fails to make detailed findings as required by 270.33, the supreme court may affirm the judgment if examination of the evidence shows that the trial court reached a result which the evidence would sustain if a specific finding supporting that result had been made. Moonen v. Moonen, 39 W (2d) 640, 159 NW (2d) 720.

274.36 History: 1859 c. 131 s. 1; 1864 c. 185 s. 1; R. S. 1878 s. 3072; 1887 c. 478; Ann. Stats. 1889 s. 3072, 3072a; Stats. 1898 s. 3072; 1905 c. 365 s. 2; Supl. 1906 s. 3072; 1925 c. 4; Stats. 1925 s. 274.36; Sup. Ct. Order, 25 W (2d) viii.

Notice of remittitur and of application to vacate a judgment reversed on appeal is a "proceeding" under ch. 185, Laws 1864, such as would prevent a dismissal. Bonesteel v. Orvis, 31 W 117.

After reversal no proceedings can be taken below until the record has been remitted; and proper practice requires notice of remittitur before further proceedings. Trowbridge v. Sickler, 48 NW 424, 4 NW 563.

Sec. 3072, R. S. 1878, is "highly penal, in that for noncompliance with the requirements the plaintiff must lose his actions. Of course

such statutes must be strictly construed in favor of the party charged with violations of them, and waivers of those requirements by defendant should be strictly enforced." Whereatt v. Ellis, 85 W 340, 55 NW 407.

Where the plaintiff, after a judgment in his favor had been reversed, had the record remitted and thereafter negotiations of settlement continued until it was too late to bring on the case for trial within the year and the defendant accepted and retained the costs before the new trial began, he waived his right to insist upon dismissal. Raymond v. Keseberg, 98 W 317, 73 NW 1010.

Sec. 3072, Stats. 1898, is mandatory. The successful party may waive either of these conditions but the trial court cannot dispense with them. Christianson v. Pioneer F. Co. 101 W 343, 77 NW 174, 917.

Where action was remitted to the circuit court, and noticed for trial within the year and continued by stipulation but the costs were not paid, the case must be dismissed. The stipulation for continuance was not a waiver of the requirement of payment of costs. State ex rel. Mitchell v. Johnson, 105 W 90, 89 NW 1104.

Where the facts as to waiver were placed in conflict by affidavits, the decision of the trial court will not be reversed. Sutton v. Chicago, St. P. M. & O. R. Co. 114 W 647, 91 NW 121.

Where a judgment was reversed and remanded with directions to bring in additional parties, the plaintiff did not comply with sec. 3072 where he had petitioned for leave to amend and bring in the additional parties on which an order to show cause was made returnable after the expiration of the year. Eisentraut v. Cornelius, 147 W 282, 133 NW 34.

The words "unless the same be continued for cause" refer to a continuance preventing the bringing of the action to trial within the prescribed year, or to some excuse for a default. A sufficient excuse is conduct of opposing counsel inconsistent with an intention to claim dismissal. State ex rel. Forrestal v. Eschweiler, 158 W 25, 147 NW 1008.

Upon an appeal from an order granting a new trial the mandate of the supreme court "order affirmed" orders a new trial. A party desiring a dismissal because the action is not brought to trial within a year must act seasonably. Parkes v. Lindenmann, 161 W 101, 151 NW 787.

The right to have an action dismissed for failure to comply with sec. 3072 may be waived while the record remains in the supreme court as by negotiation between counsel for a settlement. State ex rel. Milwaukee v. Circuit Court, 163 W 445, 158 NW 92.

Upon reversal and remanding "for further proceedings" the case when it reaches the trial court stands upon the pleadings as if no judgment had been rendered in the action. Seymour S. Bank v. Rettler, 166 W 450, 166 NW 40.

A motion for the dismissal was properly overruled where the delay was due to inability to secure the attendance of the judge who presided at the first trial, plaintiff having made repeated efforts to get him and having on several occasions prepared for trial. The defendant also waived his right to object to the failure to bring the case on for trial because when after the decision on appeal the liability company in which he was insured went into liquidation he expressed the desire to have plaintiff's claim paid out of insurance moneys and negotiations looking toward a settlement were discussed. Zeidler v. Goelzer, 191 W 378, 211 NW 140.

A successful appellant who is permitted to take further action in the court below must pay the costs and institute proceedings within one year or the trial court should dismiss the action. State ex rel. Greenway v. County Court, 32 W (2d) 6, 144 NW (2d) 569.

In cases in which the appellate court reverses the decree and remands the cause to the lower court for further proceedings, the lower court can carry into effect the mandate of the appellate court only so far as its direction extends; but the lower court is left free to make any order or direction in further progress of the case, not inconsistent with the decision of the appellate court, as to any question not presented or settled by such decision. Lingott v. Bihlmire, 38 W (2d) 114, 156 NW (2d) 439.

274.37 History: 1909 c. 192; Stats. 1911 s. 3072m; 1925 c. 4; Stats. 1925 s. 274.37.

On appellate jurisdiction of the supreme court see notes to sec. 3, art. VII, and notes to 251.08; on discretionary reversal see notes to 251.09; and on mistakes and omissions see notes to 269.43.

1. Civil actions and proceedings.
2. Criminal actions.

1. Civil Actions and Proceedings.

In an action for malicious prosecution it is error to refuse to instruct the jury that the burden of proof to show want of probable cause was upon the plaintiff. Cullen v. Hanisch, 114 W 24, 89 NW 900.

In an action for malicious prosecution it is error to submit, by separate questions, whether the defendant instituted the prosecution maliciously and whether he procured the warrant to be issued maliciously. Cullen v. Hanisch, 114 W 24, 89 NW 900.

It is not error to exclude a question, put to a party on cross-examination, as to whether some years before 6 witnesses had testified that his reputation for truth and veracity was bad; such testimony is hearsay and not legitimate cross-examination, and not a proper basis for impeaching the party as a witness in his own behalf. Cullen v. Hanisch, 114 W 24, 89 NW 900.

Where the evidence as to whether the defendant was negligent was conflicting the giving of an instruction which made him an insurer was prejudicial error. West v. Bayfield M. Co. 144 W 106, 128 NW 992.

Failure of the court to charge as to the weight to be given the testimony of an interested party was not prejudicial error. Szewczyk v. E. W. Ellis Co. 146 W 452, 131 NW 977.

