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Appeal and Error - Decisions Reviewable - The Reviewable Orders Statute of North Dakota

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NOTES

APPEAL AND ERROR — DECISIONS REVIEWABLE — THE "REVIEWABLE ORDERS" STATUTE OF NORTH DAKOTA. — Few provisions of the North Dakota statutes are more complicated, confusing, antiquated and ambiguous than the sections dealing with the appealability of judicial orders. The problem of precisely which judicial orders are appealable has come before the North Dakota Supreme Court approximately one hundred times.[1] While a multitude of adjudications on specific points has resulted, no clear-cut interpretation of the principles underlying the statutes has emerged.

Even the name given the statute which deals with the subject is a misnomer. The statute is generally known as the "reviewable orders" statute [2] but it does not provide for the "reviewability" of orders but rather for their "appealability." [3] The rule which is law in North Dakota is that *any* order which may be prejudicial, when issued in the course of a judicial proceeding, may later be reviewed by the Supreme Court upon appeal from the judgment. The Revised Code of 1943 provides specifically that "upon an appeal from a judgment, the Supreme Court may review any intermediate order or determination of the court below which involves the merits and necessarily affects the judgment appearing upon the record. . . ." [4] The reviewable orders statute, when its function is considered, merely provides that orders may be appealed before the entry of judgment in certain instances;[5] it has nothing to do with the intrinsic power of the Supreme Court to consider the correctness of the order. Thus, the name of the statute is simply confusing and misleading, and fails to indicate the statute's true purpose.

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1. Every ruling of a court or judge made or entered in writing and not included within a judgment is an "order" in North Dakota. N.D. Rev. Code §28-2801 (1943).

2. N.D. Rev. Code §28-2702 (1943).

3. Larson v. Walker, 17 N.D. 247, 115 N.W. 838 (1908) (order denying motion to set aside a previous order made without notice striking the cause from the calendar and dismissing held not an appealable order).

4. N.D. Rev. Code §28-2728 (1943).

5. That an order, to be appealable, must be made so by the reviewable orders statute, see Milde v. Leigh, 74 N.D. 15, 24 N.W.2d 55 (1946) order overruling demurrer held non-appealable because no longer included within reviewable orders statute). *Contra*: Bonde v. Stern, 72 N.D. 476, 8 N.W.2d 457 (1943) (order overruling demurrer held appealable because appeal was brought prior to the 1943 codification). For discussion of the rule that the Supreme Court is without jurisdiction, when the order is non-appealable, *compare* Bowen v. Montana L. Ins. Co., 49 N.D. 140, 190 N.W. 314 (1922), *with* Johnson v. Great Northern Ry., 12 N.D. 420, 97 N.W. 546 (1903), where the Supreme Court expressed doubt as to the appealability of the order before it but decided the case on the merits because the issue was not squarely presented.

The reviewable orders statute itself provides that:

"The following orders when made by the court may be carried 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 or upon a summary application in an action after judgment;

3. An order which grants, refuses, continues, or modifies a provisional remedy, or grants, refuses, modifies, or dissolves an injunction or refuses to modify or dissolve an injunction, whether such injunction was issued in an action or special proceeding or pursuant to the provisions of section 35-2204, or which sets aside or dismisses a writ of attachment for irregularity;

4. An order which grants or refuses a new trial or which sustains a demurrer;

5. An order which involves the merits of the action or some part thereof;

6. An order for judgment on application therefor on account of the frivolousness of a demurrer, answer, or reply; or

7. An order made by the district court or judge thereof without notice is not appealable, but an order made by the district court after a hearing is had upon notice which vacates or refuses to set aside an order previously made without notice may be appealed to the supreme court when by the provisions of this chapter an appeal might have been taken from such order so made without notice, had the same been made upon notice." [6]

To understand more fully the reviewable orders statute and to clarify the confusion which has resulted from the ambiguity of its provisions, it is necessary to consider briefly the historical nature of the right of appeal. It is interesting to note that the right of appeal originally had no existence at common law in any action triable to a jury.[7] An appeal is basically a process of the civil law and first gained a foothold in the common law courts after the common law lawyers had been familiarized with it through its adoption in the courts of chancery.[8] The right of appeal, being dependent as it is upon legislative expression, exists in North Dakota only as the statutes permit.[9] The right is ordinarily gov-

6. N.D. Rev. Code §28-2702 (1943).

7. *See* Christianson v. Warehouse Association, 5 N.D. 438, 445, 67 N.W. 300, 302 (1896).

8. *Ibid.*

9. *See* Stimson v. Stimson, 30 N.D. 78, 80, 152 N.W. 132, 133 (1915); Also *see* Myrick v. McCabe, 5 N.D. 422, 423, 67 N..W 143, 144 (1896) (no cause may be reviewed by appeal unless some statute grants the right either expressly or by necessary implication).

erned by the statute in existence at the time the judgment or order from which an appeal is taken is rendered, and can be lost by legislative repeal before it has been exercised.[10] It therefore follows that only when an appeal is taken on grounds specified by statute does the Supreme Court have jurisdiction to decide the cause.[11] Clearly in this state an appeal from a judgment regularly entered can be taken within the statutory period.[12]

The statute quoted above is not peculiar to the law of this state. It is a provision of the Field Code and came into the law of North Dakota when the Field Code was adopted by the Territory of Dakota.[13] It first appeared in 1887, when it was enacted by the legislature, and was codified into the Compiled Laws of Dakota of 1887.[14] The first statute contained five subsections which survived without change [15] the successive compilations and revisions of 1891,[16] 1899,[17] and 1905.[18] The 1913 compilation contained a change in subsection 3, but retained the language of the remaining four subsections.[19] The 1943 Revised Code altered the form of the statute by transforming its five sections into seven, but the only change in the substance of the statute was a deletion of the provisions which allowed appeals from orders overruling demurrers.[20]

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10. *See* Jenson v. Frazer, 21 N.D. 267, 130 N.W. 832 (1911) (amendatory act held not to deprive district courts of jurisdiction over perfected appeals).

11. *E.g.*, N.D. Rev. Code §§28-2701; 28-2702 (1943; Also *see* Bowen v. Montana L. Ins. Co., 49 N.D. 140, 142, 190 N.W. 314, 315 (1922); also cases cited note 5 *supra*.

12. N.D. Rev. Code §28-2704 (1943) (an appeal may be taken from a judgment within six months after entry by default or after written notice of entry in cases where the adverse party appeared).

13. For similar statutes see Cal. Code Civ. Proc. Ann. §963 (Deering 1949); Wis. Stats. §274.33 (1949) (it is to be noted that the Wisconsin Statute is entitled "Appealable Orders").

