What's So Special About Special Proceedings? Making Sense of Nebraska's Final Order Statute

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TABLE OF CONTENTS

I. Introduction ............................................. 240
II. Current Definitions of the Key Statutory Terms ........ 243
III. The New York Code of Civil Procedure ................. 254
    A. The Distinction Between Actions and Special
       Proceedings .................................... 256
    B. Appellate Jurisdiction of the New York Court of
       Appeals ........................................ 263
IV. Go West, Young Code .................................. 273
    A. Ohio .............................................. 273
    B. Nebraska ........................................ 277
V. Refocusing the Law of Special Proceedings ............... 279
    A. Procedure-Based Special Proceedings .............. 285
       2. Multifaceted Special Proceedings ............... 287
    B. Policy-Based Special Proceedings .................. 297
       1. The Old Wine: Special Proceedings ............... 297
       2. The New Bottles: Collateral Orders ............... 306
       3. To Appeal or Not to Appeal, That is the
          Question ...................................... 309
    C. Orders Made on Summary Applications ............... 312
VI. Bidding Farewell to Orders That Prevent Judgments ... 315
    A. The Contemporary Uses ............................ 316
       1. Reversals and Remands ......................... 316
       2. Multiple Claim/Multiple Party Litigation ........ 319
    B. The Historical Meaning ........................... 324
    C. The Farewell ..................................... 333
VII. Conclusion ............................................. 333

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I. INTRODUCTION

As a general rule, an appeal can only be taken from a final judgment. The final judgment rule in Nebraska is grounded in sections 25-1911 and 25-2728. Section 25-1911 allows appeals from the judgments and final orders of the district courts, while section 25-2728 allows appeals from the judgments and final orders of county courts. A final judgment or order is one that ends the case. As the Nebraska Supreme Court has often said, a final order "dispose[s] of the whole merits of the case. When no further action of the court is required to dispose of a pending cause, the order is final. If the cause is retained for further action, the order is interlocutory."²

But not all "final orders" are actually final orders. Some are interlocutory. For example, orders that are made in a special proceeding and affect a substantial right are final, appealable orders regardless of whether they dispose of the whole merits of the case.³ They are final, appealable orders because section 25-1902 classifies them as such. Section 25-1902 provides:

An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified, or reversed . . . .⁴

It is by no means clear, however, what constitutes a special proceeding and what constitutes a substantial right. The case law is a confusing collection of slogans and contradictions. The cases say that special proceedings are civil⁵—yet there are special proceedings that are criminal.⁶ The cases say that special proceedings are statutory⁷—
yet there are special proceedings that are nonstatutory. The cases say that special proceedings are not encompassed in chapter 25 of the Nebraska Revised Statutes—yet there are special proceedings that are encompassed in chapter 25. The cases say that orders affect a substantial right when they diminish a defense—yet there are orders that reject a defense but do not affect a substantial right.

This confusion is not good for anyone. It makes it hard for judges to resolve jurisdictional challenges to appeals. It also makes it hard for lawyers to know when to appeal, which is something that lawyers need to know. If an order is a final order within the meaning of section 25-1902, then one cannot wait until the end of the case to appeal. The appeal must be filed within 30 days after the entry of the order.

7. See cases cited supra note 5.
8. See Jarrett v. Eichler, 244 Neb. 310, 314, 506 N.W.2d 682, 685 (1993) (holding that an order granting motion to vacate dismissal pursuant to the court's inherent power to vacate its own judgments during term was an order made in a special proceeding).
9. See cases cited supra note 5.
12. See State v. Lauck, 261 Neb. 145, 149, 621 N.W.2d 515, 518 (2001) (holding that order rejecting defense that charges were based on conduct not criminalized by statute did not affect a substantial right); Holste v. Burlington N. R.R. Co., 256 Neb. 713, 726, 592 N.W.2d 894, 905 (1999) (holding that order rejecting personal jurisdiction defense did not affect a substantial right).
Otherwise, one waives any right to appeal the order.\footnote{15} If an order is not a final order within the meaning of section 25-1902, however, then one has to wait until the end of the case. The appeal must be filed within 30 days after the entry of the judgment or final order. Jumping the gun by filing a premature appeal is a waste of time and money. Such an appeal will be dismissed for lack of jurisdiction.\footnote{16}

In an attempt to reduce the confusion, I will first survey the court's current approach to the special proceedings clause of section 25-1902. I will then explore the historical roots of the statute. Those roots twist their way from Nebraska to Ohio to New York, where they end in the Field Code. The roots are worth exploring because they indicate that the keystone of the statute was not "substantial right," but was instead finality. That in turn forms the keystone of my proposal: to read finality back into the statute.

What that involves will vary with the nature of the proceeding. For some proceedings (which I call "single-faceted" special proceedings), a final order should be one that ends the proceeding. For others (which I call "multifaceted" special proceedings), a final order should be one that ends a distinct phase of the proceeding. For still others (which I call "policy based" special proceedings), a final order should be one that does not end either the proceeding or a discrete phase of the proceeding, but instead resolves a matter sufficiently important and separate from the merits to justify an interlocutory appeal.

After discussing the "special proceedings clause" of section 25-1902, I will turn to the "summary application" and the "prevents a judgment" clauses. The "summary application" clause applies to post-judgment motions, although in contemporary practice the clause seems to have been absorbed by the "special proceedings" clause. The "prevents a judgment" clause has been used to fill various holes in the statutory scheme but suffers from an incurable malady: lack of meaning. The clause did not make any sense when it first appeared on the statute books in New York in 1851 and, unlike good wine, it has not improved with age. It is best ignored.

\footnote{15}{See State v. Marshall, 253 Neb. 676, 682, 573 N.W.2d 406, 410-11 (1998) (holding that the court lacked jurisdiction to review order denying plea in bar because appeal was filed after conviction rather than within 30 days of the order); State v. Trevino, 251 Neb. 344, 346, 556 N.W.2d 638, 640-41 (1996) (same); In re Interest of Z.R., 226 Neb. 770, 777, 415 N.W.2d 128, 133 (1987) (holding that the court could not review adjudication order because appeal was filed after the order terminating parental rights rather than within 30 days of the adjudication order).}

II. CURRENT DEFINITIONS OF THE KEY STATUTORY TERMS

The key terms in section 25-1902 are “action,” “special proceeding,” and “substantial right.” None of these terms are defined by statute.\textsuperscript{17} They are instead defined by case law. The supreme court has not yet settled on a single definition of any of these terms, however. For example, the court has defined “action” in two ways. First, the court has said that an action is “a civil action”\textsuperscript{18}—in other words, “a cause brought under the provisions of chapter 25 of our statutes.”\textsuperscript{19} Second, the court has said that an action “involves prosecuting the alleged rights between the parties and ends in a final judgment.”\textsuperscript{20} While the first definition encompasses only civil proceedings, the second encompasses both civil and criminal proceedings.

The court has defined “special proceeding” in three ways. First, the court has said that a special proceeding is any “civil statutory remedy which is not encompassed in chapter 25 of the Nebraska Revised Statutes.”\textsuperscript{21} Second, the court has said that a special proceeding is any “special statutory remedy which is not in itself an action.”\textsuperscript{22} Third, the court has said that “[w]here the law confers a right and authorizes a special application to a court to enforce the right, the proceeding is special, within the ordinary meaning of the term ‘special proceeding.’”\textsuperscript{23} The first two definitions seem to be variations on a common theme: special proceedings are civil proceedings that are not

\textsuperscript{17} There is a statutory definition of “action” in section 49-801. That section provides: “Unless the context is shown to intend otherwise, words and phrases in the statutes of Nebraska hereafter enacted are used in the following sense: . . . (2) Action shall include any proceeding in any court of this state.” Nebr. Rev. Stat. § 49-801(2) (Reissue 1998) (enacted 1947) (emphasis added). There are two reasons why that definition does not apply to section 25-1902. First, the context indicates that an action is different than a special proceeding; section 25-1902 uses “action” when discussing two types of final orders and uses “special proceeding” when discussing a third type of a final order. Therefore, the context shows that “action” does not mean “any proceeding.” Second, by its own terms, section 49-801 only applies to later enacted statutes. Section 25-1902, however, was enacted long before section 49-801. \textit{See infra} note 61.


governed by the Code of Civil Procedure—in other words, special pro-
ceedings are civil proceedings that are not civil actions. The third def-
inition seems to be much broader.

The court has defined “substantial right” in two ways. The first def-
inition focuses on the importance of the right. The court has said
that a substantial right is “an essential legal right, not a mere techni-
cal right.” The second definition focuses on the effect of the order.
The court has said that “[a] substantial right is affected if the order
affects the subject matter of the litigation, such as diminishing a claim
or defense that was available to the appellant prior to the order from
which the appeal is taken.” The court sometimes uses both of these
definitions together and sometimes uses only one of them.

Perhaps no opinion has shaped these various definitions more than
Justice Boslaugh’s concurrence to a 1953 decision, Rehn v. Bing-
gaman. That case involved a claim against an estate. After the ad-
ministrator of the estate denied the claim, the claimant appealed to
the district court. The administrator subsequently moved for sum-
mary judgment, only to have the district court deny the motion. The
administrator then appealed. The Nebraska Supreme Court treated
the proceeding below as an action and held that the order denying the
motion was not a final order because it failed to satisfy the require-
ments of the first clause of section 25-1902 (an order that affects a
substantial right, determines the action, and prevents a judgment).