In an action against 2 defendants a demurrer ore tenus to the complaint was sustained as to one defendant, and on the trial the jury awarded the plaintiff 6 cents damages against the other. These damages were offset against

the costs and a judgment for the costs was entered by the second defendant. Thereafter the first defendant entered a separate judgment for costs against the plaintiff. The entry of separate judgments was merely an irregularity. Loomis v. Besse, 148 W 647, 135 NW 123; Loomis v. Loomis, 148 W 653, 135 NW 125.

Error in a charge to the jury in an action for damages because of a defect in a highway wherein too high a standard of care on the part of the municipality was set out, was not prejudicial in view of the evidence which clearly showed neglect of the defendant in this regard. Johnson v. Iron River, 149 W 139, 125 NW 522.

Violations of rules of practice will not work a reversal unless it is evident that they have impaired appellant's right to a fair trial. C. W. Beggs, Sons & Co. v. Estate of Behrend, 156 W 34, 145 NW 207.

There can be no reversal for the exclusion of evidence the purpose and effect of which were not disclosed to the court. Zwietusch v. Luehring, 156 W 96, 144 NW 284.

A recovery of damages fixed upon a wrong theory will not be reversed upon an appeal by the plaintiff if his recovery is as large as the correct rule would have given him. Kneeland-McClurg Co. v. Lillie, 156 W 428, 145 NW 1093.

A charge to the jury that evidence of a specified fact must be "clear and convincing" in a case where the fact required only a preponderance of evidence was not a reversible error if the trial was fairly conducted, the charge as a whole favorable to the party complaining, and the evidence in his favor very slight or practically negligible. Brennan v. Healy, 157 W 37, 145 NW 641.

An answer that did not plead a tender should have been treated as amended where the evidence received without objection showed that such tender was made. Kiefert v. Maple Valley M. H. F. Ins. Co. 158 W 340, 148 NW 864.

Allowing counsel to inform the jury as to what answer would be favorable to the plaintiff was error but was not prejudicial where, from its very nature and the general discussion of the evidence, the jury must have known the effect of their answer. Behling v. Wisconsin B. & I. Co. 158 W 584, 149 NW 484.

The evidence being ample to sustain the verdict that plaintiff was guilty of contributory negligence, the exclusion of evidence which could have had only a remote bearing on that question was not prejudicial error. De Pas v. Southern W. R. Co. 159 W 306, 150 NW 408.

Damages being deemed clearly excessive the cause will be remanded for a new trial unless plaintiff elects to take judgment for a stated smaller sum. Gillett v. Flanner-Steger L. & L. Co. 159 W 578, 150 NW 987.

Where a plaintiff, entitled to an assignment of a cause of action, began an action thereon (without such assignment), and recovered judgment, the judgment must be reversed with a direction that the plaintiff be permitted, upon filing in the trial court a proper assignment, to have judgment. Brazeau v. McBride, 160 W 204, 151 NW 253.

A reversal must be refused for an error denying the appellant proper latitude of cross-examination where the evidence clearly preponderated in support of a verdict for the respondent. Greene v. Agnew, 160 W 224, 151 NW 268.

Failure to give a requested instruction which might properly have been given is nonprejudicial if there is no probability that the result would have been changed by granting the request. E. L. Essley M. Co. v. First T. Co. 160 W 300, 151 NW 814.

The exclusion of competent evidence was nonprejudicial error, because the evidence in question was so greatly outweighed by the opposing competent evidence that the court was satisfied that the verdict would have been the same if the error had not been committed. Murphy v. Estate of Skinner, 160 W 554, 152 NW 172.

All errors committed upon a trial at the conclusion of which the prevailing party was entitled to a directed verdict were nonprejudicial. Zuleger v. Zeh, 160 W 600, 150 NW 406.

If the recovery is for nominal damages only, an erroneous judgment will not be reversed. Barnard v. Cohen, 165 W 417, 162 NW 480.

Relief may be granted to an appellant when it appears that the controversy has not been fully tried, or that justice has miscarried, though the issue was not raised in the trial court, and there was no ruling or exception bringing the question before the supreme court. Dupont v. Jonet, 165 W 554, 162 NW 664.

The refusal of the trial court to allow an inconsequential amount of legally taxable costs is not reversible error. Dring v. Mainwaring, 168 W 139, 169 NW 301.

Erroneous admission of evidence to prove express malice in a libel suit was not prejudicial error where the jury found an absence of such malice. Walters v. Sentinel Co. 168 W 196, 169 NW 564.

A refusal to charge the jury that fraud must be established "by a preponderance of the evidence so clear and satisfactory as to establish the fact with certainty and beyond reasonable controversy," was error, but harmless in view of the evidence and the correct charge given as to some of the elements of fraud. Bechmann v. Salzer, 168 W 277, 169 NW 279.

A statement in the charge that plaintiff was entitled to be compensated for "such pain and suffering, both mental and physical, if any, as it is reasonably certain he will suffer in the future," was not prejudicially erroneous, because the words "as the result of his injury" were not added where the jury was told that the damages which could be assessed must be such as resulted or would result from the injury. Bassett v. Milwaukee N. R. Co. 169 W 152, 170 NW 944.

Upon a motion to strike out a voluntarily expressed opinion of a witness the court merely directed him to give facts and not conclusions but did not direct the striking out of the objectionable testimony. This was a nonprejudicial error. Williams v. Duluth S. R. Co. 169 W 261, 171 NW 939.

In an action to recover upon express contract for personal services rendered to a

deceased person it was error to permit the claimant to testify that at the commencement of the services she was in perfect health and at the conclusion thereof she was a physical and mental wreck; but in view of the fact that recovery was had upon the express contract and not upon quantum meruit the error was not prejudicial. McNaughton v. McClure, 169 W 288, 171 NW 936.

Although a court committed error in allowing a plaintiff to testify in a proceeding against her mother's estate to a conversation with the mother in which the plaintiff took part, the error was not prejudicial because the testimony related to a statement which the deceased had made repeatedly to others, and which did not affect the verdict. Nelson v. Christensen, 169 W 373, 172 NW 741.

Errors in the admission of evidence and in the form of a special verdict are stated and held to be not prejudicial in Kellner v. Christiansen, 169 W 390, 172 NW 796.