14. Dak. Comp. Laws §5236 (1887).

15. Accuracy requires that it be pointed out that Comp. Laws of Dakota §5236 (2) (1887) contained the word "for" and read as follows: ". . . or upon a summary application in an action *for* judgment." This error was corrected in Garr v. Spaulding, 2 N.D. 414, 421, 51 N.W. 867, 869, (1892) wherein the court pointed out that the word "for" was a clerical or typographical error and should be read "after" instead of "for." (italics supplied).

16. N.D. Sess. L. (1891), C. 120, §24.

17. Rev. Codes of N.D. §5626 (1899).

18. Rev. Codes of N.D. §7225 (1905).

19. Comp. Laws of N.D. §7841 (1913) added the following to subsection 3: ". . . or refuses to modify or dissolve an injunction, whether such injunction was issued in an action or special proceeding or pursuant to the provisions of section 8074 (now 35-2204) of this code."

20. Milde v. Leigh, 74 N.D. 15, 24 N.W.2d 55 (1946) (wherein the court pointed out that the omission of orders overruling demurrers as appealable orders was intended to eliminate unnecessary appeals which do not finally settle the controversy.) For cases under the old statute see Bonde v. Stern, 72 N.D. 476, 8 N.W.2d 457 (1943) and Ripley v. McCutcheon, 48 N.D. 1130, 189 N.W. 104 (1922) where an order overruling a demurrer to one of several counterclaims was held an appealable order.

A. Orders Affecting "Substantial Rights".

A reference to subsection 1 of the reviewable orders statute will remind the reader that the statute provides that the Supreme Court may hear an appeal from "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." [21] Subsection 2 of the statute provides for the appealability of a "final order affecting a substantial right" in "special proceedings or upon a summary application in an action after judgment." [22]

These subsections—particularly subsection 1—have been particularly fruitful sources of litigation because of the vagueness of the term "substantial right." Further difficulty is encountered in determining what proceedings are considered by the court as "actions" [23] as distinguished from "special proceedings." [24]

The first appeal which arose under subsection 1 illustrates the nature of the problem. In *Persons v. Simons*,[25] it was held that an order, to be appealable under subsection 1, had to meet three requirements: (1) It had to affect a substantial right; (2) It had to, in effect, determine the action; (3) It had to prevent a judgment from which an appeal might be taken. The situation involved in the case was that the plaintiff had sued the defendant, the case had gone to the jury, and the jury had returned a general verdict and in addition had returned answers to certain interrogatories submitted to it by the trial court. The defendant, assuming that the findings of the jury were in his favor, moved for judgment on the findings. The motion was denied. Not unnaturally assuming that he had won the case, the plaintiff also thereupon moved for judgment. The court also denied this motion.

21. N.D. Rev. Code §28-2702 (1) (1943).

22. For one of the latest attempts to define the term "substantial right" see *In re* Egan's Estate, 52 N.W.2d 820, 826 (Nebr. 1952) where the Nebraska Court stated that a "substantial right" is an essentially legal right and not a mere technical one. Quaere: Whether this latest effort at clarification has an opposite effect by increasing the confusion.

23. N.D. Rev. Code §32-0101 (1943) classifies remedies as either actions or special proceedings. Section 32-0102 defines an action as ". . . an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense."

24. N.D. Rev. Code §32-0104 (1943) defines a special proceeding as ". . . any remedy other than an action." That the writs mandamus, prohibition, and certiorari are by statute designated as special proceedings see N.D. Rev. Code §32-3201 (1943); see also Gotchy v. North Dakota Workmen's Compensation Bureau, 49 N.D. 915, 194 N.W. 663 (1923) (an appeal from a decision of the Workmen's Compensation Bureau is considered a statutory proceeding rather than an action); Township of Noble v. Aasen, 10 N.D. 264, 86 N.W. 742 (1901) (contempt of court is not a special proceeding but is looked upon as a mere proceeding to vindicate the court's authority); *In re* Eaton, 7 N.D. 269, 74 N.W. 870 (1898) (disbarment is a special proceeding).

25. 1 N.D. 243, 46 N.W. 969 (1890); *cf.* Boulger v. Northern P. R. Co., 41 N.D. 316, 171 N.W. 632 (1918).

The plaintiff attempted to appeal from this order, citing subsection 1 of the reviewable orders statute.

The Supreme Court, although it did not attempt a definition of a "substantial right," agreed with the plaintiff that a substantial right had been infringed by the order of the district court. But it held that the order was not appealable because the other conditions of the statute had not been satisfied. The order did not in effect determine the action, nor did it prevent a judgment from which an appeal might be taken, because it was merely a refusal to enter judgment in the plaintiff's favor at the time the application was made and upon the particular grounds cited by the plaintiff. It was apparently the Supreme Court's view that the district court could still enter judgment for either party. The question of whether the action of the trial court was one which involved "the merits of the action" within the meaning of subsection 5 of the reviewable orders statute was not discussed except indirectly.

The ambiguity left by the decision in the *Persons* case as to just what an order "affecting a substantial right" consists of has been perpetuated in the subsequent cases. Attempts to define the term in subsequent decisions have all been made in the language used in the *Persons* case, which in reality contained no definition at all. Actually, it would appear that the term "substantial right" is indefinable. Few concepts in the realm of law have the elusive qualities possessed by the concept of a "right," as the discussions of many authorities indicate.[26]

The court, since the decision in the *Persons* case, has arrived at its results in cases involving subsection 1 of the statute by applying the three requirements therein enunciated in inverse order. What it has done in cases following the *Persons* decision has been to inquire first whether the order prevents a judgment from which an appeal might be taken, and whether it in effect determines the action. If the order satisfies these two require-

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26. For a famous analysis of the concept of "rights" see Beale, Conflict of Laws 64-86 (1935; see also Hohfeld, *Some Fundamental Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16 (1913). When the word "substantial" is applied as a qualifying adjective to the word "right," the elusive quality of the concept is substantially increased. A person has a legal right, pragmatically speaking, if the courts will impose upon some other person the duty of respecting that right. If a court will not grant protection to a claim of right, the result is simply an adjudication that there is no right to be protected. It is a famous maxim that "A right without a remedy is no right at all." Thus, the idea of an "insubstantial right" is a contradiction in terms. Any right that the courts will protect is a "substantial" right; any "insubstantial" right, which the courts will not recognize, is not a right at all. See also 19 Notre Dame Law. 384 (1944).

ments, it has been the position of the court that it also infringes a "substantial right" and is therefore appealable.[27]

An additional difficulty is encountered in the attempt to determine whether an order "determines the action."[28] For this reason an order of the trial court ordering the bringing in of an additional defendant at the request of the defendant, while appealable under subsection 5 of the statute as "involving the merits" was expressly held non-appealable under subsection 1 because of a failure to satisfy requirements (2) and (3) of the rule of the *Persons* case.[29]

Another illustration of a case where there was a failure to satisfy requirements (2) and (3) of the *Persons* rule is *West Branch Pants Co. v. Gordon.*[30] The defendant in that case had been ordered to appear before the judge for examination by the adverse party prior to trial. The defendant appealed from a denial of his motion to vacate the order. The court dismissed the appeal on the grounds that the order did not fall within any of the subdivisions of the reviewable orders statute. In referring to the order's failure to qualify under subsection 1, the court stated[31] that the order did not determine the action or prevent the rendition of a judgment from which an appeal could be taken.[32] The order was held to be merely a proceeding within and incidental to the main action. Nor did it involve the merits, within the meaning of subsection 5 of the statute.