Justice Boslaugh agreed that the order was not a final order but
thought that the second clause (an order affecting a substantial right
made in a special proceeding) rather than the first clause of section
25-1902 applied. Claims against an estate were adjudicated without

573 N.W.2d 460, 465 (1998). This definition appeared for the first time in 1896.
921, 573 N.W.2d at 464. This definition appeared for the first time in 1993. See
Jarrett v. Eichler, 244 Neb. 310, 314, 506 N.W.2d 682, 685 (1993). The definition
traces its roots to Justice Boslaugh’s concurrence in a 1953 decision. See Rehn v.
Bingaman, 157 Neb. 467, 461, 59 N.W.2d 614, 621-22 (1953) (Boslaugh, J.,
concurring).
26. The court has not yet decided whether either definition is the exclusive definition.
the court usually includes both definitions in its opinions, e.g., State v. Lauck,
261 Neb. 145, 148, 621 N.W.2d 515, 517 (2001); In re Estate of Peters, 259 Neb.
154, 159, 609 N.W.2d 23, 26 (2000), it sometimes only includes the first (essential
legal right). See Sid Dillon Chevrolet-Oldsmobile-Pontiac, Inc. v. Sullivan, 251
Neb. 722, 734, 559 N.W.2d 740, 748 (1997); Rohde v. Farmers Alliance Mut. Ins.
Co., 244 Neb. 863, 869, 509 N.W.2d 616, 623 (1994). That happens most often in
juvenile cases. See, e.g., In re Interest of Clifford M., 258 Neb. 800, 806, 606
N.W.2d 743, 748 (2000); In re Interest of Sarah K., 258 Neb. 52, 56, 601 N.W.2d
780, 783 (1999).
27. 157 Neb. 467, 59 N.W.2d 614 (1953).
using the procedures that the Code established for civil actions. Therefore, the proceedings on such claims were special proceedings rather than actions.

The code does not contain a definition of an action or a special proceeding but it does declare that there is but one form of action to be called a civil action, and the procedure for commencing and pursuing it to a final conclusion is prescribed. The civil action of the code includes all such proceedings as prior to its enactment were regarded as actions at law and suits in equity, and any such action since recognized and authorized by statute.

Any proceeding in a court by which a party prosecutes another for enforcement, protection, or determination of a right or the redress or prevention of a wrong involving and requiring the pleadings, process, and procedure provided by the code and ending in a final judgment is an action. Every other proceeding by which a remedy is sought by original application to a court is a special proceeding. A special proceeding within the meaning of the statute defining a final order must be one that is not an action and is not and cannot be legally a step in an action as a part of it.28

Justice Boslaugh went on to say that actions and special proceedings were not necessarily mutually exclusive. A special proceeding could be part of an action, provided that it was not an integral part of the action.

None of the many steps or proceedings necessary or permitted to be taken in the action to commence it, to join issues in it, and conduct it to a final hearing and judgment can be a special proceeding within the terms of the statute. A special proceeding may be connected with an action . . . as for instance garnishment or attachment—but it is not an integral part of or a step in the action or as it is sometimes referred to in such a situation [...], a part of the "main case."29

The court embraced part of Justice Boslaugh's reasoning in 1991 when it decided In re Interest of R.G.30 That case involved an appeal from two detention orders that had been entered in a juvenile proceeding. The first was an ex parte order that gave the Department of Social Services (now the Department of Health and Human Services) custody of a child for no more than 8 days. The second was an order, entered after notice and hearing, that gave the Department custody of the child pending an adjudication hearing. The court held that the first was not a final order but that the second was.

The court held that both orders had been made in a special proceeding. After quoting at length from Justice Boslaugh's concurrence in Rehn, the court said that his method of analysis was "more helpful

28. Id. at 478-79, 59 N.W.2d at 620-21 (Boslaugh, J., concurring).
29. Id. at 479, 59 N.W.2d at 621.
30. 238 Neb. 405, 411-13, 470 N.W.2d 780, 786-87 (1991). The court had relied on Justice Boslaugh's concurrence in Rehn once before. See In re Estate of Snover, 233 Neb. 198, 201-02, 443 N.W.2d 894, 897-98, (1989) (holding that a proceeding to remove a personal representative for cause under section 30-2454 is a special proceeding). R.G. was the first non-probate case to rely on it, however.
than some we have employed." The court then noted that civil actions are governed by Chapter 25 of the Nebraska Revised Statutes and said that "this court has, for nearly 110 years, construed the phrase [special proceeding] to mean every civil statutory remedy which is not encompassed in what is now chapter 25." Juvenile proceedings were therefore special proceedings because they were encompassed in Chapter 43 rather than Chapter 25.

The court then discussed the requirement that the order must affect a substantial right and indicated that the requirement has two aspects: (1) the right must be substantial and (2) the effect on the right must be substantial. The court acknowledged the right at issue in R.G.—a parent's right to raise her children—was substantial. The court added, however, that whether the right had been substantially affected depended on the purpose and duration of the order. The court did not explicitly analyze the appealability of the orders at issue in R.G., however. It instead analyzed the parent's due process challenges to those orders and said that its due process analysis explained why the ex parte order was not a final order while the pre-adjudication detention order was.

The court said that the absence of a hearing on the ex parte order did not violate the due process clause for three reasons: (1) the state had an interest in protecting endangered children, (2) the ex parte order did not play any role in determining whether to issue a pre-adjudication detention order, and (3) the ex parte order had a short duration. The ex parte order would last only for a few days, which presumably explains why it did not affect a substantial right. The pre-adjudication detention order, however, would last much longer. At the time that R.G. was decided, the statutes specified that the adjudication hearing could be held as late as 6 months after the petition was filed. The long duration of the order explains why due process

31. Id. at 413, 470 N.W.2d at 787.
33. R.G., 238 Neb. at 414, 470 N.W.2d at 788.
34. Id. at 415, 470 N.W.2d at 788.
35. Id. at 417-18, 470 N.W.2d at 789-90; see also In re Interest of Borius H., 251 Neb. 397, 401, 558 N.W.2d 31, 34 (1997) (restating the reasoning of R.G.).
required a hearing before the order could be issued,\textsuperscript{37} and presumably explains why the order affected a substantial right.

Although the court in \textit{R.G.} quoted extensively from Justice Boslaugh's concurring opinion in \textit{Rehn}, it did not quote from the portion of the opinion in which Justice Boslaugh discussed what kind of order affects a substantial right. According to Justice Boslaugh, whether an order affected a substantial right depended on whether it affected the subject matter of the litigation and could be meaningfully reviewed at the end of the case.

An order in a special proceeding which does not affect the subject matter thereof or which will not deprive the complaining party of any legal right if an appeal is delayed until after final judgment . . . does not affect a substantial right within the meaning of the statute defining a final order.\textsuperscript{38}

The court picked up on this language a few years later when it decided \textit{Jarrett v. Eichler}.\textsuperscript{39} In \textit{Jarrett}, the plaintiff filed a negligence action for the injuries she suffered in a car accident. The district court eventually dismissed the action for want of prosecution.\textsuperscript{40} By that time, the statute of limitations had run on the plaintiff's claim. The plaintiff later moved within term for an order vacating the dismissal on the ground that her pregnancy prevented her from undergoing the medical exams necessary to complete discovery in the case. After the district court vacated the order of dismissal, the defendant appealed.

The Nebraska Court of Appeals dismissed the appeal for want of a final order. In doing so, the court acknowledged that the supreme court had previously entertained an appeal from an order vacating a dismissal in \textit{Gutchewsky v. Ready Mixed Concrete Co.}\textsuperscript{41} The court of appeals distinguished \textit{Gutchewsky} on the ground that it involved an appeal from an order granting a new trial, an order that was immediately appealable under section 25-1315.03.\textsuperscript{42}

\begin{itemize}
  \item [\textsuperscript{37}] 238 Neb. at 422, 470 N.W.2d at 792.
  \item [\textsuperscript{38}] Rhen v. Bingaman, 157 Neb. 467, 481, 59 N.W.2d 614, 621-22 (1953) (Boslaugh, J., concurring) (emphasis added).
  \item [\textsuperscript{39}] 244 Neb. 310, 506 N.W.2d 682 (1993).
  \item [\textsuperscript{40}] The trial had dismissed the action twice before. Each time the action was reinstated by agreement of the parties. \textit{See id.} at 311-12, 506 N.W.2d at 684.
  \item [\textsuperscript{41}] \textit{Id.} at 314, 506 N.W.2d at 685 (citing Gutchewsky v. Ready Mixed Concrete Co., 219 Neb. 803, 366 N.W.2d 751 (1985)).
In reality, the order at issue in *Gutchewsky* was not really an order granting a new trial; there had not been a trial in the first place. The case had been dismissed for want of prosecution well before it ever reached trial. The plaintiff then filed what he called a "motion for new trial" but what was in substance a motion to vacate the order of dismissal. After the district court denied the motion, the plaintiff filed a motion for reconsideration of his so-called new trial motion. The district court agreed to reconsider its earlier order, granted the plaintiff's motion for a new trial, and vacated the dismissal.43

If the court of appeals was correct when it said that the order granting the plaintiff's "new trial" motion is what distinguished *Gutchewsky* from *Jarrett*, then not much would be left of the final judgment rule. A party could immediately appeal any interlocutory order by simply filing a "new trial" motion and then appealing from the order ruling on that motion.44 Not surprisingly, the supreme court rejected the court of appeals' distinction.45 The court then had a choice to make. It could hold that the order in *Jarrett* was not a final order, which would require the court to say that it made a mistake in reviewing the order in five cases: *Gutchewsky* plus four similar cases.46 Alternatively, the court could hold that the order in *Jarrett* was a final order, which would require the court to do something it had never done before: explain why an order vacating a dismissal for failure to prosecute was immediately appealable.

