CHAPTER 274.

WRITS OF ERROR AND APPEALS.

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

274.01 Supreme court; writs of error and appeals; when taken. (1) Except as otherwise provided the time within which a writ of error may be issued or an appeal taken to obtain a review by the supreme court of any judgment or order in any civil action or special proceeding in a court of record is limited to 3 months from service of notice of entry of such judgment or order or, if no notice is served, to 6 months from date of entry. If the person against whom a judgment is rendered is, at the time of the rendition thereof, either a minor or insane, or imprisoned on a criminal sentence, the time during which such disability shall continue except as to writs of error or appeals taken in actions authorized by ss. 75.39 to 75.50, not exceeding 10 years, shall not be reckoned as a part of said 3 or 6 months.

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

History: 1963 Sup. Ct. Order, 17 W (2d) xviii.

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

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]

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 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.

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.

274.05 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 per-

son 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.

Two separate judgments of conviction are not properly brought up under one writ of error, but where the state did not make timely objection or move to dismiss, 269.51 (1) cures the defect. Ronzani v. State, 24 W (2d) 512, 129 NW (2d) 143.

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 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.

Where 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.

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 Brewing Co. 21 W (2d) 583, 124 NW (2d) 664.

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.

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 Appeal, how taken and perfected; notice; costs. (1) An appeal is taken by serving a notice of appeal signed by the appellant or his attorney on each party adverse to him upon the appeal who appeared in the action or proceeding, and by filing a notice of appeal with the clerk of the court in which the judgment or order appealed from is entered. The notice shall state whether the appeal is from the whole of the judgment or order or from a part thereof, and if from a part only, shall specify the part appealed from. On appeals from a judgment the appellant shall serve the notice of appeal upon all parties bound by the judgment who have appeared in the action. All notices of appeal shall contain the names and addresses of counsel, if known, for all parties upon whom service is required.

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

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

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

History: 1963 Sup. Ct. Order, 17 W (2d) xviii.

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.

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

(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, 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.

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

274.115 Time for service of transcript. Service of a proposed transcript of reporter's notes, by either party, must be made within 3 months after service of notice of appeal.

History: 1963 Sup. Ct. Order, 17 W (2d) xviii.

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

274.117 Approval of transcript. Any party may procure a transcript of the reporter's notes. Unless (a) the parties stipulate otherwise, or (b) a partial transcript is approved as provided in s. 274.118, the transcript shall include all the testimony set forth by question and answer and the oral procedings had on the trial and the oral rulings and decisions of the court or referee not otherwise reduced to writing and filed with the clerk. A copy of the transcript shall be served on each adverse party who has appeared but, if there are adverse parties united in interest, then upon such as the trial judge designates, and the appellant shall give notice of such service to each of the other adverse parties united in interest. Within 10 days after service upon him, any party may serve proposed amendments upon all other parties. Thereupon, the trial judge may approve the transcript at any time and place, upon notice thereof served by any party on all the

interested parties, not less than 4 nor more than 20 days prior to such time. If no amendments are served within the time allowed, the proposed transcript may be approved by the judge on proof of its service as aforesaid and that no amendment has been served. If proposed amendments are served and accepted the proposed transcript as so amended may be approved by the judge, on proof made of its service and of the service of amendments and of their acceptance.

History: 1963 Sup. Ct. Order, 17 W (2d) xviii.

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]

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 entered no 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 Approval of partial transcript. (1) (a) A partial transcript may be approved if the appellant serves a statement of the questions he will raise on appeal, a list of the relevant exhibits and those parts of the transcript relevant to the questions stated. The questions shall be stated briefly in the form required by section (Rule) 251.34 (2).

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

(2) If a party adverse to the appellant desires a review of rulings adverse to him pursuant to s. 274.12 he shall serve on the parties adverse to him questions he will raise, such additional portions of the transcript and a list of additional exhibits he wishes to add to the appeal record and the provisions of sub. (1) shall then be followed. Such additions shall be paid for by the party raising the additional questions.

History: 1963 Sup. Ct. Order, 17 W (2d) xix.

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

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

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

History: 1963 Sup. Ct. Order, 17 W (2d) xix.