In re *Weber,*[33] an early case, refused to allow an appeal under subsection 1 from an order dismissing an appeal from justice court for jurisdictional reasons. The majority of the court took the view that such an order of dismissal did not operate as a judgment, but that the order was merely authority for the entry of the judgment. The majority, furthermore, took the position

27. In Bowen v. Montana L. Ins. Co., 49 N.D. 140, 190 N.W. 314 (1922) the court was faced with the question of whether the denial of a motion for a directed verdict and for judgment notwithstandiing the disagreement of the jury was an appealable order. Following the precedent laid down in *Persons v. Simons* the court dismissed the appeal but not before saying that the order did not come within subsection 1 because it did not determine the action. See also Whitney v. Ritz, 24 N.D. 576, 140 N.W. 676 (1913) (where order held non-appealable because it did not prevent a judgment from which an appeal might have been taken). *But see* Bolton v. Donavan, 9 N.D. 575, 577, 84 N.W. 357, 358 (1900) where the court held the order affected a substantial right without satisfying conditions (2) and (3).

28. See note 24 *supra* for illustrations of proceedings which are not actions.

29. Bolton v. Donavan, 9 N.D. 575, 577, 84 N.W. 357, 358 (1900).

30. 51 N.D. 742, 200 N.W. 908 (1924).

31. *Id.* at 744, 200 N.W. at 909.

32. For the same reason an appeal from an order overruling an objection to the jurisdiction of the court as setting aside a special appearance is not an appealable order. See McKivergin v. Atwood, 63 N.D. 73, 246 N.W. 41 (1932).

33. 4 N.D. 119, 59 N.W. 523 (1894).

that a judgment was necessary to accomplish a dismissal of the appeal from justice court. A dissenting judge argued vigorously that because an attempted appeal which does not confer jurisdiction upon the appellate court is properly dismissed by motion that the order of dismissal took on such a cloak of finality that it became an appealable order.[34]

The difficulties which have been encountered in attempting to define a "substantial right" under subsection 1 have also been met with reference to subsection 2. Subsection 2 makes appealable final orders affecting a substantial right made in either special proceedings or in actions where a summary application has been made after the rendition of a judgment.

It has long been considered a settled rule in this state that an appeal will not lie from an order granting a motion for judgment notwithstanding the verdict, where the motion was seasonably made.[35] In *Olson v. Ottertail Power Co.*,[36] the defendant, at the close of the plaintiff's case in an action for negligence, moved for a directed verdict, and renewed the motion at the close of the entire case. After the verdict had been returned for the plaintiff the defendant moved for a stay of execution so that he could prepare a motion for judgment notwithstanding the verdict. By its order the trial court stayed all proceedings except the entry of judgment and thereafter ordered the entry of judgment on the verdict. The defendant's motion for judgment *non obstante verdicto* then came on for hearing and was granted. Plaintiff took an appeal from the order granting the motion. The Supreme Court had little difficulty finding that the order was a final one affecting a substantial right made upon summary application in an action after judgment, and consequently appealable.[37] It had been previously held in this state that a motion for judgment notwithstanding the verdict has the effect of reviewing only the court's rulings in denying a motion for directed verdict.[38] It

34. *Id.* at 131, 59 N.W. 527 (dissenting opinion).

35. Turner v. Crumpton, 25 N.D. 134, 141 N.W. 209 (1913) (the denial of a motion for judgment notwithstanding the verdict is not an appealable order where it is not accompanied to the Supreme Court with a denial of a motion for a new trial).

36. 65 N.D. 46, 256 N.W. 246 (1934).

37. The court upheld plaintiff's contention that the order was more than a mere order for judgment in that it set aside a previously entered judgment thereby assuming the character of an order affecting a substantial right.

38. Ennis v. Retail Merchants Asso. M. F. Ins. Co., 33 N.D. 20, 156 N.W. 234 (1916) the court pointed out that two pre-requisites are essential to justify a trial court to order judgment notwithstanding the verdict: (1) denial of a motion for a directed verdict and (2) the party who moved for the directed verdict must have been entitled to a directed verdict at the time of the motion). For the latest legislative change see N.D. Sess. Laws, c. 204 (1951).

would appear from the court's opinion in the *Ottertail Power* case that the better procedure would have been for the defendant to have moved for a new trial on the ground that the trial court had committed error in denying the motion for a directed verdict.[39]

The "special proceedings" referred to in subsection 2 are remedies of statutory origin,[40] and include any remedy not considered as an action,[41] *e.g.* proceedings in mandamus, certiorari, habeas corpus and the like. It has been held that pre-trial conferences are not special proceedings but are merely incidental to a remedy and serve merely to narrow issues, settle pleadings, and limit the number of witnesses.[42] Similarly, contempt proceedings, being of a criminal character with the objective of vindicating the court's authority, are not considered special proceedings.[43] It is apparently necessary for contempt proceedings to be remedial in character in order to qualify them as special proceedings.[44] An analogous situation was presented in the case of *Merchant v. Pielke.*[45] The plaintiff had secured a decree reforming a contract between himself and defendant, and included within the decree was a restraining order to protect the plaintiff's person and insure compliance with the decree. The plaintiff later secured an order for the defendant to show cause why he should not be adjudged in contempt for having violated the injunction. The defendant set up as a defense that he had appealed from the decree and filed a supersedeas bond. The question was whether the filing of the supersedeas bond had the effect of dissolving the injunctional portion of the decree. The trial court ruled that the filing of the bond dissolved the injunctional portion of the decree, and dismissed the order to show cause on the ground the defendant could not be held in contempt. The Supreme Court held this order appealable under subsection 2 as a final order affecting a substantial right made in a special proceeding. The contempt proceeding was treated as being a special proceeding because it was remedial in character and not of a criminal nature.

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39. 65 N.D. 46, 53, 256 N.W. 246, 249 (1934).
40. *See* Dow v. Lillie, 26 N.D. 512, 521, 144 N.W. 1082, 1084 (1914).
41. N.D. Rev. Code §32-0104 (1943).
42. LaPlante v. Implement Dealers Mut. F. Ins. Co., 73 N.D. 159, 12 N.W.2d 630 (1944).
43. North Dakota *ex rel.* Edwards v. Davis, 2 N.D. 461, 51 N.W. 942 (1892).
44. *Id.* at 468, 51 N.W. at 944 where the court intimates that should the contempt proceedings be brought to idemnify the injured antagonist that such a proceeding would be in the nature of a remedy and in an appropriate proceeding could be considered as a "special proceeding."
45. 9 N.D. 245, 83 N.W. 18 (1900).