In jury trials the reception of incompetent evidence is not reversible error unless in the judgment of the court the result might probably have been different had it been excluded. Bell v. Milwaukee E. R. & L. Co. 169 W 408, 172 NW 791.

An instruction that the operation of a street car at a speed exceeding the speed limit was in itself negligence was harmless, where the jury found that the actual speed was 18 miles an hour and was dangerous. Alshuler v. Milwaukee E. R. & L. Co. 169 W 477, 173 NW 304.

Appellant cannot complain of instructions upon questions found by the jury in his favor, and error therein, if any, cannot be invoked to reverse the judgment. Dering v. Milwaukee E. R. & L. Co. 171 W 8, 176 NW 343.

Where the verdict is against the plaintiff on each of 2 separate issues and either one of these findings defeats the action, any error during the trial which affected one issue only will be disregarded. Baraboo v. Excelsior C. Co. 171 W 242, 177 NW 36.

It is reversible error to charge that the positive testimony is entitled to more weight than negative testimony without the qualification that the witnesses must be of equal credibility. It is also error to give such a charge without defining negative testimony. Suick v. Krom, 171 W 254, 177 NW 20.

Where plaintiff was denied costs although entitled to them, a judgment in his favor that was otherwise right could be remanded with directions that costs be taxed and inserted in the judgment. Wegner v. Sheboygan-Elkhart Lake R. & E. Co. 171 W 325, 176 NW 865.

The submission of 2 unnecessary questions in a special verdict was harmless error. Kalashian v. Hines, 171 W 429, 177 NW 602.

A new trial should not be granted because a witness voluntarily and not upon the suggestion of counsel gave some of the contents of a paper presented to him to refresh his memory, where the motion to strike out the statement included other competent evidence, and the witness afterward testified contrary to the statement he had quoted. Goldberg v. Chicago & Northwestern R. Co. 171 W 447, 177 NW 573.

Where the testimony of the parties differed as to a conversation between them modifying a previous contract, it was prejudicial error to admit in evidence as corroboration of the testimony of one of them a copy of a letter dictated by him and purporting to have been written in confirmation of that conversation, but which the defendant denied receiving and the proof of mailing of which was insufficient. Federal A. Co. v. Zimmermann, 171 W 594, 177 NW 881.

It was prejudicial error to fail to charge in connection with a special issue as to contributory negligence that operating an automobile upon a city street in violation of a city ordinance regulating such use was negligence as matter of law. Also, it was prejudicial error to fail to submit the question whether the automobile was lighted as required by the ordinance. Kramer v. Chicago & M. E. R. Co. 171 W 627, 177 NW 874.

Where the record shows that the trial court determined that defendant was negligent as matter of law, failure to include in the special verdict a question as to his negligence was not prejudicial error. Shortle v. Sheill, 172 W 53, 178 NW 304.

Although plaintiff's counsel had been guilty of attempting to show that the defendant was insured, such misconduct was not prejudicial, because the award of damages by the jury did not appear to be excessive. Smith v. Yellow C. Co. 173 W 33, 180 NW 125.

In a contest over the allowance of a claim against an estate, it was prejudicial error to charge that an alleged loaning of money must be proved by clear, convincing and satisfactory evidence, a preponderance of the evidence being sufficient. Estate of Utter, 173 W 180, 180 NW 810.

It was not prejudicial error for the court not to tender to defendant, upon whom the burden of proof rested, the opening and closing of the argument to the jury, where the question was not brought to the court's attention. Stowell Co. v. South S. M. C. Co. 173 W 216, 180 NW 813.

Where plaintiff charged an assault and the excessive use of force and defendants contended that what they did was to remove the plaintiff lawfully from a church, using necessary force only, instructions placing the burden of proof on the defendants to show the use of reasonable force only instead of on the plaintiff to show unreasonable force was prejudicial. And where, upon the trial, plaintiff's counsel in summing up the case to the jury declared that all the witnesses for the defense were communicants of the Catholic church, blindly subservient to their priest, against whose instructions they would not think of testifying, such language was prejudicial error not cured by the suggestion of the court that it be disregarded. Ogodzinski v. Gara, 173 W 371, 181 NW 227.

It is reversible error to place the burden of proof on the wrong party. Sloan v. Brown County S. Bank, 174 W 36, 182 NW 363.

The failure to make and file proper formal findings of fact and conclusions of law is not necessarily reversible error. Schmoldt v. Loper, 174 W 152, 182 NW 728.

It was prejudicial error, in an action by a physician to recover for his professional services, to allow defendant's counsel to put certain hypothetical questions. Schnetzky v. Zanto, 174 W 160, 182 NW 751.

An erroneous instruction to an advisory jury in an equity case was harmless where the trial court discovered the error and proceeded to make its own findings. Will of Keenen, 171 W 94, 176 NW 857; Behnke v. Kroening, 174 W 224, 182 NW 837.

Where evidence was insufficient to sustain a special verdict which was challenged both before and after it was rendered, and judgment was thereupon entered without changing the answers and in disregard thereof, the judgment should be affirmed. Elmergreen v. Kern, 174 W 622, 182 NW 947.

Procedural errors will be disregarded where evidence shows that the judgment could not have been different. Rowart v. Kewaunee G. B. & W. R. Co. 175 W 286, 185 NW 189.

A statement found as a conclusion of law should be sustained on appeal as a finding of fact where the record established the fact. Evan L. Reed M. Co. v. B. Heineman L. Co. 175 W 330, 185 NW 529.

The erroneous instruction respecting proximate cause and plaintiff's contributory negligence was no ground of complaint by defendant, because it was prejudicial to the plaintiff only. Kausch v. Chicago & M. E. R. Co. 176 W 21, 186 NW 257.

The exclusion of evidence respecting the true business relationship of 2 defendants, where the liability of one of them depended on that relationship, was reversible error as against one adjudged liable regardless of that relationship. Kuglich v. Fowle, 176 W 60, 186 NW 188.

A judgment by consent operates to waive all defects in the pleadings and all procedural errors. Duras v. Keller, 176 W 88, 186 NW 149.

Where defendant's counterclaim was not sustained his objection to improper evidence tending to minimize damages sought by the counterclaim will not be considered on appeal. Hind v. Thomas, 176 W 379, 187 NW 192.