The court decided to hold that the order in *Jarrett* was a final order and to explain why. The court's opinion, however, is an exercise in verbal gymnastics, most likely because there is no satisfactory way to explain why an order vacating a dismissal is immediately appealable. In one breath, the court defined a special proceeding as "every civil

43. See *Gutchewsky*, 219 Neb. at 804, 366 N.W.2d at 752.
44. Although the court did not mention this point in its opinion, the court was certainly aware of it. The defendant made the point in its petition for further review. See Petition for Further Review by the Supreme Court at 5, *Jarrett* v. Eichler, 244 Neb. 310, 506 N.W.2d 682 (1993) (No. 91-110).
45. The court did not actually mention the distinction that the court of appeals drew. It simply said that "we are compelled to correct errors made by the court of appeals regarding motions for new trial." *Jarrett*, 244 Neb. at 312, 506 N.W.2d at 684. The court went on to say that "unless the proceedings leading up to the motion for new trial constitute a trial, the order granting a new trial does not afford a right to appeal." Id. at 312, 506 N.W.2d at 684.
statutory remedy which is not encompassed in chapter 25." In the next breath, the court said that a proceeding to vacate a dismissal within term fit that definition because a “court's authority to vacate its prior decisions within term does not derive from chapter 25; rather, it is an inherent authority and is derived from common law." In other words, the proceeding to vacate the dismissal was a statutory proceeding because it was not a statutory proceeding.

Things did not get much better when the court tried to explain why the order affected a substantial right. The court redefined the term “substantial right” by reworking Justice Boslaugh's language in Rehn. The court needed to do that because Justice Boslaugh's language would not allow the court to say that the order at issue in Jarrett affected a substantial right. Simply put, an order vacating a dismissal does not “deprive the complaining party of any legal right if an appeal is delayed until after final judgment.” The party is free to challenge such an order on an appeal from the final judgment. If the appellate court concludes that the trial court abused its discretion in granting the motion, it can vacate the final judgment and remand the case with instructions to dismiss.

Therefore, the court dropped the idea of rights being lost and replaced it with the idea of claims or defenses being diminished. “A substantial right is affected,” the court said, “if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing.” The court went on to hold that the order in Jarrett affected a substantial right because, if the district court had not vacated the order of dismissal, the defendant could have invoked the statute of limitations to defeat any new lawsuit that the plaintiff might have filed.

47. Jarrett, 244 Neb. at 314, 506 N.W.2d at 685 (emphasis added).
50. Jarrett, 244 Neb. at 314, 506 N.W.2d at 685. Justice Boslaugh's concurrence in Rehn was the only support that the court cited for this statement.
The court's explanation seems to be somewhat of a stretch. The requirement that the order must affect "the subject matter of the litigation" suggests that the order must diminish a claim or defense that could have been asserted in the very litigation in which the order was entered. Otherwise, the loss of the claim or defense would not affect "the subject matter of the litigation." The order at issue in Jarrett, however, did not diminish a claim or defense; it simply allowed the litigation to go forward. To the extent that it affected any defenses, it affected a statute of limitations defense in another case—and a hypothetical case at that.

It is hard to avoid the conclusion that Jarrett's definition of "substantial right" is just a collection of malleable words that have no real meaning. Yet the court continues to invoke the words as though they actually mean something. For example, take the court's 2001 decision in State v. Lauck.\footnote{51} Lauck was charged with willfully providing false information on an application for a handgun certificate. The basis for the charge was the false answer Lauck gave to a question about prior convictions. Lauck filed a plea in abatement on the ground that, under a proper interpretation of the relevant statute, it was not illegal to provide false information about prior convictions. He claimed it was only illegal to provide false information about one's name, address, social security number, and date of birth. The district court overruled the plea, and Lauck appealed.

The court dismissed the appeal for lack of a final order. The court said that order did not affect a substantial right because it did not diminish any claim or defense available to Lauck at trial.

Lauck may still present all of the defenses that he could have presented before the order overruling his plea in abatement. Lauck can argue, through the rules of statutory interpretation, that he did not commit any crime at all or that he did not commit the crime of false information under § 69-2408. Lauck is not precluded from making a motion to dismiss after the State rests its case . . . . If Lauck were convicted of the charge against him, he would not be prohibited from raising on appeal the issue of whether there was sufficient evidence to convict him.\footnote{52}

What the court seems to be saying is that the order rejecting Lauck's no-such-crime defense did not diminish his no-such-crime defense because he could continue asserting it (and presumably the trial court could continue rejecting it) at successive points in the litigation. That just makes no sense. For all practical purposes, the defense no longer exists at the trial court level. The trial court squarely rejected the defense when it denied Lauck's plea in abatement. If an order denying such a plea does not affect the subject matter of the litigation by diminishing a defense, then it is hard to imagine what kind of order would.

\footnotesize{51. 261 Neb. 145, 621 N.W.2d 515 (2001).}
\footnotesize{52. \textit{Id.} at 149, 621 N.W.2d at 518.}
Given the problems the court had in explaining why the order did not affect a substantial right, the court might have been better off had it taken a different track. Rather than beginning with the question of whether the order affected a substantial right, the court might have begun with the question of whether the order was made in a special proceeding. The answer to that question seems much clearer. The order was made in a criminal action, not a special proceeding. Therefore, it was not a final order regardless of whether it affected a substantial right.

But nothing is clear in the world of special proceedings. The court's various definitions of "special proceeding" are so malleable that just about any proceeding can be classified as a special proceeding. A plea in abatement fits two of the three definitions of "special proceeding." A plea in abatement is a statutory proceeding. Section 29-1809 authorizes the plea "when there is a defect in the record which is shown by facts extrinsic thereto." Therefore, a plea in abatement is a "special statutory remedy which is not in itself an action." Putting things another way, the law not only confers a right to an abatement when there is a defect in the record but also authorizes a special application to a court to enforce the right. Therefore, "the proceeding is special, within the ordinary meaning of the term 'special proceeding.'"

The court's 1997 decision in Sid Dillon Chevrolet-Oldsmobile-Pontiac, Inc. v. Sullivan provides an even better illustration of how malleable the court's definitions are. Sullivan was unhappy with the service he received at Sid Dillon Chevrolet so he mounted a public relations campaign that accused Sid Dillon of being a dishonest dealer. Sid Dillon struck back by suing Sullivan for violation of the Uniform Deceptive Trade Practices Act. On the same day that the suit was filed, the district court entered a temporary restraining order against Sullivan, restraining him from saying anything that might damage Sid Dillon. Sullivan unsuccessfully moved to dissolve the

54. The Uniform Deceptive Trade Practices Act is codified at Neb. Rev. Stat. §§ 87-301 to 87-306 (Reissue 1999). Sid Dillon also asserted a common law claim for libel and slander. The claim was dismissed at some point in the litigation and was not a basis for the issuance of the temporary injunction. See Brief of Appellant at 1, Sullivan, 251 Neb. 722, 559 N.W.2d 740 (1997) (No. A-94-1176).
55. The temporary restraining order remained in effect for over two years. It was entered on June 8, 1992 (the day on which the petition was filed) and remained in effect until November 10, 1994. See 251 Neb. at 727-28, 550 N.W.2d at 744. That should not have happened. A temporary restraining order given without notice can remain in effect for no longer than 10 days unless (1) the court finds that there is good cause for extending the order for up to another 10 days or (2) the restrained party consents to an extension for a longer period of time. See Neb. Rev. Stat. § 25-1064(3) (Reissue 1995 & Cum. Supp. 2000). Unless Sullivan consented to extending the life of the order (which seems unlikely given that he moved to dissolve it seven days after it was entered), the temporary re-
temporary restraining order, and the case eventually proceeded to trial. The district court found for Sid Dillon and entered a permanent injunction against Sullivan. It also found that Sullivan had violated the temporary restraining order on more than one occasion. The court therefore held him in contempt.56

On appeal, the supreme court held that both the temporary restraining order and the permanent injunction were unconstitutional prior restraints on speech. The court invoked the collateral bar rule, however, to uphold the district court's order finding Sullivan in contempt. Under the collateral bar rule, a party who violates a court order cannot defend a subsequent contempt charge by attacking the validity of the underlying order.57 There are a number of exceptions to the collateral bar rule, including, for example, the exception that applies when a party lacks an effective means of challenging the order.58 The court in Sullivan closed the door to that exception by rewriting Nebraska law. It held that Sullivan could have appealed the order denying his motion to dissolve the temporary restraining order. The order was appealable, the court said, because it was made in special proceeding and affected a substantial right made in a special proceeding.

56. The district court fined Sullivan $25,000. Although the opinion does not identify the type of contempt, it was presumably coercive civil contempt. The district court's order provided that Sullivan could purge himself of the fine if he did not violate the permanent injunction for approximately one year after the injunction was issued. See 251 Neb. at 727, 559 N.W.2d at 744.

57. See Sullivan, 251 Neb. at 733, 559 N.W. at 748; see also Evans v. Williams, 206 F.2d 1292, 1299 (D.C. Cir. 2000) (same); DAN B. DOBBS, LAW OF REMEDIES 153-59 (2d ed. 1993) (discussing the collateral bar rule). The collateral bar rule normally applies only to criminal contempt proceedings. The reason is that, while a criminal contempt conviction survives even if the underlying order is vacated, a civil contempt conviction does not survive. See, e.g., Collins v. Barry, 841 F.2d 1297, 1299-1300 (6th Cir. 1988); United States v. Spectro Foods Corp., 544 F.2d 1175, 1182 (3d Cir. 1976). But one might argue that coercive civil contempt, like criminal contempt, is designed to vindicate the authority of the court and should therefore survive even if the underlying order falls. Whether that reflects the court's thinking in Sullivan is unclear; the court did not explain why the collateral bar rule applied to Sullivan's civil contempt conviction.

