CHAPTER 274.

WRITS OF ERROR AND APPEALS.

Cross Reference: See 251.251 to 251.66 (Rules 1 to 66) for rules of practice in supreme court.

274.01 Supreme court; writs of error and appeals; when taken. (1) Except as otherwise specially provided, the time within which a writ of error may be issued or an appeal taken to obtain a review by the supreme court of any judgment or order in any civil action or special proceeding in a court of record is limited to 6 months from the date of the entry of such judgment or order, but if the person against whom a judgment is rendered is, at the time of the rendition thereof, either a minor or insane, or imprisoned on a criminal sentence, the time during which such disability shall continue except as to writs of error or appeals taken in actions authorized by sections 75.39 to 75.50, inclusive, not exceeding 10 years, shall not be reckoned a part of said 6 months; said 6 months shall begin to run immediately from the entry of such judgment or order.

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

History: 1951 c. 342.

Cross Reference: Exceptions to the general rule limiting time for appeal will be found in the following sections: 48.47, 88.25, 89.15, 89.27 (18), 102.25, 111.07 (7), 146.11 (5), 227.21, 227.26, 247.37, 289.29. There may be other exceptions.

After the time has expired within which the trial court can modify its judgment or appeal can be taken, provisions disposing of property can be reached only by an attack on the judgment itself. Dunn v. Dunn, 258 W 188, 45 NW (2d) 727.

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 Automobile Ins. Co. 266 W 106, 62 NW (2d) 549, 63 NW (2d) 740.

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.

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

274.04 Appeals from orders. The time within which an appeal may be taken directly from an order is further limited to 90 days from the date of the service by either party upon the other of notice of the entry of the order.

274.05 Writs of error. Writs of error may issue of course out of the supreme court at any time to review the order or judgment of any court discharging or remanding a person brought up by writ of habeas corpus and to review final judgments in actions triable by jury. The proceedings and judgment upon such writs shall be according to the course of the common law and the rules and practice of the supreme court, except as modified by this chapter. But no writ of error shall issue or appeal lie to review an order or judgment on habeas corpus remanding to custody a prisoner committed for trial pursuant to s. 954.13 unless allowed by one of the justices of the supreme court upon a finding that the writ or appeal is not sought for dilatory purposes, after reasonable notice of application for the writ or for leave to appeal and opportunity to be heard to the attorney general and the district attorney of the county involved.

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

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

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

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

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

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

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.

In a proper case, on proper application for the exercise of the superintending control of the supreme court over other courts, an appropriate writ may be issued compelling a circuit court to dispose of a pending matter, but appeals are taken from orders or judgments, and an "appeal" from the "failure" of the circuit court to act on certain matters brings nothing before the supreme court. Burling v. Burling, 275 W 612, 82 NW (2d) 807.

274.10 Writ of error not essential, parties defined. Any judgment within section 274.09 or any order defined in section 274.33 may be reviewed before the supreme court upon an appeal by any party aggrieved. A party first appealing is the appellant. All others are respondents.

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.

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

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

(3) The appeal undertaking must be executed on the part of the appellant by at least two sureties, to the effect that he will pay all costs and damages which may be awarded against him on the appeal, not exceeding $250.

Cross References: As to filing an undertaking guaranteed by a surety company instead of by individual sureties, see 204.07. As to perfecting a defective appeal, see 274.32.

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 was dismissed. Will of Stanley, 228 W 530, 280 NW 685.

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 per cent 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 Automobile 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, 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 (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.

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

asks for a reversal or modification of the judgment or order or portion thereof appealed from.

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

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

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

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

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

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 (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 Automobile 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 (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.

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

Under (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.

274.13 Return on appeal. Upon an appeal being perfected the clerk of the court from which it is taken shall, at the expense of the appellant, forthwith transmit to the supreme court, the record containing the items specified in s. 251.251. The court may, however, in each case, direct copies to be sent in lieu of the originals.

History: Sup. Ct. Order, effective January 1, 1958.

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.

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.