In the score or more cases appealed under subsection 2 some light penetrates to partially illuminate the phrase "affecting a substantial right" as used in the statute. Illustrative of orders "affecting a substantial right upon summary application in an action after judgment" are *Rabinowitz v. Crabtree*[46] and *Mielcarek v. Riske*.[47] In the *Rabinowitz* case the defendant, through inadvertence, had failed to include on appeal an official transcript of the record. Assuming that no appeal was being taken the plaintiff issued execution. The defendant thereupon immediately made application for additional time within which to prepare a statement and to move for judgment notwithstanding the verdict. This motion was denied after a hearing and the defendant appealed from the order denying his motion. The order was held appealable under subsection 2 because it ended the defendant's remedies in the trial court. In *Mielcarek v. Riske* the court held that an order denying a motion to vacate an irregularly entered judgment appealable and substituted therefor a judgment in conformity with the verdict.[48]

B. Orders Affecting Provisional Remedies

Subsection 3 of the renewable orders statute concerns itself principally with orders affecting provisional remedies.[49] Unlike the preceding sections the instant subsection is sufficiently definite to accurately guide the practitioner in determining the appealability or non-appealability of an order in so far as it relates to provisional remedies. The clarity of the language used by the legislature in subsection 3 largely accounts for the dearth of adjudicated cases construing its terminology. However, in *Swiggum v. Valley Invest. Co.*,[50] the court was called upon to construe the term "modifies" as applied to provisional remedies. The court held that an order which fixed the amount of the

46. 27 N.D. 353, 145 N.W. 1055 (1914); see also St. P., M. & M. Ry. Co. v. Blakemore, 17 N.D. 67, 114 N.W. 730 (1908) (proper remedy from an order directing the clerk to retain money paid in satisfaction of a judgment until a determination could be made of thte taxes due was by appeal from the order rather than by writ of certiorari).

47. 74 N.D. 202, 21 N.W.2d 218 (1945).

48. That this is the proper procedure, see Olson v. Mattison and Storby, 16 N.D. 231, 112 N.W. 994 (1907). A motion to vacate a judgment which appeals to the discretion of the court and which raises questions in addition to errors of law prior to judgment, is an appealable order as soon as the trial court enters an order denying the motion to vacate; see Boyd v. Lemmon, 49 N.D. 64, 189 N.W. 681 (1922).

49. N.D. Rev. Code §32-0110 (1943): "The provisional remedies in civil actions are: (1) Claim and delivery of personal property; (2) Attachment; (3) Garnishment; (4) Receivers; and (5) Deposits in court." *See* Forman v. Healy; 11 N.D. 563, 566, 93 N.W. 866, (1903) (where the court also includes injunctions as a provisional remedy; but one available only to a plaintiff in a civil action upon a proper showing).

50. 73 N.D. 396, 15 N.W.2d 467 (1944).

bond in a garnishment at less than double the amount demanded in the complaint was an order which modified the provisional remedy of garnishment and therefor an appealable order under subsection 3.[51]

In *State v. Vick*,[52] a controversy involving the legal residence of a family carried upon the relief rolls of Burke County, a justice of the peace, upon the complaint of the overseer of the poor of Burke County, ordered an order for the removal of the Vick family to Barnes County. The Barnes County authorities caused an appeal to be taken from this order and for an order to stay the enforcement of the order pending the appeal. The plaintiff thereupon moved for dismissal of the appeal and for an order vacating the order staying the enforcement of the order. Both motions being denied, the plaintiff appealed upon the theory that the order was appealable under subsection 3 as being a refusal to dissolve an injunction. The Supreme Court held that the order was not appealable under any subsection of the reviewable orders statute and that although the order stayed the removal of the Vick family to Barnes County this did not operate to render the order an injunction. The order operated simply to maintain the status quo of the parties pending the final determination upon appeal.

C. Orders Granting or Refusing New Trials or Sustaining Demurrers

Orders which grant or refuse new trials or sustain demurrers are appealable under subsection 4 of the statute. This subsection was formerly the last appendage to subsection 3 and included, prior to the 1943 codification, orders which overruled demurrers as well.[53] The 1943 Revised Code omitted the rule that an order overruling a demurrer was appealable, in an effort to eliminate unnecessary appeals which did not finally determine the controversy.[54]

Most of the litigation which has centered about this subsection

51. In the second appeal of this case, 73 N.D. 422, 15 N.W.2d 862 (1944) the court held non-appealable an order denying a motion to consolidate two actions for trial. The order is an illustration of an interlocutory order clearly not appealable except by special statutory dispensation.

52. 62 N.D. 654, 244 N.W. 873 (1932).

53. Comp. Laws of N.D. §7841 (1913). For cases under the statute prior to the change see Bonde v. Stern, 72 N.D. 476, 8 N.W.2d 457 (1943) (order overruling a demurrer to complaint held appealable); Ripley v. McCutcheon, 48 N.D. 1130, 189 N.W. 104 (1922) (an order overruling a demurrer to one of several counterclaims was held to be an appealable order).

54. *See* Milde v. Leigh, 74 N.D. 15, 24 N.W.2d 55, 56 (1946) (omission made upon recommendation of the committee on procedure).

has arisen from the practice of making motions for judgment notwithstanding the verdict or in the alternative for a new trial. In *Turner v. Crumpton*,[55] a 1913 decision, an appeal was taken from an order denying a motion for judgment n.o.v before entry of the judgment. The court held that an order denying a motion for judgment notwithstanding the verdict is not in and of itself an appealable order, when it is not coupled with some other motion, such as a motion for a new trial, which will give the court jurisdiction. Apparently in response to the holding of this decision, the practice was followed in several later cases of making alternative motions for judgment n.o.v. or for a new trial. The "catch" to this line of procedure appeared in *Stratton v. Rosenquist*,[56] in which the court granted the new trial but denied the motion for judgment notwithstanding the verdict. The movant thereupon appealed to the Supreme Court from the order granting a new trial on the theory that the order was one expressly made appealable by statute. The court held, however, that since the appellant had himself asked for the new trial, he was in no position to claim injury at having received the relief he had asked for. This being so, the court would not consider the merits of the decision denying the motion for judgment notwithstanding the verdict. "If a party does not want a new trial," the court said, "he ought not to ask for it." [57] The correct procedure under this decision would appear to have been to make the motion for judgment notwithstanding the verdict, and then file a motion for new trial if the motion for judgment was denied.[58]

The rule of *Stratton v. Rosenquist* did not survive for long. Four years after its decision the legislature enacted a statute providing that where a motion for a new trial and a motion for judgment notwithstanding the verdict were coupled in the alternative, the Supreme Court might review the order denying the motion for judgment notwithstanding the verdict even though the motion for new trial had been granted.[59] In *Welch Mfg. Co. v. Herbst Department Store*,[60] the issue arose again. The court