The district court grounded its denial of Sullivan's motion to dissolve the temporary restraining order on the fact that, in part, the action was brought and the order was entered under the Uniform Deceptive Trade Practices Act; a statutory civil remedy not encompassed in chapter 25. Further, the temporary restraining order completely prohibited Sullivan from speaking about Dillon; thus, the order clearly affected an essential legal right.\(^{59}\)

The logical implication of this passage is startling. If the order at issue in \textit{Sullivan} was made in a special proceeding because the action was based on the Uniform Deceptive Trade Practices Act, then any order that affects a statutory cause of action would be an order made in a special proceeding. That would include everything from an order denying a motion to strike in a wrongful death action to an order granting a motion to compel in a UCC case. Furthermore, if \textit{Sullivan} means what it says, then a number of the court's earlier decisions would no longer be valid, namely its decisions holding that orders dissolving or continuing temporary injunctions are not final, appealable orders.\(^ {60}\)

It is hard to believe the court meant what it said. It seems far more likely that, for whatever reason, the court wanted to affirm Sullivan's contempt conviction and wrote its opinion accordingly. The court apparently did so, however, without considering what effect its virtually unlimited language could have in the future. So far, the language has not had any effect; the court has not cited \textit{Sullivan} in any of its subsequent cases that address the question of what constitutes a special proceeding. But there is no guarantee that \textit{Sullivan} will remain dormant as the court continues to struggle with section 25-1902.

Perhaps the major reason why the court continues to struggle with section 25-1902 is that while the court has articulated a number of definitions, it has neither explained why those are the correct definitions nor identified the policies that the statute serves. As a result, the definitions have become malleable, the analysis has become wooden, and the area has become a morass. That is not surprising. To paraphrase an old adage, bad statutes make for bad law. What makes section 25-1902 a bad statute is that it uses words that have no

59. 251 Neb. at 734, 559 N.W.2d at 748.
60. See Guar. Fund Comm'n v. Teichmeier, 119 Neb. 387, 229 N.W. 121 (1930); Meng v. Coffee, 52 Neb. 44, 71 N.W. 975 (1897); Bartram v. Sherman, 46 Neb. 713, 65 N.W. 789 (1896); Einspahr v. Smith, 46 Neb. 138, 64 N.W. 698 (1895); Clark v. Fitch, 32 Neb. 511, 49 N.W. 374 (1891); Scofield v. State Nat'l Bank, 8 Neb. 16 (1878). At the time that these cases were decided, a temporary injunction could be issued without notice to the defendant if (s)he had not yet answered at the time that the temporary injunction was sought. See Neb. Comp. Stat. §§ 20-1064 to 20-1066 (1930). If the injunction was issued without notice to the defendant (s)he could move to dissolve the injunction. See Neb. Comp. Stat. § 20-1075 (1930). In 1986, the legislature added what is now section 25-1064(2). That section specifies that a temporary injunction cannot be issued without notice to the adverse party. Neb. Rev. Stat. § 25-1064(2) (Cum. Supp. 2000).
plain meaning and fails to provide any context or points of reference to help a court interpret those words. That raises the question of whether the words ever meant anything.

The answer is "yes"—and "no." History indicates that Justice Boslaugh was on the right track when he said that the difference between actions and special proceedings was procedural. His analytical train derailed, however, when he said that a special proceeding could occur within an action. Actions and special proceedings were originally created as mutually exclusive categories. History also indicates that the words "substantial right" worked their way into the statute, not because they meant anything, but because they were handy. That is worth knowing; it is much easier for a court to work with an incoherent statute when the court knows that there is no well-understood definition lurking in the background, waiting to be discovered. That knowledge allows a court to create coherence by focusing on fundamental policies rather than to perpetuate incoherence by focusing on meaningless words.

III. THE NEW YORK CODE OF CIVIL PROCEDURE

The operative language of section 25-1902 has remained unchanged since it was adopted by the Territorial Legislature in 1858.61 Like much of the Nebraska Code of Civil Procedure, section 25-1902 was copied verbatim from the 1853 Ohio Code of Civil Procedure.62 The Ohio Code was in turn copied in large part from the New York Code of Procedure,63 which is also known as the "Field Code."64 Like

61. What is now section 25-1902 was originally section 521 of the 1858 Code of Civil Procedure. Section 521 provided:
An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment; and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified or reversed as provided in this title.
NEB. CODE CIV. P. § 521, 1858 Neb. Terr. Laws 197. The only changes over time have involved the last clause of the statute. In the 1913 revision, "as provided in this title" was changed to "as provided in this chapter and chapter 19." NEB. REV. STAT. § 8176 (1914). Chapter 19 involved the vacation or modification of judgments at subsequent term. NEB. REV. STAT. §§ 8207-8215 (1914) (now codified at NEB. REV. STAT. §§ 25-2001 through 25-2009 (Reissue 1995 & Cum. Supp. 2000)). In the 1943 revision, the clause was changed to "as provided in this chapter." NEB. REV. STAT. § 25-1902 (Reissue 1943).


63. See HEBURN, supra note 62, at 100.

64. See, e.g., CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 22 (2d ed. 1947).
the Nebraska Code, the Ohio Code did not contain definitions of either "action" or "special proceeding." But the New York Code did. The New York Code opened with a series of general definitions that focused on remedies in the courts of justice. As used in the Code, the term "remedies" did not refer to damages, injunctions, orders, or other forms of relief. It instead referred to the means of enforcing rights. In other words, "remedies in the courts of justice" was just another way of saying "judicial proceedings."

The Code divided judicial proceedings into two categories: actions and special proceedings. Actions were in turn divided into two categories: civil and criminal. The Code defined 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 offence." The Code then defined a special proceeding as "every other remedy." In other words, a special proceeding was any judicial proceeding—

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65. The terms "action," "special proceeding," and "substantial right" now have statutory definitions in Ohio. "An action is an ordinary proceeding in a court of justice, involving process, pleadings, and ending in a judgment or decree, by which a party prosecutes another for the redress of a legal wrong, enforcement of a legal right, or the punishment of a public offense." OHIO REV. CODE ANN. § 2307.01 (Anderson 1998) (effective 1953). A special proceeding is "an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity." OHIO REV. CODE ANN. § 2505.02(A)(2) (Anderson 1998) (effective 1998). A substantial right is "a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect." OHIO REV. CODE ANN. § 2505.02(A)(1) (Anderson 1998) (effective 1998).

66. See In re Cooper, 22 N.Y. 67, 87 (1860); Belknap v. Waters, 11 N.Y. 477, 478 (1854). Historically, the term "remedies" referred to the "judicial means of enforcing a right or redressing a wrong." Stratton v. European and N. Am. Ry., 74 Me. 422, 428 (1883); see, e.g., United States v. Layman, 26 F. Cas. 1024, 1031 (C.C.D. Mass. 1818) (No. 15,647); Missionary Soc'y of the Methodist Episcopal Church v. Ely, 47 N.E. 537, 538 (Ohio 1897); California v. Poulterer, 16 Cal. 515, 527 (1860).


68. Amended Code § 4, 1849 N.Y. Laws 614. The Code defined a criminal action as one "prosecuted by the people of the state as a party, against a person charged with a public offence, for the punishment thereof." Amended Code § 5, 1849 N.Y. Laws 614. A civil action was defined as every other action. Amended Code § 6, 1849 N.Y. Laws 614.

69. Amended Code § 2, 1849 N.Y. Laws 614. The definition in the original Code was the same except that the original Code used the term "regular judicial proceeding" rather than "ordinary proceeding." Code § 2, 1848 N.Y. Laws 497. The New York Commissioners on Practice & Pleadings originally proposed a slightly different definition. The Commissioners defined an action as "a judicial proceeding, between party and party, for the enforcement or protection of a right, the redress of a wrong, or the punishment of a public offence." FIRST REPORT OF THE COMMISSIONERS ON PRACTICE & PLEADINGS 2 (Albany, Charles Van Benthuysen, 1848) [hereinafter FIRST REPORT].

whether civil or criminal—that was not an ordinary proceeding. The Code, however, did not contain any concrete examples of ordinary proceedings—or at least none that were specifically identified as such.

The Code also did not include any concrete examples of special proceedings. The term "special proceeding" appeared only three times in the original Code, twice in the portion that contained the Code's general definitions and once in the section that governed the jurisdiction of the New York Court of Appeals. The term was never used in the context of particular proceedings that were specifically labeled as special proceedings. Yet those concrete examples exist, primarily in the legislative history of the Code. The reason why they are not in the Code itself is that the Code was never finished—or at least not in the way that the drafters envisioned. It was just the first installment of what the drafters envisioned as a comprehensive code of procedure that would encompass "the whole law of the State, concerning remedies in the courts of justice."

A. The Distinction Between Actions and Special Proceedings

The Code was drafted by the New York Commissioners on Practice and Pleadings. When the Commissioners were appointed in 1847, law and equity were still separate procedural systems in New York. There had been some changes over time. For example, the New York Constitution of 1846 abolished the separate court of chancery and gave the supreme court both legal and equitable jurisdiction. Yet the basic procedural rules for actions at law and suits in equity were still different. The differences were especially pronounced in the area of

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71. See Code §§ 1, 3, 11, 1848 N.Y. Laws 497, 499. The term also appeared once in the Facilitating Act. See Facilitating Act § 9, 1848 N.Y. Laws 568 (governing appeals from the special to the general terms of the supreme court in existing suits).