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

undertaking and deposit may be waived in writing by the respondent and such waiver shall have the same effect as the giving of the undertaking would have had.

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

274.16 Undertaking in supreme court, when not required. The undertaking required by section 274.06 on the issuance of a writ of error and by section 274.11 on an appeal shall not be required if the trial judge shall certify that the cause or proceeding necessarily involves the decision of some question of law of such doubt and difficulty as to require a decision by the supreme court or if such judge or any other circuit judge shall certify that the party desiring the writ or to appeal is unable to furnish such undertaking; but such certificate shall be made only upon notice to the parties interested. Such certificates shall be filed with the clerk of the court and be returned with the record to the supreme court with the writ of error or the appeal.

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

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

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

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

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

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

274.23 Same, as to other judgments. If the judgment appealed from direct the doing or not doing of any other particular act or thing, and no express provision is made by statute in regard to the undertaking to be given on appeal therefrom, the execution

thereof shall not be stayed by an appeal therefrom unless an undertaking be entered into on the part of the appellant, in such sum as the court or the presiding judge thereof shall direct, and by at least two sureties, to the effect that the appellant will pay all damages which the opposite party may have sustained by the doing or not doing the particular act or thing directed to be done or not done by the judgment appealed from, and to such further effect as such court or judge shall in discretion direct.

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

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

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

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

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

274.29 Sureties on undertakings to justify; may be excepted to. An undertaking upon an appeal shall be of no effect unless it shall be accompanied by the affidavit of the sureties, in which each surety shall state that he is worth a certain sum mentioned in such affidavit, over and above all his debts and liabilities, in property within this state not by law exempt from execution, and which sums so sworn to shall, in the aggregate, be double the amount specified in said undertaking. The respondent may except to the sufficiency of the sureties within twenty days after service of a copy of the undertaking, and unless

they or other sureties justify in the manner prescribed in sections 264.17, 264.18 and 264.19, within ten days thereafter, the appeal shall be regarded as if no undertaking had been given. The justification shall be upon a notice of not less than five days.

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

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

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

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

See note to 274.11, citing Falk v. Industrial Comm. 258 W 109, 45 NW (2d) 161.

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

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

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

(3) When an order grants, refuses, continues or modifies a provisional remedy or grants, refuses, modifies or dissolves an injunction, sets aside or dismisses a writ of attachment, grants a new trial or sustains or overrules a demurrer, decides a question of jurisdiction, determines an issue submitted under s. 263.225, or denies an application for summary judgment, but no order of the circuit court shall be considered appealable which simply reverses or affirms an order of the civil court of Milwaukee county, unless the order of the civil court grants, refuses, continues, modifies or dissolves a provisional remedy or injunction.

(4) Orders made by the court vacating or refusing to set aside orders made at chambers, where an appeal might have been taken in case the order so made at chambers had been made by the court in the first instance. For the purpose of appealing from an order either party may require the order to be entered by the clerk of record.

History: Sup. Ct. Order, 271 W x.

An order construing a will after due hearing on a petition for construction is appealable. Estate of Audley, 256 W 433, 41 NW (2d) 378.

An 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, is not appealable. Neitge v. Severson, 256 W 628, 42 NW (2d) 149.

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 Indemnity Co. 258 W 462, 46 NW (2d) 224.

An order refusing to substitute the assignee of a judgment as plaintiff and to permit him to sue over on the judgment, and an order discharging the judgment of record, are appealable. Stanley C. Hanks Co. v. Scherer, 259 W 148, 47 NW (2d) 905.

An order, extending the time for the defendants to answer the complaint, and re-

lieving them from a default because of their failure to answer, is not appealable. Schleif v. Karass, 260 W 391, 51 NW (2d) 1.

An order refusing to dismiss a garnishment before execution issued is an order continuing a provisional remedy and appealable. Mahrle v. Engle, 261 W 485, 53 NW (2d) 176.