55. 25 N.D. 134, 141 N.W. 209 (1913).
56. 37 N.D. 116, 163 N.W. 723 (1917); *accord*, Strong v. Nelson, 43 N.D. 326, 174 N.W. 869 (1919).
57. 37 N.D. 116, 121, 163 N.W. 723, 724. That the Supreme Court of Wisconsin used the same line of reasoning *see* Larson v. Hanson, 207 Wis. 485, 242 N.W. 184, 185 (1932).
58. *Ibid.* A motion for judgment notwithstanding the verdict, in effect, reviews only the courts' ruling in denying a motion for a directed verdict. *See* Ennis v. Retail Merchants Asso. M. F. Ins. Co., 33 N.D. 20, 36, 156 N.W. 234, 238 (1916).
59. C. 133, N.D. Sess. Laws (1921); now N.D. Rev. Code §28-1511 (1943) as amended by C. 204, N.D. Sess. Laws (1951).
60. 53 N.D. 42, 204 N.W. 849 (1925).

stated that it was "satisfied" with the rule of *Stratton v. Rosenquist* but bowed to the obvious intention of the legislature and reviewed the decision of the trial court on both matters. The 1951 session of the legislature re-enacted the rule that both orders were reviewable on appeal, but strengthened it by providing that the court "shall" review both orders.[61] The previous section had stated that the court "may" review them.[62]

One additional point concerning the motion for judgment notwithstanding the verdict should be noted. The reader will recall that in the case of *Turner v. Crumpton, supra.*, the court held that a motion for judgment notwithstanding the verdict was not appealable when made *before* the entry of judgment. But *after* the judgment has been entered, a motion for judgment notwithstanding the verdict is appealable as a "final order affecting a substantial right . . . upon a summary application in an action after judgment" as well as being an order which "involves the merits of the action." [63]

D. Orders Which Involve "The Merits of the Action"

Certainly the most broadly phrased subsection of the reviewable orders statute is the clause which provides than an appeal may be taken from "an order which involves the merits of the action or some part thereof." Because of its broadness the language of the section is not intrinsically helpful.

It is however clear from the decisions of the court that an order which "involves the merits" is not the same as one which affects a "substantial right.[64] The requirements set out by the court in *Persons v. Simons, supra,* with respect to orders "affecting a substantial right" are not applicable to orders which involve the "merits of the action." [65] But simply to state that an order which affects a substantial right is different from one which "involves the merits" defines neither term, does not aid analysis, and solves nothing.

An examination of the early cases, however, will indicate the guiding principle underlying the definition of orders involving the merits of an action. Probably the earliest and certainly one

61. C. 204, §2, N.D. Sess. Laws (1951).
62. N.D. Rev. Code §28-1511 (1943).
63. Olson v. Ottertail Power Co., 65 N.D. 46, 256 N.W. 246 (1934).
64. *See* Schutt v. Federal Land Bank, 71 N.D. 640, 642, 3 N.W.2d 417 (1942); Hauser v. Security Credit Co., 66 N.D. 399, 406, 266 N.W. 104, 107 (1936) (where the court pointed out that the phrase "involves the merits" has been construed to embrace orders which pass upon the substantial legal rights of the complainant whether such rights do or do not relate directly to the subject matter in controversy or to the cause of action).
65. See cases cited note 64 *supra.*

of the most illuminating discussions is found in the case of *St. John v. West*,[66] in a decision written by Mr. Justice Selden of New York in 1850. The court had before it an action of ejectment. The plaintiffs proposed to add the names of several additional persons as parties plaintiff. The trial court denied the motion, and the plaintiff appealed. The question before the court was whether the order involved the merits of the case and could thus be taken up on appeal. To settle this question, it was necessary for Justice Selden to define the term "involves the merits."

Justice Selden had this to say:

> "To make the provision in question . . . accord at all with those notions which long experience and the practice of courts have heretofore settled as just and proper, it is obvious that some signification must be given to one or the other of the terms referred to, more or less variant from its most common and natural import. The word 'merits', as a legal term, having acquired no precise technical meaning, clearly admits of some latitude of interpretation. Let it be understood, therefore, in the section of the statute under review, as meaning the strict legal rights of the parties, as contradistinguished from those mere questions of practice which every court regulates for itself, and from all matters which depend upon the discretion or favor of the court, and we have not only a rational but an exact and well defined construction of the provision in question. It would then give an appeal from every order which involved, that is, passed upon and determined, any positive legal right of either party, and deny it in all other cases." [67]

This is apparently the construction of the statute which is law in North Dakota. In the first place, the decision in *St. John v. West, supra,* was handed down prior to the adoption of the statute in this state, and the construction placed upon it may therefore be regarded as having been incorporated into it by implication when the legislature passed the statute.[68] Secondly, although the court refused, in *Ellingson v. Northwestern Jobbers Credit Bureau*,[69] to adopt this construction when it was quoted to it from a Minnesota decision which mirrors almost to the word the analysis of Justice Selden,[70] other cases have apparently done so.[71]

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66. 4 How. Pr. R. 329 (N.Y. 1850).
67. *Id.* at 332.
68. 2 Sutherland, Statutory Construction §5209 (3rd ed. 1943).
69. 58 N.D. 754, 758, 227 N.W. 360 (1929).
70. *See* Plano Mfg. Co. v. Kaufert, 86 Minn. 13, 15, 89 N.W. 1124, 1125 (1902).
71. *See* Hauser v. Security Credit Co., 66 N.D. 399, 406, 266 N.W. 104, 107 (1936) and cases therein cited to the effect that an order "involving the merits" within the meaning of the statute must decide some question involving some strictly legal right as distinguished from a mere question of practice.

In short, the statute impliedly contains a distinction between those orders which affect a *substantive* right of the parties to an action, and those orders which affect a right which is merely *procedural* in character. That this is true becomes apparent upon a consideration of the North Dakota precedents.

Thus, for example, the North Dakota court has held non-appealable as not involving the "merits of the action" orders which deny a trial at law by jury,[72] orders overruling an objection to the court's jurisdiction and an attempted special appearance,[73] denying a motion to strike an amended complaint from the files and for judgment on the pleadings,[74] refusing to vacate a restraining order pending an appeal,[75] denying a motion to strike portions of a counterclaim,[76] remanding a case from the district to the county court for the purpose of admitting new evidence,[77] denying a motion to dismiss,[78] denying a motion to vacate an order advancing a cause on the calendar,[79] denying a motion for continuance,[80] requiring the defendant to appear for a pre-trial examination,[81] to show cause why a divorce decree should not be vacated and denying a motion to quash,[82] requiring a pleader to make his pleadings more definite and certain,[83] denying a motion to consolidate two actions for trial,[84] granting a motion to amend a complaint,[85] and refusing to dismiss an appeal from a county court.[86]

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72. Schutt v. Federal Land Bank, 71 N.D. 640, 3 N.W.2d 417 (1942); Gulbro v. Roberts, 43 N.D. 455, 171 N.W. 616 (1919) (order denying a jury trial until after the issues of the counterclaim had been tried to the court held not appealable).