An erroneous instruction as to the damages that might be recovered was not prejudicial where the verdict was not large considering the plaintiff's injuries, and where on a former trial the verdict was substantially the same. Gilmore v. Orchard, 177 W 149, 187 NW 1005.

Refusal to give a proper instruction was a harmless error where the party requesting it was liable as a matter of law. Haggerty v. Rain, 177 W 374, 186 NW 1017.

Where the issue was such that it was error to admit the testimony of a nonexpert witness and the issue was sharply contested, the admission of such testimony was reversible error. Peacock v. Wisconsin Z. Co. 177 W 510, 188 NW 641.

Error, if any, in the submission of defendant's counterclaim in an action for damages caused by a collision of vehicles was harmless where there was no evidence of negligence on plaintiff's part. McMullen v. Rutlin, 177 W 617, 189 NW 146.

Error in the reception of evidence as to the extent of damage sustained was cured where the court required the plaintiff to elect whether he would take judgment for the amount testified to by the defendant or submit to a new trial, and the plaintiff elected to take judgment accordingly. Golos v. Worzalla, 178 W 414, 190 NW 114.

When taking of evidence was concluded the court dismissed the jury and made findings of fact. It was unnecessary to determine on appeal whether this was error because a verdict to the same effect as the findings should have been directed. Wilgrube v. Nast, 178 W 535, 190 NW 451.

In an automobile collision case, where the rate of speed was not in dispute, permission to prove that on another street the truck was driven at great speed was harmless error. And the reception of evidence of many bruises, broken bones and fracture of the neck, where the fact of death was undisputed, was no ground for a new trial in view of the conclusion of the supreme court that the damages should be reduced. Thomas v. Lockwood O. Co. 178 W 599, 190 NW 559.

The improper rejection of the testimony of one of plaintiff's witnesses was not reversible error where he had the benefit of the testimony of other competent witnesses, and might have called more such witnesses, and where the defendant introduced no more witnesses upon the question (the damages resulting from the condemnation of land) than the plaintiff introduced. In re Opening of Oklahoma Avenue, 179 W 136, 190 NW 1001.

Where the only error was an excessive award of damages which was reduced on appeal, the judgment should be modified and affirmed. Wasicek v. M. Carpenter B. Co. 179 W 274, 191 NW 503.

Error in the admission of evidence is not prejudicial unless it appears that with its exclusion a different result might have resulted. Taylor v. Connors, 180 W 105, 192 NW 371.

Where judgment was for the defendant and the record showed no actionable negligence on his part, there was no basis for a reversal. Wavrunek v. Frank C. Schilling Co. 180 W 117, 192 NW 378.

Where, notwithstanding the admission of incompetent evidence, a verdict was amply supported by competent evidence it should be sustained. Wisconsin A. S. Co. v. Frint M. C. Co. 180 W 137, 192 NW 468.

The failure of the court to give a proper instruction is not reversible error in the absence of a request for such an instruction. Rost v. Roberts, 180 W 207, 192 NW 38.

It was not prejudicial to fail to instruct the jury that the emergency rule does not excuse a defendant's negligence if the emergency itself was caused by his negligence, where the verdict acquitted him of negligence. Siegl v. Watson, 181 W 619, 195 NW 867.

It was error to refuse permission to read to the jury admissions contained in the answer, but not prejudicial, where the fact admitted was not in dispute. Zeidler v. Goelzer, 182 W 57, 195 NW 849.

A refusal to submit to the jury a material issue raised by the pleadings is a prejudicial error. Kile v. Anderson, 182 W 467, 196 NW 762.

It was error to deny defendant's motion for a directed verdict in his favor where there was no evidence supporting the complaint. Goodrich v. Lawson, 183 W 295, 197 NW 705.

Although the trial court ought to have made findings on issues formed by the pleadings as to estoppel, laches and waiver, its failure so to do was not prejudicial error where as mat-

ter of law the plaintiff was not chargeable with knowledge which would preclude relief on any of these grounds. Johnson v. Blumer, 183 W 369, 197 NW 340, 198 NW 277.

An error in instructions was nonprejudicial where no jury would be justified in finding a verdict contrary to the one they did find. Stevens v. Montfort S. Bank, 183 W 621, 198 NW 600.

Where there was no poll of the jury taken and the verdict indicates no disagreement, it is presumed in such a case that the jury were unanimous. Dick v. Heisler, 184 W 77, 198 NW 734.

In an action for alienating a wife's affection, it was prejudicial error to exclude evidence of plaintiff's infidelity offered by defendant; also to admit inadmissible evidence of defendant's adulterous disposition, offered by the plaintiff. The combined effect of a number of errors may operate prejudicially where any one of them, alone, would be harmless. Helminiak v. Przekurat, 184 W 417, 198 NW 746.

An erroneous instruction which was preceded and followed by a correct instruction is not reversible error, where the jury's findings made negligence a matter of law. Terry v. Schmidt, 185 W 550, 201 NW 729.

An instruction that the fact that a bad result followed defendant's treatment of plaintiff may be considered by the jury with all the other evidence in reaching a conclusion as to whether defendant was negligent is erroneous; but the error is not prejudicial. Nelson v. Newell, 195 W 572, 217 NW 723.

Where the record showed that the right result was reached and no injustice done, the judgment must be affirmed. Metzinger v. Perry, 197 W 16, 221 NW 418.

Failure to prove plaintiff's corporate capacity, not questioned below nor in argument, was not ground for reversal. Roundy, Peckham & Dexter Co. v. Hetzel, 198 W 492, 224 NW 475.

That plaintiff's attorney represented defendant in a previous related action is no ground for reversing judgment, defendant not having objected. Michel v. McKenna, 199 W 608, 227 NW 396.

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 a liability policy to protect others driving the car, was prejudicial, because the statute requires such a provision in all policies. Christiansen v. Aetna C. & S. Co. 204 W 323, 236 NW 109.

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

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. 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.

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.

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

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

Uniting an action for false arrest of defendant and an action, based on another false arrest of defendant and another, was reversible error, where serious confusion of issues and apportionment of damages developed. 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 tort-feasors by a secret settlement with one of them, which was not 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 dismissal of the action. Trampe v. Wisconsin T. 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.

In an action against a gas company for damages to a building from an explosion resulting when a contractor in digging a trench severed a 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 was prejudicial 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.