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. In response to motions to set aside an arbitration agreement and to vacate the award, an order denying the motion to set aside the arbitration agreement disposed of such motion in the absence of an appeal therefrom within the 6 months allowed by 274.01 (1), and the language of a subsequent order denying the motion to vacate the award, so far as including the motion previously denied, was surplusage and of no effect, and did not serve to extend the time within which an appeal might be taken in relation to such previously denied motion. Pick Industries, v. Gebhard-Berghammer, Inc. 262 W 498, 56, 57 NW (2d) 97, 519.

In an action against farm tenants to have a lease declared void and for other relief, a portion of an 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," was only the expression of an intention which the court might never implement, and was not an appealable order. Veitch v. Schlepp, 262 W 565, 55 NW (2d) 914.

Order extending time for settling bill of exceptions is appealable. Briggson v. Viroqua, 264 W 40, 58 NW (2d) 543.

Where the $110 per month gross rentals which a widow was collecting, as of the date of the hearing on her petition for reimbursement from the trustee for expenditures made by her in improvements to the homestead, had been approved by prior order of the county court, an order denying such petition "without prejudice" was nevertheless an appealable order, in that it was a final determination that the widow was not entitled to be reimbursed by the trustee for such improvements on the basis of the then existing facts, and constituted a "final order affecting a substantial right." Will of Greiling, 264 W 146, 59 NW (2d) 241.

An order limiting the scope of an adverse examination is not appealable under (3) as an order refusing or modifying a provisional remedy. Will of Block, 264 W 471, 59 NW (2d) 440.

An order limiting the adverse examination of the defendant, and striking from the subpoena for the adverse examination a direction that he produce on his examination certain books and records of a corporation, the latter of which was in effect a further limitation of the examination, is not appealable under (3). Dobbert v. Dobbert, 264 W 641, 60 NW (2d) 378.

An order refusing to enter a default judgment and allowing a defendant to answer is not appealable under (1) as a final order which in effect determines the action and prevents a judgment from which an appeal might be taken. Willing v. Porter, 266 W 428, 63 NW (2d) 729.

Under 274.33 (1) an order for judgment is not appealable; nor are findings of fact and conclusions of law appealable. The language in 269.51 (1) that the respondent shall be deemed to have waived all objections "to the jurisdiction of the appellate court," unless he moves to dismiss the appeal before taking or participating in any other proceedings in the appellate court, cannot be construed to mean that jurisdiction which the court does not otherwise have may be conferred by such waiver, but the statute must be held to apply only to such matters as are in their nature appealable. Jaster v. Miller, 269 W 223, 69 NW (2d) 265.

An order denying a motion to vacate a judgment on the ground of newly discovered evidence is appealable under (2). Estate of Koos, 269 W 478, 69 NW (2d) 598.

An 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 is appealable. Vuchetich v. General Casualty Co. 270 W 552, 72 NW (2d) 389.

A portion of an answer, separately stated and alleging for further answer to the complaint and as a bar thereto the defense of res adjudicata, was sufficiently pleaded as a separate defense so that an order striking out such portion of the answer was appealable. Teegarden Co-op. Cheese Co. v. Heckman, 271 W 86, 72 NW (2d) 920.

An order quashing a substituted service made pursuant to 85.05 (3), Stats. 1951, on a nonresident motorist involved in an accident in Wisconsin, is appealable. Waddell v. Mamat, 271 W 176, 72 NW (2d) 763.

See note to 269.57, citing Appleton v. Sauer, 271 W 614, 74 NW (2d) 167.

An order striking out, as irrelevant, portions of a pleading is not appealable. Britz v. Chilsen, 273 W 392, 78 NW (2d) 896.

See note to 263.44, citing Britz v. Chilsen, 273 W 392, 78 NW (2d) 896.

In an action for the protection of trade secrets, an order denying a private trial and a sealed record is not appealable, but the supreme court may exercise its superintending control and order the trial court to issue the order sought, if that is the only effective way to protect the secrets. State ex rel. Ampco Metal v. O'Neill, 273 W 530, 78 NW (2d) 921.