72. FIRST REPORT, supra note 69, at v.

73. N.Y. CONST. of 1846, art. VI, § 3; art. XIV, §5.

74. The Constitution of 1846 did take one step toward merging law and equity. Prior to the adoption of the Constitution, witnesses in actions at law testified orally in open court while witnesses in suits in equity testified before an examiner who transcribed their testimony for use at trial. See GEORGE VAN SANTVOORD, A TREATISE ON THE PRACTICE IN THE SUPREME COURT OF THE STATE OF NEW YORK IN EQUITY ACTIONS, ADAPTED TO THE CODE OF PROCEDURE 13-15 (Albany, Weare C. Little 1860). The constitution changed that by specifying that testimony in equity cases would be taken in the same way as it was taken in law cases. N.Y. Const. of 1846, art VI, § 10.

Perhaps the most significant aspect of the constitution was the provision that required the legislature to appoint three commissioners "whose duty it shall be to revise, reform, simplify and abridge the rules of practice, pleadings, forms and proceedings of the courts of record of this State" subject to adoption and modification by the legislature. N.Y. Const. of 1846, art. VI, § 24. Those commissioners became known as the Commissioners on Practice & Pleadings and were responsi-
pleading. The common law pleading system was built around the forms of action and was designed to tender a question of law or fact for decision.\textsuperscript{75} The equity pleading system was more free-flowing and was designed in part to give the plaintiff an opportunity to obtain discovery from the defendant.\textsuperscript{76}

The basic marching orders that the Commissioners received from the legislature were to abolish the "forms of actions and pleadings in cases at common law" and to create "a uniform course of proceeding in all cases, whether of legal or equitable cognizance."\textsuperscript{77} Yet the Commissioners had grander ideas. They saw their task as nothing less than preparing a comprehensive code of procedure that would "make full provision for every proceeding in the judicial tribunals from the beginning to the end of every controversy."\textsuperscript{78}

Making full provision for every proceeding involved more than drafting uniform procedural rules for actions at law and suits in equity. It also involved redrafting the rules of evidence, the rules of procedure for criminal cases, and the rules of procedure for a variety of statutory proceedings that the Commissioners called "special proceedings." Those proceedings included, among others, arbitration, habeas corpus, discharge of insolvent debtors, and lien enforcement.\textsuperscript{79} What

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\textsuperscript{75} There were a number of different forms of action. They included, among others, Assumpsit, Covenant, Debt, Trespass, and Trespass on the Case. Although the major difference between the various forms of action was substantive, there were also incidental procedural differences between them. Most of those procedural differences involved traverses (denials), the procedural device for tendering issues of fact. For further discussion of common law pleading, see Joseph H. Koffler & Alison Reppy, Handbook of Common Law Pleading (1989); Henry Winthrop Ballantine & Benjamin J. Shipman, Handbook of Common-Law Pleading (3d ed. 1923); R. Ross Perry, Common Law Pleading: Its History and Principles (Boston, Little, Brown, and Co. 1897).

\textsuperscript{76} The plaintiff's initial pleading in equity was called a "bill." A bill had nine parts: the address, the introduction, the stating part, the confederating part, the charging part, the jurisdictional part, the interrogating part, the prayer for relief, and the prayer for process. See Van Santvoord, supra note 74, at 11. The stating part contained a narrative of the facts constituting the plaintiff's cause of action and was the model for the Code's provisions on fact pleading. See id. at 11-12; see also Clark, supra note 64, at 16-17 (noting the contents of the stating part).

The interrogating part was a discovery device and contained general and special interrogatories. The general interrogatory was a prayer that the defendants admit or deny the allegations of the bill according to their knowledge, information, and belief. The special interrogatories were essentially requests for admission on matters relevant to the plaintiff's cause of action. For further discussion of equity pleading, see Benjamin J. Shipman, Handbook of the Law of Equity Pleading (St. Paul, West Publishing Co. 1897); C.C. Langdell, A Summary of Equity Pleading (2d ed., Cambridge, Charles W. Sever and Co. 1883).

\textsuperscript{77} Act of Apr. 8, 1847, ch. 59, § 8, 1847 N.Y. Laws 67.

\textsuperscript{78} First Report, supra note 69, at iv.

\textsuperscript{79} First Report, supra note 69, at 2.
made those proceedings special was their procedure. They were all regulated by statutes that prescribed procedural rules different than the procedural rules for either actions at law or suits in equity.

In short, there were really three categories of civil proceedings with which the Commissioners were concerned: (1) actions at law, (2) suits in equity, and (3) everything else. What the Commissioners essentially did was collapse those three categories into two. Actions at law and suits in equity became civil actions and were given a new set of uniform procedural rules. The procedural leftovers—in other words, the proceedings that were not governed by the uniform procedural rules—became special proceedings.

The Commissioners submitted their first report to the legislature in 1848. This report—which the Commissioners described as “but a report in part”—did not include rules of evidence, rules of criminal procedure, or rules of procedure for what the Commissioners called “the immense mass of special proceedings known to our law.” Those would all be the subject of future reports. The first report instead focused on the most pressing concern: the distinction between actions at law and suits in equity.

What the Commissioners proposed in their first report was nothing short of a procedural revolution. Part II of their proposed code abolished law and equity as separate procedural systems and built a new procedural system around a new form of action: the civil action. From the standpoint of the Commissioners, all of their proposed reforms rested on the following section:

The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished; and, there shall be in this state, hereafter, but one form of action, for the enforcement or protection of private rights and the redress or prevention of private wrongs, which shall be denominated a civil action.

Because not all actions implicated the same considerations, the Commissioners proposed a few specialized rules for particular actions. Yet the hallmark of the new procedural system was uniformity. The same basic procedural rules would apply to all civil actions,

80. First Report, supra note 69, at iv.
81. First Report, supra note 69, at v.
82. Code § 62, 1848 N.Y. Laws 510. Here is how the Commissioners described this section when they first proposed it:

The chief object . . . is to declare the leading principles which lie at the foundation of the whole proposed system of legal procedure, and without which, in our judgment, very few, if any essential reforms can be effected in remedial law. We refer to the abolition of the distinction between actions at law and suits in equity, and of the forms of such actions and suits.

First Report, supra note 69, at 67-68.
83. For example, there were specialized rules for pleading publication in libel and slander actions, for pleading satisfaction of conditions precedent in contract ac-
regardless of whether they were legal or equitable: all civil actions would be brought in the name of the real party in interest,\(^\text{84}\) commenced by service of a summons,\(^\text{85}\) and governed by the same rules of joinder, pleading, and discovery.\(^\text{86}\) The judgments in all civil actions would be reviewed by appeal and governed by the same rules of execution.\(^\text{87}\)

Although most of the Commissioners' proposals were procedural, some of them were jurisdictional. Part I of their proposed code rewrote a number of the statutes governing the civil jurisdiction of the New York courts. That was necessary because those statutes were cast in terms of the old forms of action.\(^\text{88}\) In rewriting the jurisdictional statutes, the Commissioners gave the court of appeals jurisdiction over appeals from, among other things, judgments in actions and final orders in special proceedings.\(^\text{89}\)

The legislature made some changes to the Commissioners' proposed code before enacting it into law. One of those changes made it clear that the Code did not apply to special proceedings. Section 390 of the Code specified that, "[u]ntil the legislature shall otherwise provide, this act shall not affect . . . any special statutory remedy not heretofore obtained by action [i.e., any proceeding that was not an action at law or a suit in equity]."\(^\text{90}\) There was a good reason for including


84. See First Report, supra note 69, at 123-25; Code § 91, 1848 N.Y. Laws 515. The purpose of the real party in interest requirement was to allow contract assignees to sue. Although equity recognized their right to do so, law did not. See George Van Santvoord, A Treatise on the Principles of Pleading in Civil Actions Under the New York Code of Procedure 64-65 (Albany, John D. Parsons, Jr. 1873); First Report, supra note 69, at 123-25.


86. The Code's provisions on joinder of parties were based on the equity rules. See Van Santvoord, supra note 74, at 74-82. The initial provisions on joinder of causes of action were based on the common law rules; like the common law rules, the Code's provisions focused on the nature of the action. Compare Koffler & Reppy, supra note 75, at 96-98 with Code § 143, 1848 N.Y. Laws 525. Those provisions were later expanded in 1852 to allow joinder when the causes of action arose out of the same transaction. See Amended Code § 162, 1852 N.Y. Laws 655.


87. See First Report, supra note 69, at 197-203 (execution), 213-31 (appeals); Code §§ 238-57, 271-324, 1848 N.Y. Laws 541-44, 547-55. Prior to adoption of the Code, writs of error were used to review judgments in law actions while appeals were used to review decrees in equity. See infra text notes 106-09 and accompanying text.

88. See First Report, supra note 69, at 8.

89. First Report, supra note 69, at 11; see Code § 11, 1848 N.Y. Laws 499.

ing that section. The Code was a work in progress and the operative provisions that would affect special proceedings had not yet been written.

It soon became apparent that there were problems with the Code, problems that led to a series of amendments in the years that followed.\(^{91}\) Those problems in turn torpedoed the Commissioners' plans for a comprehensive code of procedure. The Commissioners submitted their final report in 1850. Their final report included a four-part proposed code of civil procedure as well as a proposed code of criminal procedure.\(^{92}\) Parts one and two of the proposed code of civil procedure were an expanded version of what had already been enacted. Part three was a proposed codification of rules of procedure for various special proceedings. Part four was a proposed codification of the rules of evidence.

The legislature did adopt some of the proposed revisions to the original code. But because of its dissatisfaction with the original code, the legislature did not adopt the proposed code of criminal procedure, the proposed rules of procedure for special proceedings, or the proposed rules of evidence.\(^{93}\) The end result was a Code whose general definitions recognized three categories of proceedings—civil actions, criminal actions, and special proceedings—but whose operative provisions only addressed civil actions.