73. McKivergin v. Atwood, 63 N.D. 73, 246 N.W. 41 (1932); Bennett v. Bennett, 54 N.D. 86, 208 N.W. 846 (1926).

74. Torgerson v. Minneapolis, St. P. & S. Ste. M. R. Co., 51 N.D. 745, 200 N.W. 1013 (1924).

75. State *ex rel.* Lemke v. District Court, 49 N.D. 27, 186 N.W. 381 (1921).

76. Ferguson v. Jenson, 76 N.D. 647, 38 N.W.2d 560 (1949).

77. *Re* Glavkee, 75 N.D. 118, 25 N.W.2d 925 (1947).

78. Union Brokerage Co. v. Jenson, 74 N.D. 154, 20 N.W.2d 343 (1945); Burdick v. Mann, 59 N.D. 611, 231 N.W. 545 (1930) (appeal taken from several orders including the denial of a motion to dismiss); Security Nat. Bank v. Bothne, 56 N.D. 269, 217 N.W. 148 (1927) (order denying motion to dismiss for lack of jurisdiction); Strecker v. Railson, 19 N.D. 677, 125 N.W. 560 (1910) (order denying defendant's motion for dismissal and granting plaintiff's motion to amend his complaint both held non-appealable).

79. Burdick v. Mann, 59 N.D. 611, 231 N.W. 545 (1930).

80. *Ibid.*

81. West Branch Pants Co. v. Gordon, *supra* note 30.

82. Schillerstrom v. Schillerstrom, 74 N.D. 761, 24 N.W.2d 734 (1946).

83. First Nat. Bank v. Farm Mortg. Loan & T. Co., 56 N.D. 7, 215 N.W. 877 (1927); *See* Johnson v. Great Northern Ry. Co., 12 N.D. 420, 422, 97 N.W. 546, (1903) (wherein the court decided the appeal on its merits but intimated by way of dictum that should the case come squarely before it they would hold the order non-appealable).

84. Swiggum v. Valley Invest. Co., 73 N.D. 422, 15 N.W.2d 862 (1944) (second appeal).

85. Strecker v. Railson, 19 N.D. 677, 125 N.W. 560 (1910).

86. *In re* Bratcher, 74 N.D. 12, 24 N.W.2d 54 (1946).

Consideration of these precedents will reveal, it is believed, that the common thread tying them together is the fact that all appear to have involved questions which were basically procedural in character. A few of the decisions illustrate the point that the distinction between orders affecting a procedural right and those affecting a substantive right is principally one of degree, and difficult to make in close cases. For example, the familiar rule that one cannot appeal from an order for judgment but only from the entry of the judgment itself [87] presents a rather close issue under the subsection in question. Certainly a strong argument could be made for the proposition that an order for judgment is an order which in effect determines the action. It is the last formal order which the trial judge himself makes. Thus, there would be a certain amount of logic to the position that the order is one which involves the merits of the action, a point borne out by the fact that an order for judgment *is* considered appealable when it is made in a special proceeding.[88] The rule that one cannot appeal from an order for judgment simply reflects the court's judgment that the order is basically a procedural step. Of course, if one wants to appeal before the entry of judgment, one can make a motion for a new trial, and appeal from the decision on that.[89]

Another illustration of a case presenting a close question as to whether the order affected a substantive or procedural right is *Ellingson v. Northwestern Jobbers Credit Bureau.*[90] In that case the court held non-appealable an order denying a motion to vacate the service of summons on a foreign corporation, where the motion was made on the ground that the person on whom service of process was made was not an agent of the foreign corporation, and therefore service of process had not been made in the state of North Dakota. If the decision denying the motion is considered as an adjudication that the defendant corporation

87. *See e.g., In re* Eaton, 7 N.D. 269, 273, 74 N.W. 870, 871 (1898) (an order for judgment is non-appealable but is reviewable on appeal from the judgment).

88. Oliver v. Wilson, 8 N.D. 590, 80 N.W. 757 (1899) (order granting writ of mandamus).

89. Orders granting or denying new trials are appealable under the express provisions of the statute. N.D. Rev. Code §28-2702 (4) (1943). The practice appears to be to join a motion for a new trial in the alternative with a motion for judgment n.o.v. So far as the motion for judgment n.o.v. is concerned, the making of a motion for directed verdict prior to the submission of the case to the jury is a condition precedent, which, if not met, results in loss of the right to make the motion. See, *e.g.* Lueck v. State, 70 N.D. 604, 605, 296 N.W. 917 (1941); Gross v. Miller, 51 N.D. 755, 200 N.W. 1012 (1924) (motion for directed verdict is a necessary preliminary to motion for judgment n.o.v.).

90. 58 N.D. 754, 227 N.W. 360 (1929) *affirming* Security Nat. Bank v. Bothne, 56 N.D. 269, 217 N.W. 148 (1927).

was present within the state of North Dakota, there is some room for argument that the order affected a substantive right. But the logical answer would appear to be that requiring a person to participate in a legal proceeding has never been held to be, in and of itself, an infringement of any substantive right.

Orders which do involve the merits of an action, and which are therefore appealable, have been held to include orders vacating findings of fact and relieving the parties from the effects of certain stipulations,[91] orders setting aside stipulations for dismissal of the action[92] and orders modifying a dismissal with prejudice.[93] A survey of the cases indicates that the court has decided more cases in favor of non-appealability than it has in favor of appealability under this statute. That this should be true is not surprising. There are sound reasons of good judgment indicating that the court should go slow in allowing appeals from an action prior to the determination of all, instead of merely one or two, of the issues involved in it. In *Whitney v. Ritz*[94] an action was brought in justice court for damages for the burning of grass on the plaintiff's land. The defendant moved to reverse and set aside the judgment for the plaintiff in the justice court on the appeal to the district court, contending that the pleadings below had been oral in violation of statute and that consequently the justice court was without jurisdiction to hear the action for injury to the freehold. The court held that the defendant could not appeal from the denial of the order, and that he should have waited for the entry of a judgment in the district court. The court stated, in the course of its opinion, that:

> "The purpose and wisdom of this provision are apparent. It prevents multiplicity of appeals in the same action, and enables the party to secure a determination upon questions arising in the progress of litigation, prior to final judgment, on an appeal from the judgment. Otherwise all proceedings in an action might be stayed pending the determination of separate appeals from each order made during the life of the case, and a final judgment thereby prevented or postponed for years."[95]

One further word may be added concerning the "involving the merits" section of the statute. It would appear that from time to time the court has held orders appealable which did not in-