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

Inaccuracy in the form of a 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 and remarks to opposing counsel's objection, although improper, were not prejudicial. 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.

The denial of a motion for a new trial for alleged misconduct of a juror was not error where 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 (a 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 resulted in prejudice. Horgen v. Chaseburg State Bank, 227 W 510, 279 NW 33.

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 G. & E. Co. 228 W 250, 280 NW 291.

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 E. R. & L. Co. 230 W 312, 284 NW 31.

Although mandamus was not the proper action, 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 and could determine that the money due from the county was due to the relator's judgment debtor, without being required to dismiss the action merely because mandamus was not the proper form of action. The appropriate relief in such case was a judgment for the relator's recovery of the money from the defendant county, not an order for a preemptory writ 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. Reiher v. Mandernack, 234 W 568, 291 NW 758.

Error of the trial court in ruling that commissioners in condemnation proceedings were incompetent to testify as witnesses on the trial had on 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. In re Hefty, 236 W 60, 294 NW 518.

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 im-

proper and prejudicial where the trial court made no ruling on objection of defendant's counsel, and 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.

An erroneous instruction that the place where the plaintiff's and the defendant's automobiles collided was in a 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.

Where the trial court committed merely procedural error 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 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 error is not prejudicial. 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 show 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 is $2,500, although improper as suggesting permissible allowance of the maximum, is not prejudicial if the assessment of the jury is proper. 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 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 is 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. Auto. 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.

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

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), Stats. 1943, although error, is not prejudicial 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 admitted in his answer and alleged in his counterclaim. 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. Martin v. Ebert, 245 W 341, 13 NW (2d) 907.

Where the defendant's violation of the injunction was a criminal contempt, and the fine imposed was one appropriate to punishment for criminal contempt, and error, if any, in the contempt proceedings went only to matters of procedure, not affecting any substantial right, the judgment must be affirmed. 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 and could be expected to affect the result. 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 had power to entertain a separate action by the divorced wife to recover arrearages in support money for the children and the parties had a full trial on the merits, and the court granted a money judgment for the arrearages and did not punish or threaten the defendant with contempt, the error committed by entertaining the con-

tempt proceeding was not prejudicial. 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 P. & F. Co. 247 W 536, 20 NW (2d) 658.

The refusal of the trial court to grant a second adjournment in an action for unlawful detainer, to enable the defendant to take an adverse examination, was not prejudicial error, especially where the defendant did not furnish the affidavit or undertaking required for a second adjournment. March v. Voorsanger, 248 W 225, 21 NW (2d) 275.

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 must consider whether the complaint states a cause of action at law and, if it does, must consider whether, on the record made on the motion for 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 issue on appeal from a judgment for the plaintiff was as to the comparative negligence of the parties, and as a matter of law the plaintiff's causal negligence was at least as great as the defendant's, the judgment will be 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. Poole v. Houck, 250 W 651, 27 NW (2d) 705.

An improper appeal to prejudice because of the wealth of a party, or because it is a corporation or a corporation of a particular class, is a sufficient ground for a new trial. Statements of counsel for the plaintiff in argument to the jury in a death action against a railroad company, containing a strong suggestion of the defendant's wealth, and of negligent acts amounting to murder, which could only have been calculated to distract the jury's attention from the real issue of injury from failure to exercise ordinary care, constituted such an appeal to the prejudice of the jury as to require a new trial. DeRousseau v. Chicago, St. P. M. & O. R. Co. 256 W 19, 39 NW (2d) 764.

Where the impleaded defendants would have had the right to set up the defense of contributory negligence on the part of one plaintiff and to implead such plaintiff for purposes of contribution if the plaintiffs had amended their complaint to seek relief against the impleaded defendants, but the plaintiffs made no claim of negligence against the impleaded defendants in the entire action, the granting of plaintiffs' motion after verdict for amendment of the pleadings or proceedings to conform to the facts as found by the jury, and ordering judgment in favor of the plaintiffs against the impleaded defendants, constituted prejudicial error requiring a new trial as to all parties. Rhodes v. Shawano Transfer Co. 256 W 291, 41 NW (2d) 288.

It is not reversible error if the court or counsel inform the jury of the effect of an answer on the ultimate result of the verdict, unless actual, instead of presumed, prejudice resulted to the complaining party. Bailey v. Bach, 257 W 604, 44 NW (2d) 631.

In reviewing a discretionary order, the supreme court does not reverse merely because it might come to a different conclusion on the record before it, but it must clearly appear that there was an abuse of judicial discretion. Popko v. Globe Ind. Co. 258 W 462, 46 NW (2d) 224.

Alleged errors in the receipt and rejection of certain evidence relating to the size and storage capacity of a barn and the amount of hay stored therein at the time of a fire are deemed not prejudicial, it not appearing that a different result would have been reached otherwise, or that substantial rights of the defendant insurers were affected by the rulings of the trial court. Widness v. Central States Fire Ins. Co. 259 W 159, 47 NW (2d) 879.

Where a wife-guest sued only the husband's insurance carrier, and had not established a cause of action when erroneously permitted to call him as an adverse witness, the error was prejudicial even though defendant insurance carrier was permitted to cross-examine and attempt to impeach the husband. Voss v. Metropolitan Cas. Ins. Co. 266 W 150, 63 NW (2d) 96.

See note to 270.21, on requested instructions, citing Mead v. Ringling, 266 W 523, 64 NW (2d) 222, 65 NW (2d) 35.

On improper remarks of counsel as constituting prejudice, see Roeske v. Schmitt, 266 W 557, 571-573, 64 NW (2d) 394, 401-403.

Alleged misconduct of a juror in bringing to the jury room a bottle of the carbonated beverage in question, and a newspaper article relating to another bursting-bottle case, and exhibiting the same to other jurors, but not during their deliberations, and before the trial court instructed the jury, could be disregarded by the trial court and a new trial denied in the absence of a showing by the herein defendant bottler, complaining of such misconduct, that any prejudice resulted. Zarling v. La Salle Coca-Cola Bottling Co. 2 W (2d) 596, 87 NW (2d) 263.

The trial court's refusal to receive certain evidence offered by the defendant, although error, was not prejudicial, in that the rejected

evidence did not tend to support the defendant's claim that she had acquired the disputed strip of land by adverse possession, and had nothing to do with proof of her acts of occupation, on which alone her claim of ownership depended. Cuskey v. McShane, 2 W (2d) 607, 807 NW (2d) 497.