Although the legislature did not adopt the portion of the Commissioners’ final report that dealt with special proceedings, that portion again reflects the Commissioners’ understanding that the line between civil actions and special proceedings rested on procedural differences. The major differences were that, unlike civil actions, special proceedings did not involve the use of formal pleadings to frame the issues and the service of a summons on the defendant. They instead involved the use of motions and the service of notices or court orders. In other words, the proposed procedural rules of special proceedings resembled the procedural rules for motions.

For example, take mandamus. The plaintiff in a mandamus proceeding filed a motion for a writ of mandamus—which is another way

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\(^{91}\) The Code was substantially amended in 1849. The original code contained 391 sections; the Code as amended in 1849 contained 473 sections. See Amended Code, 1849 N.Y. Laws 613-705; Code of Procedure, 1848 N.Y. Laws, 497-565. The Code was again amended in 1851. See Amended Code, 1851 N.Y. Laws, 876-904.


of saying that the plaintiff filed a motion for a court order. By contrast, the plaintiff in a civil action filed a complaint which, among other things, included a statement of the facts constituting the plaintiff's cause of action. The defendant in a mandamus proceeding was served with a court order in the form of either a peremptory writ or an alternative writ. The peremptory writ ordered the defendant to perform the act at issue. The alternative writ ordered the defendant, at the time and place specified in the writ, to show cause why (s)he had not performed the act at issue. By contrast, the defendant in a civil action was served with a summons that, among other things, required the defendant to serve an answer within 20 days after service of the summons.

A defendant served with an alternative writ could show cause by filing an answer. The writ and the answer framed the issues for decision. No other pleadings or written allegations were allowed. By contrast, the parties' pleadings framed the issues in a civil action. Those pleadings included the plaintiff's complaint, the defendant's answer or demurrer to the plaintiff's complaint, the plaintiff's reply or demurrer to new matter alleged in the defendant's answer, and the defendant's demurrer to new matter alleged in the plaintiff's reply.

The proposed rules for mandamus were atypical in that they contemplated the use of one (but not all) of the pleadings that were used in civil actions. In the case of mandamus, that pleading was the answer. But the proposed rules for most special proceedings did not contemplate the use of any pleadings. That was true of, among others, the proposed rules for habeas corpus proceedings, probate proceedings, condemnation proceedings, contempt proceedings, conservatorship proceedings, corporate dissolution proceedings, and summary

94. See Final Report, supra note 92, at 536-37, 539 (section 1287). The Commissioners proposed changing the name of mandamus to "mandate." Id. at 537-38 (section 1282).
97. Amended Code § 128, 1849 N.Y. Laws 641. Under the 1849 amendments, a copy of the complaint did not have to be served with the summons. If the defendant made a written demand within 10 days after service of the summons, however, the plaintiff was required to serve a copy of the complaint on the defendant. The defendant was then required to serve the answer within 20 days after service of the complaint. Amended Code § 130, 1849 N.Y. Laws 642.
98. Final Report, supra note 92, at 539-40 (section 1290).
99. Amended Code §§ 140-55, 1849 N.Y. Laws 645-47. The original Code did not include demurrers to the defendant's answer or to the plaintiff's reply. The legislature added them in 1849. See Final Report, supra note 92, at 265 (proposing elimination of demurrers to answers or replies on the ground they encouraged delay and increased expenses).
proceedings to foreclose on a mortgage. They instead contemplated the use of motions only.100

In short, the Commissioners' reports indicate that, at least from the standpoint of the Commissioners, civil actions had two major characteristics that special proceedings of a civil nature did not. Civil actions involved (1) the service of a summons and (2) the use of the pleadings prescribed by the Code. Because those characteristics were procedural rather than historical, the classification of a particular proceeding at any given point in time was not written in stone. Classifications changed as procedures changed. For example, quo warranto was a special proceeding when the Code was first adopted in 1848.101 It became a civil action in 1849, however, when the legislature abolished the old procedures for quo warranto (writs and informations) and replaced them with the new procedures of the Code.102

100. See Final Report, supra note 92, at 541 (explaining applications for writs of assessment of damages for private property taken by the state for public use), 546 (explaining applications for writs of deliverance, the new name that the Commissioners gave to writs of habeas corpus), 584-85 (explaining applications for orders confirming sale of property in summary foreclosure proceedings), 619-20 (explaining warrants of arrest, notices, or orders to show cause in indirect contempt proceedings), 633-35 (explaining applications for orders to show cause in corporate dissolution proceedings), 651-66 (disallowing pleadings in surrogates' courts, which would include probate proceedings and conservatorship proceedings (known at the time as proceedings in cases of insanity or habitual drunkenness)).

That was even true, at least to some extent, of the proposed rules for forcible entry and detainer, the special proceeding that most closely resembled a civil action. The defendant in forcible entry and detainer proceedings was not served with a summons. The defendant was instead served with either an order to show cause or a notice of motion. See id. at 594-95. The proposed rules provided for the use of complaints and answers, but not demurrers or replies. See id. Although the complaint may have served an issue-framing function, it also served another function. The complaint (which had to be verified) provided the evidentiary basis for the order to show cause. See id. at 594.

Forcible entry and detainer proceedings were designed to be conducted quickly. The notice or order to show cause could be served as little as two days before the appearance date, which was also the answer date. See id. at 595. In actions, however, the answer date could not be less than 20 days after service of the summons. See Amended Code §§ 128-30, 1849 N.Y. Laws 641-42. That suggests that adherence to the timing-provisions of the Code was another essential attribute of an action.


B. Appellate Jurisdiction of the New York Court of Appeals

All of this would be of passing historical interest had the distinction between actions and special proceedings not worked its way into section 11 of the Code, the section that governed the jurisdiction of the New York Court of Appeals. But the distinction did work its way into section 11—and section 11 in turn worked its way westward to Nebraska by way of Ohio. It is therefore worth exploring the history of section 11 in order to determine what meaning, if any, the Commissioners attached to its key terms.

Section 11 gave the court of appeals jurisdiction to review on appeal “every actual determination” made at the general term (i.e., appellate term) of certain courts in the following cases:

1. In a judgment in an action . . . ; and upon the appeal from such judgment, to review any intermediate order involving the merits, and necessarily affecting the judgment:
2. In an order affecting a substantial right, made in such action, when such order in effect determines the action, and prevents a judgment from which an appeal might be taken:
3. In a final order, affecting a substantial right made, in a special proceeding, or upon a summary application, in an action after judgment.103

The courts were the New York Supreme Court, the Court of Common Pleas for the City and County of New York, and the Superior Court of the City of New York. Those courts had both appellate and original jurisdiction. They could only exercise appellate jurisdiction at what was called “general term.” The general term of the supreme court consisted of at least three judges. N.Y. Const. of 1846, art. VI, § 6. The general term of the court of common pleas and the superior court consisted of two judges. Amended Code § 36, 1849 N.Y. Laws 622.

The general terms had jurisdiction to hear appeals from special terms of the same court. Unlike a general term, a special term was held by one judge. See 1 HENRY WHITTAKER, PRACTICE AND PLEADING UNDER THE CODE 20-21 (New York, E.G. Jenkins 1854). For example, if a single judge of the supreme court directed the entry of judgment, then the aggrieved party could appeal that judgment to the general term of the supreme court. Amended Code § 348, 1849 N.Y. Laws 684.

The general terms of the supreme court and the court of common pleas also had jurisdiction to hear appeals from inferior courts. See Amended Code §§ 344 (providing for appeals to supreme court from judgments of county courts, mayors' courts, and recorders' courts), 352 (providing for appeals to the court of common pleas from judgments of the marine court and justice's courts of New York City), 1849 N.Y. Laws 683, 685.

The 1851 amendments added a fourth subsection which gave the court of appeals the power to review an order granting a new trial except in cases that had been originally commenced in a justice's court or in the marine court of New York City. Id. The fourth subsection was not incorporated into the original Ohio Code or the original Nebraska Code. The provision in the Nebraska Code that allows appeals to be taken from orders granting or denying new trials in civil cases was added in 1947. Act of May 31, 1947, ch. 85, § 1(2), 1947 Neb. Laws 263 (codified as amended at Neb. Rev. Stat. § 25-1315.03 (Reissue 1995)).
The first and third subsections were included in the original Code\textsuperscript{105} and are discussed here. The second subsection was added in 1851 and is discussed in section VI.

Some background is necessary before going any further. The court of appeals was created in 1847 and replaced the court of errors as the court of last resort in New York.\textsuperscript{106} Prior to the adoption of the Code, there were two methods for obtaining review as a matter of right. Writs of error were used to review final judgments and determinations rendered at law. Appeals were used to review orders and decrees made in equity.\textsuperscript{107} While finality was a requirement for seeking review by writ of error, it was not a requirement for seeking review by appeal. Interlocutory orders and decrees in equity were immediately appealable.\textsuperscript{108} Furthermore, if they were to be appealed at all, they had to be appealed immediately. They could not be challenged on an appeal from the final decree.\textsuperscript{109}

The Code changed all of that. Under the Code, writs of error were out and appeals were in. The Code expressly provided that judgments

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\textsuperscript{105} Here is the original version of section 11:

\begin{quote}
The court of appeals, shall have exclusive jurisdiction to review, upon appeal, every actual determination hereafter made, at a general term, by the supreme court, by the superior court of the city of New-York, or by the court of common pleas for the city and county of New-York, in the following cases, and no other:

1. In a judgment in an action commenced therein, or brought there from another court; and upon the appeal from such judgment, to review any intermediate order involving the merits, and necessarily involving the judgment.