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 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.

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 (4), and their request for a review under sub. (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 Investment 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 (1), the supreme court will treat such cross appeals as motions to review, and will consider that (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, technically, 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.

On appeal from the order construing a will, the respondent could not by motion to review pursuant to (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 (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.

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

History: 1963 c. 429.

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 judg-

ments, 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; judg-**

ment 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.

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, grants or denies a motion for stay of proceeding under s. 262.19, 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.

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

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

History: Sup. Ct. Order, 15 W (2d) vii.

Where the trial court had no jurisdiction to issue an order for blood tests under the particular circumstances, the order was appealable under (3) as one deciding a question of jurisdiction. Limberg v. Limberg, 10 W (2d) 63, 102 NW (2d) 103.

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. Whether 274.11 (4), created by ch. 189, Laws of 1959, authorizes the supreme court, on an appeal from a judgment, to review an appealable post-judgment order 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, is not decided. 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.

An order permitting a person to intervene in a pending action is not an appealable order. Bartell Broadcasters v. Milwaukee Broadcasting Co. 13 W (2d) 165, 108 NW (2d) 129.

In an action to quiet title to a parcel of land, title to which was claimed both by plaintiffs and defendants, an order denying the application of persons not parties, and making no claim to the disputed area, to intervene in the action, was not an appealable order within (2), so far as the defendants were concerned. Brody v. Long, 13 W (2d) 288, 108 NW (2d) 662.

An order dismissing a complaint without prejudice, but with conditions for recommencement, was appealable under (1) as an

order affecting a substantial right, made in an action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken, the order in question having fully determined the action, although it left open the adjudication of the alleged cause of action. Russell v. Johnson, 14 W (2d) 406, 111 NW (2d) 193.

Neither an order denying a motion for change of venue nor an order denying a challenge to the jury array is an appealable order. Russell v. Johnson, 14 W (2d) 406, 111 NW (2d) 193.

An order denying a motion to strike a case from the calendar is not appealable. Such a motion is deemed to be equivalent to a motion for continuance, and orders refusing a continuance are not appealable, they being merely matters of practice and not affecting the merits. (3), so far as including in the list of appealable orders an order which "decides a question of jurisdiction," did not extend to an order, otherwise not appealable, entered by a particular judge after he had been named in an affidavit of prejudice. Alsmeyer v. Norden, 14 W (2d) 451, 111 NW (2d) 507.

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. An order denying a motion to dismiss an action is not made appealable by (3); and likewise, an order denying a motion for judgment on the pleadings is not appealable. Szuszka v. Milwaukee, 15 W (2d) 241, 112 NW (2d) 699.

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.

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

The restriction in (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 (1) and (2). First Wisconsin Nat. Bank v. Rische, 15 W (2d) 564, 113 NW (2d) 416.

In an action for foreclosure of a mechanic's lien, where the issue of value of labor was referred to referees and the trial court held that a sum for miscellaneous items was not included in the reference and ordered a trial as to such items, this order was not appealable as a final order or as one made in a special proceeding. Herman Andrae Electrical Co. v. Packard Plaza, 16 W (2d) 44, 113 NW (2d) 567.

Where a trial court granted a motion to reopen a judgment nearly 2 years after notice of entry, this was error, and the order was appealable under (3). Vande Voort v. Stern, 16 W (2d) 85, 114 NW (2d) 126.

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

Under (3), providing that an order which grants, refuses, modifies, or dissolves an injunction is appealable, finality of the order is not a requirement, and thereunder an appeal lies from an order refusing or dissolving a temporary injunction. [Holding in Nash v. Meggett, 89 W 486, to the contrary, overruled.] Bloomquist v. Better Business Bureau, 17 W (2d) 101, 115 NW (2d) 545.

Where the trial court concluded, after trial, that plaintiff had mistaken its remedy and entered an order (1) giving the plaintiff the option of amending its complaint within 30 days, but (2) directing that if the plaintiff did not exercise the option judgment be entered dismissing the complaint, and the plaintiff appealed from the order, the order was not an appealable order. State Department of Public Welfare v. LeMere, 17 W (2d) 240, 116 NW (2d) 173.