When a motion for a new trial on the ground of improper conduct of counsel is denied by the trial court, it must affirmatively appear on appeal that the remarks operated to the prejudice of the complaining party before an abuse of discretion will be found. The rule with respect to the showing of prejudice because of improper argument of counsel to the jury is less stringent when the trial court has found that the improper argument had a prejudicial effect and has granted a new trial. Klein v. State Farm Mut. Auto. Ins. Co. 19 W (2d) 507, 120 NW (2d) 885.

Where an attorney told the jury that the sale of a car would void an insurance policy, thus telling them the effect of their answer to a question as to whether the car had been sold, the judgment should be reversed. Erb v. Mut. Service Cas. Co. 20 W (2d) 530, 123 NW (2d) 493.

Lack of findings is not necessarily reversible error, and the supreme court can affirm if the examination of the evidence shows the trial court reached a result which the evidence would sustain if a specific finding supporting that result had been found. State ex rel. Skibinski v. Tadych, 31 W (2d) 189, 142 NW (2d) 838.

2. Criminal Actions.

Where the trial judge has refused to set aside a verdict on the ground that the evidence was insufficient, the supreme court will not interfere except in a clear case of the want of proof of any fact upon which the guilt of the accused can be fairly predicated. Williams v. State, 61 W 281, 21 NW 56.

Error cannot be predicated on the refusal of the trial judge to allow the defendant to open and close the argument on the issue of insanity, unless proper exception is taken to the refusal. Cornell v. State, 104 W 527, 80 NW 745.

Exceptions to the instructions to the jury, not incorporated into the bill of exceptions so as to become a part of the record, cannot be considered on appeal. Koch v. State, 126 W 470, 106 NW 531. See also Brown v. State, 127 W 193, 106 NW 536.

While it was misconduct on the part of the jurors to visit during the trial the building which was the subject of damage, without a view having been authorized, such misconduct does not require a reversal under sec. 3072m (derived from ch. 192, Laws 1909). Parb v. State, 143 W 561, 128 NW 65.

The admission of hearsay statements of the deceased in a murder trial, where the evidence was circumstantial, was prejudicial error. Runge v. State, 160 W 8, 150 NW 977.

A physician having testified in a murder trial, just before the close of the testimony in the evening, that he assisted in taking a photograph of the deceased, it was not prejudicial error to refuse the request of the defendant the next morning to permit the calling of witnesses to contradict such statement, because it did not appear that such testimony would probably have affected the result. Musso v. State, 160 W 161, 151 NW 327.

It is error not to inform the jury that defendant is not guilty of the crime charged if detectives prompted, urged, or originated the perpetuation of the offense and defendant under the circumstances of the case was only a passive participant in the crime charged. Koscak v. State, 160 W 255, 152 NW 181.

The statement by a district attorney to the jury that he would prove prior convictions of the accused without having alleged any such convictions was reversible error, it appearing that not until the close of the trial (no evidence of such convictions having been offered) did the trial court instruct the jury to disregard such statement. Alsheimer v. State, 165 W 646, 163 NW 255.

Certain instructions in a trial of several defendants for conspiracy to murder were harmless errors as to some of the defendants and prejudicial errors as to others. Bianchi v. State, 169 W 75, 171 NW 639.

It is reversible error to refuse proper instructions respecting intent in a prosecution for manufacturing or selling oleomargarine in imitation of butter in violation of sec. 4607c, Stats. 1917. Essex v. State, 170 W 512, 175 NW 795.

The failure of a trial court to strike out improper evidence received in a prosecution for a serious crime and instruct the jury to disregard it until the close of the testimony, 16 hours after its admission, was harmless, where circumstances strongly supported the verdict. Schwartz v. State, 171 W 306, 177 NW 15.

An erroneous instruction as to the guilt of an accessory before the fact was not prejudicial in the absence of evidence tending to show that the accused was an accessory. Kreuger v. State, 171 W 566, 177 NW 917.

An order granting a new trial, made for an erroneous reason, should not be set aside if a new trial should have been granted on some other ground stated in the motion. State v. Labuwi, 172 W 204, 178 NW 479.

It was not reversible error to receive a verdict of "guilty" of manslaughter in the absence of the accused and his counsel, where they had been advised by the court that if a verdict was reached before 9 or 10 o'clock that evening the judge would be in attendance to receive it, and the sheriff had notified counsel by telephone that the jury was ready to return its verdict. Clemens v. State, 176 W 289, 185 NW 209.

To an inquiry by defendant's counsel as to the record in the case the district attorney answered: "Which one? There are 5 cases." This was error, but not reversible error, where the court immediately admonished the jury to disregard the answer and the evidence of guilt was strong. Schiner v. State, 178 W 83, 189 NW 261.

Though one accused of crime is entitled to a fair trial, not every irregularity need be treated as reversible error, but the court must apply its judgment and reason; and when it is plain that the rights of defendant were not prejudiced, immaterial irregularities are not grounds for a new trial under sec. 3072m,

Stats. 1921. Manna v. State, 179 W 384, 192 NW 160.

A bare technical error will not justify the disturbance of a verdict, even in case of a conviction of a homicide. Manna v. State, 179 W 384, 192 NW 160.

Where testimony was improperly received there was no prejudicial error, in view of the whole record. Rogers v. State, 180 W 568, 193 NW 612.

In a prosecution for murder, where the silence of defendant, when incriminatory letters were read to him by an attorney of his deceased wife, was maintained under such circumstances as would neither manifest nor be indicative of guilt, the admission of such letters was error. McCormick v. State, 181 W 261, 194 NW 347.

Where the sheriff entertained one of the jurors in a criminal case, a judgment of conviction must be reversed. La Valley v. State, 188 W 68, 205 NW 412.

269.43 and 274.37, Stats. 1925, directing the court to disregard any error or defect not affecting the substantial rights of the adverse party, and prohibiting the reversal of a judgment by reason of such error or defect, applies to criminal as well as civil actions. Sprague v. State, 188 W 432, 206 NW 69.

Although there was procedural error in the trial, the judgment of conviction will be affirmed, as none of the errors affected the substantial rights of the defendant. Schacht v. State, 191 W 198, 210 NW 421.