2. In a final order, affecting a substantial right, made in a special proceeding, or upon a summary application in an action, after judgment:

But such appeal shall not be allowed in an action originally commenced in a court of a justice of the peace, or in the marine court of the city of New-York, or in an assistant justice's court of that city, or in the municipal court of the city of Brooklyn, or in a justice's court of the cities of Albany, Troy, and Hudson, respectively.

Code § 11, 1848 N.Y. Laws 499. The version of section 11 that the legislature enacted in 1848 was identical to the version that the Commissioners proposed in their first report. Compare id. with First Report, supra note 69, at 11.

\textsuperscript{106} The official name of the court of errors was the court for the trial of impeachments and the correction of errors. See Francis Bergan, The History of the New York Court of Appeals 1847-1932 19 (1985). As noted in the text, the court of appeals replaced the court of errors. The creation of the court of appeals was mandated by the 1846 New York Constitution. See N.Y. Const. of 1846, art. VI, §§ 2, 25. The legislation creating the court was passed in May 1847. See Act of May 12, 1847, ch. 280, 1847 N.Y. Laws 319-23. For further discussion of the creation of the court of appeals, see Bergan, supra, at 15-38.

\textsuperscript{107} See Act of May 12, 1847, ch. 280, §§ 11, 17, 1847 N.Y. Laws 322, 324.


\textsuperscript{109} See Van Santvoord, supra note 74, at 664.
and orders in civil actions could only be reviewed by appeal. The Code also eliminated the historic distinction between judgments at law and decrees in equity as well as the historic distinction between interlocutory decrees and final decrees in equity. Under the Code, there were only orders and judgments. The Code defined an order as "[e]very direction of a court or judge, made or entered in writing, and not included in a judgment." The Code defined a judgment as "the final determination of the rights of the parties to an action."

The first subsection of section 11 was yet another aspect of the merger of law and equity. By allowing an appeal from a judgment—which, as previously discussed, meant a final judgment—the first subsection applied to all civil actions the rule of finality that previously applied only to actions at law. Although the Commissioners intended to eliminate appeals from interlocutory orders in equity cases, they did not intend to eliminate appellate review of those orders. They instead intended to defer review until an appeal from a final judgment and to limit the types of orders subject to review. That explains why the Commissioners included the clause that allowed the court of appeals, on an appeal from a judgment, to review any intermediate orders that involved the merits and necessarily affected the judgment.

The third subsection dealt with both special proceedings and actions. It allowed an appeal from a final order that affected a substantial right and that was either made in a special proceeding or on a summary application in an action after judgment. To borrow a line from Winston Churchill, the third subsection is "a riddle wrapped in a mystery inside an enigma." The Commissioners did not define or explain what they meant by the terms "final order," "substantial right," or "summary application in an action after judgment." The only explanation they offered was that the statute made the real test

111. An interlocutory decree in equity was one that determined some of the rights of the parties but directed further proceedings, usually before a referee. One of the more common interlocutory decrees was one that determined that the plaintiff was entitled to equitable relief but referred the matter to a referee for an accounting and reserved future directions until receipt of the referee's report. A final decree was one that finally disposed of the case. See Van Santvoord, supra note 74, at 512-18, 578-79.
115. See First Report, supra note 69, at 15-16, 19.
of appealability whether there had been "an actual and final determination of a matter, involving a substantial right."\(^{117}\)

Yet there may be some clues to the riddle. The statutes that governed the jurisdiction of the court of appeals prior to the adoption of section 11 were substantially the same as the statutes that had governed the jurisdiction of the old court of errors.\(^{118}\) The Commissioners were not fond of those statutes. According to the Commissioners, nothing under the old system had "presented so many embarrassments" and "led to so much diversity in the court itself" as the statutes that governed the jurisdiction of the court of errors.\(^{119}\) The time had come to eliminate those embarrassments by providing a "tangible and convenient rule"\(^{120}\) for determining the jurisdiction of the court of appeals.

Among the embarrassments that the Commissioners discussed were the conflicting results the court of errors had reached in five cases.\(^{121}\) The basic question in those cases was whether writs of error were available to review final determinations made in a summary

\(^{117}\) First Report, supra note 69, at 19.

\(^{118}\) See id. at 12-13.

\(^{119}\) Id. at 13. The Commissioners discussed three such embarrassments. One of them was the inability of the court of errors to develop a clear standard for determining the types of interlocutory orders that were appealable in equity cases. See id. at 15-16. The Commissioners attempted to eliminate that embarrassment through the last clause of section 11(1). See supra text accompanying notes 114-15.

Another of the embarrassments stemmed from the language of the old statutes that authorized the court of errors to correct all errors. Despite that language, the court of errors had limited its review to actual determinations made by the court below. See First Report, supra note 69, at 16-17. According to the Commissioners, the court had interpreted the statute in a way "not called for by its language, or even its spirit." Id. at 17. The Commissioners attempted to eliminate that embarrassment by including language in section 11 that expressly limited review to actual determinations made by the general term from which the appeal was taken. See supra text accompanying note 103.

The last of those embarrassments was the uncertainty surrounding the availability of writs of error to review final determinations made in summary manner. As explained in the text, the Commissioners attempted to eliminate that embarrassment through section 11(3). See infra text accompanying notes 121-22.

\(^{120}\) First Report, supra note 69, at 13.

\(^{121}\) See, e.g., People ex rel. Dikeman v. President and Trs. of Brooklyn, 13 Wend. 130 (N.Y. 1834) (dismissing writ of error from order denying writ of mandamus); In re Negus, 10 Wend. 34 (N.Y. 1832) (quashing writ of error from order denying motion to set aside award made by trustees to creditor in absconding debtor proceedings); Brooks v. Hunt, 17 Johns. 484 (N.Y. 1820) (quashing writ of error from order refusing to set aside writ of execution); Clason v. Shotwell, 12 Johns. 31 (N.Y. 1814) (allowing writ of error from judgment awarding plaintiff possession of property in forcible entry and detainer proceedings); Yates v. People, 6 Johns. 337 (N.Y. 1810) (allowing writ of error from determination in habeas corpus proceedings that petitioner's confinement was lawful). For the Commissioners' discussion of these cases, see First Report, supra note 69, at 13-16.
manner—in other words, final determinations made in proceedings that were conducted without the formal pleadings and procedures used in actions at law. The court of errors allowed the writ in two of the cases but quashed the writ in the other three.

That suggests the Commissioners wrote the third subsection of section 11 to eliminate any uncertainty about the power of the court of appeals to review final determinations in proceedings that involved the use of motions and orders to show cause rather than pleadings. Four of the five cases involved orders made in proceedings that the Commissioners would have classified as special proceedings: habeas corpus, forcible entry and detainer, absconding debtor, and mandamus.122 As previously discussed, special proceedings involved the use of motions or orders to show cause rather than the use of the pleadings prescribed by the Code.

The other case involved an order denying a motion to set aside a writ of execution, a writ that had been issued to execute a judgment in an action at law.123 Presumably, the Commissioners would have classified that order as one made on a summary application (i.e., on a motion) in an action after judgment. The term “summary application in an action after judgment” most likely encompassed any motion for post-judgment relief, including, for example, a motion in proceedings supplementary to execution, a motion for the issuance of a writ of execution more than five years after the entry of judgment, a motion to set aside a judgment, and a motion to set aside an execution.124 That may in turn explain why the Commissioners lumped special proceedings and summary applications together in the same subsection. Both were procedurally different from actions in that both involved the use of motions rather than the use of pleadings.

Assuming that this solves the riddle of summary applications, the mystery and enigma remain: what is a “final order” and what is a “substantial right”? The five cases from the court of errors provide

122. See First Report, supra note 69, at 2; supra notes 94-100 and accompanying text.

123. See Brooks v. Hunt, 17 Johns. 484 (N.Y. 1820). The judgment debtor in Brooks moved to set aside the writ on the ground that, under the state insolvency laws, he had been discharged of all liability on the judgment. See id. at 484. The Commissioners' discussion of Brooks indicates that the Commissioners believed that the order was final and should have been reviewed. The Commissioners said that the order "in effect, finally determined [the judgment debtor's] liability to pay the judgment; and yet the court of errors, with but two dissenting voices, quashed the writ of error, on the ground that it was not a final determination, but only a decision upon a collateral or interlocutory point." First Report, supra note 69, at 14.

124. The courts later took the position that orders granting or denying motions to vacate a judgment were not orders made on a summary application in an action after judgment. See infra note 383 and accompanying text. There is nothing in any of the Commissioners' reports that supports that position.
some clues—but not much more than that. The Commissioners opened their discussion of those five cases by saying that the first case had established the following rule: writs of error were available when the lower court made a decision that "[was final, and of which a record [could] be made, and which ... decide[d] the rights of property or personal liberty."\(^\text{125}\)

The Commissioners' discussion of those cases indicates that the Commissioners believed that the determinations in all five should have been subject to review. Three of them involved orders that ended the proceedings,\(^\text{126}\) one of them involved an order that denied a motion to set aside a nonjudicial determination of liability,\(^\text{127}\) and one of them involved an order that denied a party's post-judgment motion to quash an execution.\(^\text{128}\) It is hard to articulate a definition of "final order" based on these cases. Perhaps the most that can be said is that the Commissioners thought that an order was final if it finally determined a party's right to relief. At the very least, that would include (1) an order that ended the proceeding and (2) an order that denied a motion to set aside a prior determination of a party's right to relief in a proceeding.