An order vacating a previous order dismissing the action as to certain parties, and reinstating them as parties defendant, is not appealable. Brown Deer v. Milwaukee, 274 W 50, 79 NW (2d) 340.

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.

An order vacating a judgment entered on default of either party does not determine the action and prevent a judgment from which an appeal might be taken, within (1); nor is it a final order within (2); nor does it fall under (3) and (4); and hence it is not appealable. Cross v. Leuenberger, 274 W 393, 80 NW (2d) 468.

See note to 32.04, citing Barrows v. Kenosha, 275 W 124, 81 NW (2d) 519.

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

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 this section, 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.

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.

274.35 Reversal, affirmance or modification of judgment; how remitted, clerk's fees. (1) Upon an appeal from a judgment or order or upon a writ of error the supreme court

may reverse, affirm or modify the judgment or order, and as to any or all of the parties; and may order a new trial; and if the appeal is from a part of a judgment or order may reverse, affirm or modify as to the part appealed from. In all cases the supreme court shall remit its judgment or decision to the court below and thereupon the court below shall proceed in accordance therewith.

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

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

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 is again 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. Liability 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 Automobile Ins. Co. 266 W 106, 62 NW (2d) 549, 63 NW (2d) 740.

Where the trial court correctly sustained demurrers to complaints but on the incorrect ground that a temporary natural accumulation of snow and ice could never be the basis of liability under the safe-place statute, and as a result the plaintiffs appealed to the supreme court instead of pleading over, the plaintiffs should be afforded the opportunity to serve amended complaints. Cross v. Leuenberger, 267 W 232, 65 NW (2d) 35, 66 NW (2d) 168.

An award of $300 to a child who was rendered unconscious for a short period of time as a result of the accident, and who sustained a fractured clavicle or shoulder blade, a hematoma of the right hip resulting in blood in the hip joint, bruises to her knees and face, and pain and suffering for 10 days as the result of the hematoma, is deemed so inadequate that it cannot be permitted to stand. In view of the inadequacy of the award, the cause is remanded with directions that the trial court determine the lowest amount which a fair-minded jury properly instructed would probably allow the plaintiff for her damages, and that the plaintiff be given the option of accepting such amount or a new trial, such new trial to be limited to the question of damages. Thomas v. Tesch, 268 W 338, 67 NW (2d) 367.

See note to 251.09, citing Flakall Corp. v. Krause, 269 W 310, 70 NW (2d) 8.

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 Lumber 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.

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

Cross Reference: For disposition after remittitur of pending motion for new trial, see 270.49 (1).
Opinion of supreme court to be sent to trial court in case of reversal, see 251.16.

274.37 Judgments; application to reverse or set aside; new trial; reversible errors. No judgment shall be reversed or set aside or new trial granted in any action or proceeding,

civil or criminal, on the ground of misdirection of the jury, or the improper admission of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure the new trial.

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

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.

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. Whether prejudice is found or not, the practice of informing the jury of the effect of an answer is disapproved. Bailey v. Bach, 257 W 604, 44 NW (2d) 631.

Alleged errors in the receipt and rejection of certain evidence relating to the size and storage capacity of the barn and the amount of hay stored therein at the time of the 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 matters bearing on the damages sustained by the plaintiff from a collision were thoroughly tried before the jury in the trial court, and the supreme court reviewed the question of damages on a first appeal, and concluded that the determination of the reduced amount of damages by the trial court was within the limitation imposed on it by law, but reversed and remanded the cause because the trial court had not specifically stated that it had followed the proper rule, the supreme court, on being assured that the trial court had done so, must affirm its determination and cannot again review the question of damages on a second appeal. Rasmussen v. Milwaukee E. R. & T. Co. 261 W 579, 53 NW (2d) 442.

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 wife-guest sued only 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 husband. Voss v. Metropolitan Casualty Ins. Co. 266 W 150, 63 NW (2d) 96.

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

Improper remarks of counsel as constituting prejudice discussed. Roeske v. Schmitt, 266 W 557, 64 NW (2d) 394.