Evidence of prior convictions of defendant, who did not take the stand, and stressing the fact in the argument to the jury that he was a Chicago bootlegger, was error, as was also reference to a complaint filed against the defendant because of another crime; but these errors, under a fair consideration of the evidence were not prejudicial. Esterra v. State, 196 W 104, 219 NW 349.

In instruction that "persons are presumed to intend the natural, probable, and usual consequences of their acts intentionally done" would not be error because of the short range at which the defendant fired the revolver. Ruffalo v. State, 196 W 446, 220 NW 190.

Where the evidence would not authorize a lesser degree of homicide than murder in the first degree, the improper form of the verdict, which found the defendant guilty of "the offense charged in the information," was not prejudicial. Deerkop v. State, 196 W 571, 219 NW 278.

Communication by the judge to the jury, in the absence of counsel, informing them of maximum and minimum punishment, was error, but not prejudicial, where guilt of the accused was conclusively shown. Hackbarth v. State, 201 W 3, 229 NW 83.

Improper references by the district attorney to prior convictions of which defendant had previously informed the court was not prejudicial, 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. 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. Bach v. State, 206 W 143, 238 NW 816.

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

Cross-examination of defendant in a rape trial, as to his wife's commencement of divorce proceedings after his arrest, was prejudicial. Cleveland v. State, 211 W 565, 248 NW 408.

A defendant cannot complain of errors which are favorable to him. State v. Galle, 214 W 46, 252 NW 277.

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

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 whether 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 so intended. In a prosecution under 340.39, Stats. 1933, 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. State v. Christiansen, 222 W 132, 267 NW 6.

In a prosecution for larceny of a gambling device, refusal to submit the question of value of the device was reversible error, since the degree of the offense depended upon the value of the article stolen. State v. Clementi, 224 W 145, 272 NW 29.

The improper receipt of evidence of prior acts of a nature like those under consideration may be held not prejudicial where there is an overwhelming quantum of other evidence in the case. Bartz v. State, 229 W 522, 282 NW 562.

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 upon the defective counts. Liskowitz v. State, 229 W 636, 282 NW 103.

In a prosecution under 340.45, Stats. 1939,

where the question in determining defendant's guilt was whether she had sought to settle a claim for civil damages which she in good faith supposed she had against a tavern keeper for selling beer to her minor daughter or whether she had extorted money under threat of criminal prosecution, an instruction inaccurately stating the elements of a civil cause of action for such defendant was largely immaterial, was misleading, and constituted prejudicial error. Stockman v. State, 236 W 27, 293 NW 923.

An instruction that it was for the jury to determine the facts from the evidence "and the law from either the court or the arguments of counsel" was error with respect to the quoted portion. Stockman v. State, 236 W 27, 293 NW 923.

While a defendant in a criminal case has the right on appeal or writ of error to demand the 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.

In a prosecution under 348.09, Stats. 1943, 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 not prejudicial to the state. State v. Jaskie, 245 W 398, 14 NW (2d) 148.

The stated view of the trial court that it, as well as the jury, must be convinced beyond a reasonable doubt of the defendant's guilt of the crime charged was error. State v. Hanks, 252 W 414, 31 NW (2d) 596.

Failure to give a requested instruction to the jury which might properly have been given is nonprejudicial if there is no probability that the result would have been changed by granting the request. In a criminal case, where on the evidence the jury could have acquitted only by violating their oaths, alleged errors in the charge are nonprejudicial. A bare technical error will not disturb a verdict even in a conviction of a homicide. State v. Kuick, 252 W 595, 32 NW (2d) 344.

In situations involving personal or social misconduct with members of the jury by officers of the court, counsel or one of the parties, the purity of the verdict must at all times be sustained, because, where misconduct occurs, suspicion falls on the administration of justice and the jury system is brought into disrepute; and in such cases a new trial will be ordered without the necessity of establishing that prejudice resulted to the rights of the losing party through such misconduct. The fact, that the special prosecutor's written notes of his final argument to the jury were inadvertently taken into the jury room along with the exhibits and remained there during the deliberations of the jury is not sufficient to require the granting of a new trial to the defendant without a showing that prejudice may have resulted from such error. A showing of prejudice to the defendant was made, requiring a new trial, where proper inquiry by the trial court disclosed that at least one juror had read part of such notes, which, although containing only statements of facts brought out in the evidence, served to refresh the jurors' minds as to facts favorable to the state, thereby giving the state an unfair advantage over the defense and depriving the defendant of a fair trial. State v. Sawyer, 263 W 218, 56 NW (2d) 811.

Where testimony introduced by the prosecution concerning the defendant's bad relations in the community for neighborliness did not take the form of testimony as to reputation, but was introduced on rebuttal by the state to refute the defendant's testimony of good relations with his neighbors, the admission of such testimony as to bad relations on the basis of impeachment was not error. State v. Schweider, 5 W (2d) 627, 94 NW (2d) 154.

The test of whether the trial court commits prejudicial error in refusing a defendant's request to submit lesser degrees of homicide than the one charged is whether there is some reasonable ground in the evidence for a conviction of the lesser offense and an acquittal of the greater. If the trial court should have submitted a lower degree of homicide, its failure to do so results in undeniable prejudice to the defendant. Brook v. State, 21 W (2d) 32, 123 NW (2d) 535.

In a criminal case as in a civil case the rule is, if there is any credible evidence which in any reasonable view supports the verdict, the verdict should not be disturbed on appeal. State v. Morrissy, 25 W (2d) 638, 131 NW (2d) 366.

In applying the harmless-error rule, the possibility of a different result is not the equivalent of "has affected the substantial rights" required for reversal. State v. Stevens, 26 W (2d) 451, 132 NW (2d) 502.

Unless a request is made for an instruction on a lesser included criminal offense it is not error for the trial court not to give the instruction on its own motion even though the evidence would sustain it. Neuenfeldt v. State, 29 W (2d) 20, 138 NW (2d) 252. See also: Williamson v. State, 31 W (2d) 677, 143 NW (2d) 486; and Green v. State, 38 W (2d) 361, 156 NW (2d) 477.

Where defendant asked for a mistrial because jurors read a newspaper story that his alleged partner in the crime had pleaded guilty, but on examination the jurors stated they were not influenced, and where there was ample evidence of defendant's guilt, the verdict will not be reversed. Oseman v. State, 32 W (2d) 523, 145 NW (2d) 766.