91. Northern Pacific R. Co. v. Barlow, 20 N.D. 197, 126 N.W. 233 (1910).
92. Lilly v. Haynes Co-op Coal Mining Co., 48 N.D. 937, 188 N.W. 38 (1922).
93. Hauser v. Security Credit Co., 66 N.D. 399, 266 N.W. 104 (1936).
94. 24 N.D. 576, 140 N.W. 676 (1913).
95. *Id.* at 579, 140 N.W. 677.

fringe substantive rights, on the basis of the "involving the merits" section. For instance, it has been held that an order bringing in an additional party defendant at the request of the defendant was appealable as being one which involved the merits of the action.[96] It has similarly been held that an order directing the clerk of court to retain money paid to a litigant in satisfaction of a judgment in a condemnation proceeding brought by a railroad until the hearing of a claim by a county against the litigant for unpaid taxes involved the merits and was appealable,[97] as is an order granting or denying a change of venue.[98]

The authority on this point, however, is scanty and discussion of reasons for the holding is generally lacking. There appears to be no good reason why an order bringing in an additional defendant should be held to involve the merits of the action and to give an immediate right of appeal. The code provides that "parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just," [99] thus indicating that the addition or dropping of parties is considered a relatively routine operation. It is difficult to see why such a step should carry with it the consequence of a suspension of the entire proceedings while the slow process of an appeal is being consummated.

With respect to an order granting or denying a change of venue the situation is a little different. A change of venue is generally requested on the grounds that a fair trial cannot be had in the district where suit is brought. This is a matter with which the Supreme Court is concerned by virtue of the duty incumbent upon it, under its general power to supervise proceedings in lower courts, to see to it that proceedings in the district courts are conducted justly and fairly. In the exercise of this superintending jurisdiction, for instance, the court has gone so far as to review orders concerning change of venue in criminal cases, where an appeal on the part of the state is impossible, by means of the writ of certiorari.[100] But while the rule that a

96. Bolton v. Donavan, 9 N.D. 575, 84 N.W. 357 (1900).

97. St. P., M. & M. Ry. Co. v. Blakemore 17 N.D. 67, 114 N.W. 730 (1908).

98. Robertson Lumber Co. v. Jones, 13 N.D. 112, 99 N.W. 1082 (1904) (order granting a change of venue in a civil action held appealable); White v. Chicago, M. & St. P. R. Co., 5 Dak. 508, 41 N.W. 730 (1889). (order denying a change of venue).

99. N.D. Rev. Code §28-0211 (1943).

100. State v. Winchester, 19 N.D. 756, 122 N.W. 1111 (1909); *accord,* State *ex rel.* Fletcher v. District Court, 213 Iowa 822, 238 N.W. 290 (1931). For a discussion of the superintending jurisdiction of the North Dakota Supreme Court see Crum, *The Writ of Certiorari In North Dakota,* 27 N.Dak.L.Rev. 271 (1951).

change of venue is appealable on direct appeal from the order possesses some justification, it is submitted that there is none for a rule which permits an appeal on a question which is both basically procedural and which does not carry with it the danger of an unfair trial. In cases involving other than a change of venue it is believed that an order should be appealable as involving the merits only when it affects a substantive right.

E. Subsection 6 of the Statute

Subsection 6 of the reviewable orders statute provides that an order for judgment on application therefor on account of the frivolousness of a demurrer, answer, or reply is appealable. The inclusion of subsection 6 within the present "reviewable orders" statute raises two questions: (1) Why should it exist at all? (2) Since it does exist, should the rule that one cannot appeal from an order for judgment in other situations be abolished?

With respect to question (1), no satisfactory answer is to be found. An order for judgment is not appealable in any other situation,[101] and there appears to be no sound reason for making an exception in this particular case. Possibly the exception exists to permit an unsuccessful litigant to vent his injured pride by immediately taking the case before a higher tribunal, but no other justification for it comes to mind or is to be found in the cases. It is submitted that the provision should be repealed.

So far as question (2) is concerned, a slightly more important problem is involved. The rule that one cannot appeal from an order for judgment, but rather only from the entrance of the judgment itself, would appear open to at least some criticism on the ground that it simply presents a trap for the unwary.[102] If it is permissible to appeal from an order for judgment in the specific case where an order for judgment is entered on account of the frivolousness of an adversary's pleading, why then is it not permissible to do so in all cases? The fact that this means an appeal may be taken before the judgment itself is entered is really beside the point; as has been demonstrated earlier, if one wishes to appeal before the entry of judgment, he may move for a new trial and appeal from the order denying it.

The only reason which might be suggested for denying per-

101. Except of course in a special proceeding.

102. The N.D. Rev. Code §28-0901 (1943) provides that "A judgment is the final determination of the rights of the parties in an action." Also *see* Universal Motors v. Coman, 73 N.D. 337, 338, 15 N.W.2d 73, (1944) wherein the court states that strictly speaking in North Dakota there are no judgments other than final judgments.

mission to appeal from an order for judgment is that it is possible that the appeal will be taken before the grounds have been specifically presented to the lower court, *e.g.* by motion for a new trial or for judgment notwithstanding the verdict. But the code provides now that "no motion for a new trial shall be necessary to obtain, on appeal, a review of any questions of law or of the sufficiency of the evidence unless before the taking of the appeal the judge shall notify counsel of the party intending to take the appeal that he desires such motion to be made." [103] This would seem to indicate that even in the case of the appeal from a judgment, no clear-cut specifications of the issues to be raised on appeal need be presented to the lower court beforehand. Logically there is no reason why the same policy should not be followed if an order for judgment is made appealable.

F. Subsection 7 of the Statute

Subsection 7 of the statute specifically provides that orders made by the court without notice are not appealable.[104] But an order made by the court, after hearing has been had upon notice, which vacates or refuses to set aside a previously entered order made without notice may be appealed if the previously entered order would have been appealable if it had been made after notice. This subsection requires that the district court be given an opportunity, upon a noticed hearing, to reconsider orders which it has made without notice as a condition precedent to an appeal.[105] Subsection 7 of the present reviewable orders statute formerly was subsection 5.[106] The original subsection provided that an appeal would lie from "orders made by the district 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 granted or denied by the district court in the first instance. . . ." [107] The language of this subsection was modified in the Revised Codes of 1899 and has since remained in its present form except for an immaterial change in tense in the 1943 codification.[108]

The question of whether an order was one made by the court

103. N.D. Rev. Code §28-2727 (1943).
104. Universal Motors v. Coman, 73 N.D. 337, 15 N.W.2d 73 (1944).
105. *Id.* at 338, 15 N.W.2d 73.
106. *E.g.*, N.D. Comp. Laws §7841 (5) (1913); N.D. Rev. Codes §7225 (5) (1905); N.D. Rev. Codes §5626 (5) (1899).
107. N.D. Comp. Laws §5236 (1887); C. 120, §24 N.D. Sess. Laws (1891).
108. Where formerly the statute read ". . . are not appealable," the 1943 codification of the N.D. Rev. Code §28-2702 (7) (1943) now reads ". . . is not appealable."