Where a preliminary hearing on criminal charges was held in county court, and the accused was bound over for trial to the circuit court, and thereafter moved the circuit court to dismiss the action on the ground of insufficiency of the evidence adduced at the preliminary hearing, the accused thereby submitted to the jurisdiction of the circuit court, and hence could no longer seek habeas corpus to test the sufficiency of the evidence at the preliminary examination, and the order denying such motion for dismissal was a nonappealable order. State ex rel. Offerdahl v. State, 17 W (2d) 334, 116 NW (2d) 809.

An order for judgment and an order denying a motion to review and modify the judgment are not appealable orders. Olson v. Augsberger, 18 W (2d) 197, 118 NW (2d) 194.

An order permitting the plaintiff husband in an action for a legal separation to amend his complaint to assert a cause of action for property division and that portion of such order fixing attorney fees are not appealable. Jezo v. Jezo, 19 W (2d) 78, 119 NW (2d) 471.

An order directing the entry of judgment for the plaintiffs on their submission of proof of damages, if any, is not appealable in that it does not prevent a judgment from which an appeal can be taken. Likewise as to an order which strikes an answer. Lentz v. Northwestern Nat. Casualty Co. 19 W (2d) 569, 120 NW (2d) 722.

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

See note to 274.09, citing Dehnart v. Waukesha Brewing Co. 21 W (2d) 583, 124 NW (2d) 664.

An order denying an application to bring additional parties into an action is not, as to one who is already a party, an appealable order, but he will have an opportunity to review it on appeal from the judgment in the case. State v. Chippewa Cable Co. 21 W (2d) 598, 124 NW (2d) 616.

A motion to strike a defense as sham or frivolous, based on affidavits which contradicted allegations in the defense attacked, was not in legal effect a demurrer, and an order granting it was not appealable within (3). State v. Chippewa Cable Co. 21 W (2d) 598, 124 NW (2d) 616.

An order requiring the plaintiff to submit to a continuance of a pretrial adverse examination and to answer responsively certain certified questions is one affecting a provisional remedy which is granted by statute and not by the court and is not appealable. Richie v. Badger State Mut. Casualty Co. 22 W (2d) 133, 125 NW (2d) 381.

An order enlarging the time for filing a summons and complaint in a divorce action is not appealable. Buenger v. Buenger, 22 W (2d) 451, 126 NW (2d) 21.

Where plaintiff was in default in replying to a counterclaim, but at trial was afforded 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, the defendant could not appeal from the order entered thereon, since if the plaintiff complied with the terms and also filed his reply, the case would then go to trial; if, on the other hand, the plaintiff did not do so, the defendants would be entitled to prepare a judgment from which an appeal could have been taken; hence the order in question was not one which "determines the action" and prevents a judgment from which an appeal might be taken under (1). Dombrowski v. Tomasino, 24 W (2d) 16, 127 NW (2d) 786.

Defendant bank demurred to a cross complaint on the ground of defect of parties in that it was named in the wrong capacity. The court sustained the demurrer and granted leave to amend. The bank contended that this in effect overruled the demurrer. Held, order not appealable. Travelers Ins. Co. v. Fidelity & Cas. Co. 24 W (2d) 38, 128 NW (2d) 71.

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

An order dismissing the complaint as against the insurer resulting from the trial court's sustaining the former's plea in

abatement was appealable, since it prevented a judgment from which an appeal might be taken. Newberger v. Pokrass, 27 W (2d) 405, 134 NW (2d) 495.

An order opening or vacating a judgment and permitting further proceedings, even though it affects a substantial right and is obviously made in an action after judgment, is not a final order and is nonappealable. Buckley v. Park Building Corp. 27 W (2d) 425, 134 NW (2d) 666.

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.

Neither an order denying a motion for change of venue nor an order denying a challenge to the jury array is reviewable under this section, 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 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.

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

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

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

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

History: 1964 Sup. Ct. Order, 25 W (2d) viii.

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.

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. Automobile 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 supreme court reversed the judgment. Erb v. Mutual Service Casualty Co. 20 W (2d) 530, 123 NW (2d) 493.

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.