Error because waiver of preliminary examination was made a condition of reduced bail was harmless because it was not shown to have any effect on the issue of guilt or innocence. Whitty v. State, 34 W (2d) 278, 149 NW (2d) 557.

It is not error per se, warranting reversal, for the prosecution to call as a state's witness one who it is aware will assert his privilege against self-incrimination. Price v. State, 37 W (2d) 117, 154 NW (2d) 222.

Uncontradicted testimony that the victim was lying on his back with his arms in the air and hands on the gun barrel struggling with the gun was inconsistent with any theory that he was already dead or dying or unconscious; hence errors of the trial court in limiting the

examination of the medical witnesses and its comment could not be deemed prejudicial or made the basis for a new trial. State v. Rice, 38 W (2d) 344, 156 NW (2d) 409.

Whether or not in a criminal prosecution the harmless error rule can be applied to error at trial which offends a constitutional norm depends on whether there is reasonable possibility that the evidence complained of might have contributed to the conviction; hence all trial errors which violate the constitution do not automatically call for reversal. Hayes v. State, 39 W (2d) 125, 158 NW (2d) 545.

Since the trial court, in dismissing the prosecution's case, emphasized that this action was based on the belief that the state failed to show defendant's intent and the evidence offered by the state and excluded by the court had that purpose, the ruling on the evidence was prejudicial, necessitating reversal. State v. Hutnik, 39 W (2d) 754, 159 NW (2d) 733.

The rule in Wisconsin, following the early English rule, is that the exclusion, separation, sequestration of witnesses, or putting witnesses under the rule is not a matter of right but lies in the legal discretion of the trial court. The rule does not presume prejudice from a failure to sequester, and unless prejudice results therefrom there can be no abuse of discretion warranting reversal. Ramer v. State, 40 W (2d) 79, 161 NW (2d) 209.

See note to sec. 8, art. I, on limitations imposed by the Fourteenth Amendment, citing La Claw v. State, 41 W (2d) 177, 163 NW (2d) 147, 165 NW (2d) 152.

Admission of evidence of 2 previous convictions prior to finding and conviction, while improper, was harmless in the light of compelling evidence of defendant's guilt, and the fact that the case was tried to an able and experienced judge (without a jury) who, it could be presumed, disregarded in his consideration of the issue of guilt all matters not relevant to that issue. Block v. State, 41 W (2d) 205, 163 NW (2d) 196.

Where veracity or credibility of an accused is a major factor in determining his guilt or innocence, it is prejudicial error to exclude testimony in his behalf, otherwise admissible, which goes materially to that issue. Logan v. State, 43 W (2d) 128, 168 NW (2d) 171.

Where the medical examiner who performed an autopsy testified that in her opinion the victim's death resulted from homicide (which after objection was qualified by her statement that the cause of death was due to a blow or blows), and the trial court ordered the testimony stricken and instructed the jury to disregard it, there was no prejudicial error. Woodhull v. State, 43 W (2d) 202, 168 NW (2d) 281.

CHAPTER 275.

Ejectment.

275.01 History: R. S. 1858 c. 141 s. 1; R. S. 1878 s. 3073; Stats. 1898 s. 3073; 1925 c. 4; Stats. 1925 s. 275.01; 1935 c. 541 s. 296.

See note to sec. 16, art. I, citing Howland v. Needham, 10 W 495.

An action of ejectment abates upon the death of the sole defendant. Farrell v. Shea, 66 W 561, 29 NW 634.

If both parties claim title to the land under a will their rights under the will may be determined in an action of ejectment. Kelley v. Kelley, 80 W 486, 50 NW 334.

Where title or the right of possession is in dispute between 2 parties, one of whom is in actual possession under claim or color of right, injunction will not as a rule lie to transfer possession to the other party; and particularly, injunction will be refused to determine an issue of ownership or the right of possession of land where an adequate remedy at law is available, as by ejectment. Lipinski v. Lipinski, 261 W 327, 52 NW (2d) 922.

Where adjoining landowners take conveyances from a common grantor which describe the premises conveyed by lot numbers, but such grantees have purchased with reference to a boundary line then marked on the ground, such location of the boundary line so established by the common grantor is binding on the original grantees and all persons claiming under them, irrespective of the length of time which has elapsed thereafter. Thiel v. Damrau, 268 W 76, 66 NW (2d) 747.

The statutory directive is that ejectment may be "commenced and proceeded in as other civil actions". Arthur v. State Conservation Comm. 33 W (2d) 585, 148 NW (2d) 17.

275.02 History: R. S. 1849 c. 106 s. 3; R. S. 1849 c. 118 s. 1 to 4; R. S. 1858 c. 141 s. 2; R. S. 1858 c. 152 s. 1 to 4; R. S. 1878 s. 3074, 3197, 3199; 1885 c. 252; Ann. Stats. 1889 s. 3074; Stats. 1898 s. 3074, 3197, 3199; 1925 c. 4; Stats. 1925 s. 275.02, 281.15, 281.17; 1935 c. 541 s. 297, 389; Stats. 1935 s. 275.02; 1939 c. 513 s. 53.

Revisor's Comment, 1950: The ancient and intricate rules of common law and of equity pleadings have been abolished. In olden times, the hair-splitting distinctions and artificial subtleties whereby a skilled barrister determined whether ejectment would lie in a law court, or whether the remedy must be sought in an equity court, were very important. Those distinctions and niceties have dwindled almost to the vanishing point.

Ch. 120, Laws 1856, adopted the Civil Code (Field Code). That act says (a) actions are of 2 kinds, civil and criminal; (b) the distinction between "actions at law and suits in equity and the forms of all such actions and suits have been abolished and there is but one form of action for the enforcement or protection of private rights" (260.08, Stats.); (c) "The complaint shall contain * * * a statement of the ultimate facts constituting each cause of action" and a "demand of the judgment to which the plaintiff supposes himself entitled" (263.03). If the plaintiff asks for what the law does not give, still the court will award to him what the law does give. In furtherance of justice he may amend his pleading; the court may "change the action from one at law to one in equity, or from one on contract to one in tort, or vice versa" (269.44). If he is in the wrong court, his action "shall be certified to some other court which has jurisdiction" (269.52).