or merely a "chambers" order was involved in the case of *Insurance Co. v. Weber*.[109] The action was one for unlawful detainer and originated in justice court. A judgment for the plaintiff was entered and the defendant appealed on both questions of fact and law and demanded a trial de novo in the district court. The plaintiff obtained an order requiring the defendant to appear before the district judge at "chambers" and show cause why the action was appealable. A hearing was then held and an order made that the appeal be dismissed. The order was signed with the judge's name, followed by the words: "Judge District Court, Richland County, N.D." After the time for appeal from this order had expired, the defendant moved that the district court vacate the order. This motion was denied, after hearing, and the order denying the motion was signed: "By the Court: W. S. Lauder, Judge District Court, Richland County, N.D." The defendant appealed from this order, arguing that the first order dismissing the appeal from justice court was a mere "chambers" order because the words "By the court" did not precede the judge's signature. The Supreme Court held the omission of the quoted words immaterial, and said that the appeal from the order denying the motion to vacate the first order failed because it was basically an attempt to extend the statutory period of appeal from the first order.

In the later case of *Larson v. Walker*,[110] an appeal was taken from an order striking the cause from the calendar and for the dismissal of the action instead of from the judgment of dismissal. The appellant contended, when he awoke to his error, that the order was appealable because the order was one which denied a motion to set aside a previous order made without notice.[111] The response from the court was that since the original order made without notice was non-appealable, no right of appeal accrued when the court thereafter on a hearing refused to set aside the original order. This was because whether such an order was made with or without notice, it was non-appealable.

G. Summary and Proposal

Many problems must be faced by the practitioner before the question of what orders are appealable can be satisfactorily

109. 2 N.D. 239, 50 N.W. 703 (1891).

110. 17 N.D. 247, 115 N.W. 838 (1908); For another case construing this subsection see Olson v. Mattison and Storby, 16 N.D. 231, 112 N.W. 994 (1907).

111. This again illustrates the technicality of the rule that one cannot appeal from an order for judgment.

solved. From the very nature of the present reviewable orders statute and the cases construing its subsections it is clear that judicial interpretations have not wholly dispelled the ambiguity and confusion which surround such terms as "affecting a substantial right" and "involves the merits of the action." The suggestion that the ambiguity and confusion can be dispelled only by legislation is made hesitatingly but the lack of other alternatives forces such a conclusion. That law is not an exact science is forcefully evident from the numerous adjudications under the reviewable orders statute.

Accordingly, there is herewith presented a tentative redraft of the present statute. No statute is ever perfect, of course, and perfection is not claimed for this one. But it is believed that the following sample statute is at least an improvement over the present statute and that it presents a basis of discussion. Comments to each section follow in footnotes.

"WHEN APPEAL PERMISSIBLE. An appeal may be taken to the supreme court from the district court or from a county court of increased jurisdiction when the district court or county court of increased jurisdiction [112] has entered: [113]

1. A judgment or an order for judgment in any action or special proceedings; [114]

2. An order which in effect determines the action and prevents a judgment from which an appeal might be taken;[115]

3. A final order affecting a substantial right in a special proceeding or upon a summary application in an action after judgment; [116]

4. An order which grants, refuses, continues, modifies, or dissolves a provisional remedy or injunction, or refuses to modify or dissolve an injunction, whether such injunction

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112. Appeals from county courts of increased jurisdiction are regulated by the same procedure as district courts. See N.D. Rev. Code §27-0821 (1943).

113. The heading of the Statute, "When Appeal Permissible," is revised for clarity, thus stating the function of the section more explicitly. The introductory clause specifies from which courts an appeal may be taken to the supreme court, including the county courts of increased jurisdiction. This eliminates the need for a cross reference from section 27-0821, which provides that the rules governing the appeal from the county courts of increased jurisdiction are the same as those governing appeals from district courts.

114. This subsection does not appear in the present reviewable orders statute and proposes no significant change. The present rule that orders for judgment are not appealable appears unnecessarily technical and this section accordingly alters it.

115. This section would modify subsection 1 of the present statute by deleting the words "affecting a substantial right made in any action." It is believed that the rephrasing would clarify the law because no independent definition of "substantial right" has ever been made in terms which would give the phrase any real meaning.

116. This proposed subsection preserves subsection 2 of the present statute unchanged. The phrase "substantial right" was here retained because the rule of Persons v. Simons is not applicable to this subsection and consequently the phrase possesses an independent validity which it lacks in the present subsection 1 of the statute.

was issued in an action or special proceeding or pursuant to the provisions of section 35-2204; [117]

5. An order which sets aside or dismisses a writ of attachment for irregularity; [118]

6. An order which grants a new trial or sustains a demurrer; [119]

7. An order which denies a new trial when such order is entered after the order for judgment; [120]

8. An order which involves the merits of the action or some part thereof; [121]

9. An order made by the district court or county court of increased jurisdiction is not appealable if made without notice; but an order made by such court, after a hearing upon notice, ruling upon the correctness of the original order may be appealed to the supreme court when by the provisions of this section an appeal might have been taken from the original order had it been made upon notice." [122]

LAVERN C. NEFF

INTERNAL REVENUE — DEDUCTIONS AND CREDITS — DEPLETION ALLOWANCES WITH RESPECT TO OIL AND GAS INTERESTS. — The underground reserves of oil and gas are wasting assets which are consumed and exhausted by drilling operations.[1] Therefore, when money is invested in the production of oil and gas, it is invested in the sum total of the oil which is discovered or purchased and the sale of this product reduces the investment. To make an allowance for the return of such capital, the income tax law permits the owner of an economic interest in oil and gas in place to take a depletion allowance when he reports his

117. This proposed subsection merely rephrases for clarity and shortness subsection 3 of the present statute.

118. Attachment is a provisional remedy and thus is rightfully included within subsection 4 above. However, because the language of this subsection has always been in the statute it is here placed in a separate subsection merely to simplify the language of the proposed statute.

119. This retains the rule of the present reviewable orders statute.

120. This modifies the rule of the present statute by making an order denying a new trial appealable only when entered after the order for judgment. The change is believed desirable because in all but the most exceptional cases, the appeal should be from the order or action of the court which terminates the case, and for the reason that appeals should be discouraged while the trial is in progress.

121. The language of the present statute has hesitantly been retained here. It would be more accurate and more logical to say that "An order which effects a substantive right" is appealable. But the court has not always confined appeals under this subsection to cases where purely substantive rights are involved. This could be solved perhaps by using the language here suggested and then making orders granting or denying a change of venue separately appealable. This would be declaratory of the existing case law, for which a substantial justification exists.

122. This subsection preserves unchanged the language of the present statute but has been rephrased to achieve clarity.

1. *See* Anderson v. Helvering, 310 U. S. 404, 407 (1940).