Less, however, can be said about "substantial right." Four of the cases involved determinations that affected rights of personal liberty or rights of property.\(^\text{129}\) But the fifth did not. It involved a decision

\(^{125}\) First Report, supra note 69, at 13. The rule was not really a rule that the court of errors had adopted and followed. It was simply a statement that one of the 28 members of the court made in Yates v. People. See 6 Johns. 337, 402 (N.Y. 1810) (opinion of Justice Spencer). By a 16-12 vote, the court in Yates refused to quash a writ of error taken from the supreme court's determination in a habeas corpus proceeding.

\(^{126}\) See, e.g., People ex rel. Dikeman v. President and Trs. of Brooklyn, 13 Wend. 130 (N.Y. 1834) (denying peremptory writ of mandamus after failure to plea to return of alternative writ); Clason v. Shotwell, 12 Johns. 31 (N.Y. 1814) (awarding plaintiff possession of property in forcible entry and detainer proceedings with writ of re-restitution); Yates v. People, 6 Johns. 337 (N.Y. 1810) (holding that petitioner's confinement was lawful in habeas corpus proceeding).

\(^{127}\) See In re Negus, 10 Wend. 34 (N.Y. 1832) (denying debtor's motion to set aside trustee's award to creditor in absconding debtor proceedings). The order in this case could also be classified as one that ended the proceedings because there was only one creditor in the case.

\(^{128}\) See Brooks v. Hunt, 17 Johns. 483 (N.Y. 1820) (issuing an order denying motion to set aside writ of execution).

\(^{129}\) The four were In re Negus, 10 Wend. 34 (N.Y. 1832) (involving property right; order at issue denied motion to set aside award made by trustees to creditor in absconding debtor proceedings); Brooks v. Hunt, 17 Johns. 483 (N.Y. 1820) (involving property right; order at issue refused to set aside writ of execution; writ of error quashed); Clason v. Shotwell, 12 Johns. 31 (1814) (involving property right; writ at issue awarded plaintiff possession of property in forcible entry and detainer proceedings); Yates v. People, 6 Johns. 337 (N.Y. 1810) (involving personal liberty right; judgment at issue was made in habeas corpus proceeding and determined that petitioner's confinement was lawful).
denying a writ of mandamus to compel village officials to file a report with the county clerk, a decision that the Commissioners described as a final determination that settled "most important rights."130 If the Commissioners wrote the third subsection against the background of the five cases discussed in their report—which is as good a theory as any—then they may have chosen the term "substantial right" simply because it seemed to work. The term was broad enough to cover determinations that affected "most important rights" (whatever those are) as well as determinations that affected rights of property and personal liberty. In other words, the term may have been chosen, not because it had any concrete meaning, but because it covered all five of the determinations on which the Commissioners were focusing.131

130. FIRST REPORT, supra note 69, at 15. The case was People ex rel. Dikeman v. President and Trustees of Brooklyn, 13 Wend. 130 (N.Y. 1834). The report included the amount of assessed compensation that would be paid to the various property owners, including the realtors, whose property would be taken in order to open a street. See People ex rel. Dikeman v. President and Trs. of Brooklyn, 1 Wend. 318, 319-19 (N.Y. Sup. Ct. 1828). The applicable statutes required the village trustees to file the report with the clerk of the court of common pleas. Id. at 321. The court could then confirm or reject the report. The village trustees effectively discontinued the proceedings, however, by refusing to file the report.

One of the key issues at the supreme court level was whether the relators had a vested right to the compensation assessed in the report; if so, then the village trustees could not abandon their plans to open the street with impunity. See id. at 321-25. In other words, the case arguably involved property rights. The Commissioners did not discuss the case in those terms, however, perhaps because they were unaware of the details. The details do not appear in the opinion of the court of errors that the Commissioners discussed in their report. They instead appear in the earlier opinion of the supreme court.

131. There is no indication that "substantial right" was a commonly used term with a well-understood meaning at the time that the Code was adopted. During the period from 1799 to 1848, the term appeared in a grand total of 15 opinions. See In re Negus, 10 Wend. 34, 48 (N.Y. 1832) (opinion of Sen. Tracy); Livingston’s Ex’rs v. Van Rensselaer’s Adm’rs, 6 Wend. 63, 75 (N.Y. 1830); Bridge v. Johnson, 5 Wend. 342, 348 (N.Y. 1830); Waters v. Stewart, 1 Cai. Cas. 47, 51 (N.Y. 1805) (opinion of the President); Shepard v. Hoit, 7 Hill 198, 200 (N.Y. Sup. Ct. 1845); Webber v. Shearman, 6 Hill 20, 29 (N.Y. Sup. Ct. 1843); People ex rel. Barry v. Mercein, 3 Hill 399, 420 (N.Y. Sup. Ct. 1842); Clarke v. Van Surlay, 15 Wend. 436, 441 (N.Y. Sup. Ct. 1836); Michaels v. Shaw, 12 Wend. 587, 588 (N.Y. Sup. Ct. 1834); Barney v. Keith, 6 Wend. 555, 557-58 (N.Y. Sup. Ct. 1831); Salisbury v. Parker, 7 Cow. 150, 151 (N.Y. Sup. Ct. 1827); Beekman v. Satterlee, 5 Cow. 519, 527 (N.Y. Sup. Ct. 1826); Lion ex dem. Eden & Wood v. Burtis, 18 Johns. 510, 512 (N.Y. Sup. Ct. 1821); Hatten v. Speyer, 1 Johns. 37, 42 (N.Y. Sup. Ct. 1806); Van Alen v. Rogers, 1 Johns. Cas. 281, 283 (N.Y. Sup. Ct. 1800). The cases reveal no clear pattern of usage. Sometimes the term was used alone and sometimes it was used in conjunction with form. The word "form" was used in reference to clerical mistakes, parts of documents, and the forms of action.

After the Code was adopted, judges could not agree on the meaning of "substantial right." Some judges interpreted the term to mean matters of substance as opposed to matters of form. Others interpreted it to mean a legal right. See People v. N.Y. Cent. R.R., 29 N.Y. 418 (1864). In that case, the court of appeals
To the extent that the Commissioners understood the term "substantial right" to mean anything, the most that can be said is that they understood it to mean matters of substance rather than form. The Commissioners apparently borrowed the term from Senator Tracy’s dissenting opinion in In re Negus, the only opinion in those five cases in which the term appeared. In Negus, the court of errors dismissed a writ of error taken from an order in an absconding debtor proceeding. One reason cited for dismissing the writ was that summary proceedings could not be reduced to the type of formal record that the common law required. The absence of formal record was of no consequence to Senator Tracy, however. He said that the order determined "most important rights of property" and also said that dismissing the writ because of the absence of a formal record would "be

held that an order awarding the defendant $20,000 in additional costs affected a substantial right and was therefore appealable. Chief Justice Denio wrote:

In a general way it may be said that every order which may be made in a cause affects the rights of the parties in some appreciable manner. What, then, is meant by the term substantial right? In my opinion it is distinguished from a formal right... [I]t is sufficient to say that an order which peremptorily and finally charges a party with the payment of a sum of money, great or small, which he ought not to pay, or with a greater amount than he ought to pay, affects his rights, not in a manner of form but in substance . . . .

Id. at 421.

In his dissent, Justice Hogeboom said that the order did not affect a substantial right because the award of additional costs was a matter committed to the discretion of the lower court. As Justice Hogeboom explained:

A substantial right is something to which, upon proved or conceded facts, a party may lay claim as a matter of law—which a court may not legally refuse—and to which it can be seen that the party is entitled within well settled rules of law. There is many a point of practice and matter of discretion, the decision of which may directly or indirectly affect a party’s pecuniary interests to the amount of thousands of dollars, and in a loose and general sense may be said to affect a substantial right, but which has never been pretended to be embraced within this language.

Id. at 430 (Hogeboom, J., dissenting). Justice Hogeboom’s interpretation represented the weight of earlier authority. See, e.g., People ex rel. Vanderbilt v. Stilwell, 19 N.Y. 531, 532 (1859) (holding that an order quashing a writ of certiorari did not affect a substantial right; allowance or refusal of certiorari was a matter of discretion); Moncrief v. Moncrief, 10 Abb. Pr. 315, 316 (N.Y. Sup. Ct. 1860) (holding that an order granting or refusing temporary alimony did not affect a substantial right; awards of temporary alimony were discretionary); Tallman v. Hinman, 18 How. Pr. 89, 90 (N.Y. Sup. Ct. 1854) (holding that an order denying motion to set aside judgment did not affect substantial right; “[a] party cannot be said to have a right to what a court has discretion to grant or withhold”). The court of appeals specifically rejected that interpretation in 1877. See Martin v. Windsor Hotel Co., 70 N.Y. 101, 102-03 (N.Y. 1877) (holding that the earlier view defining substantial right as an absolute legal right was erroneous).

132. 10 Wend. 34 (N.Y. 1832).
133. The order denied a motion to set aside an award that the trustees made to a creditor.
134. See id. at 40 (opinion of the Chief Justice).
sacrificing substance to form—sustaining formal objections to defeat substantial rights."

The Commissioners may have done more than simply borrow the term "substantial right" from Negus. They may have done the equivalent of a cut-and-paste job, taking bits and pieces from Negus and wrapping them around the terms "order" and "special proceeding." For example, in his opinion in Negus, the Chancellor said: "There are a great variety of cases where error will not lie on adjudications affecting the rights of the parties." The Commissioners may have cut the phrase "the rights of the parties," pasted in the more catchy phrase from Senator Tracy's opinion—"substantial rights"—and ended up with a statute that allowed an appeal from a "final order, affecting a substantial right."

To take another example, in his opinion in Negus, the Chief Justice described the decision of the lower court as one "made on a summary application." That phrase apparently caught the Commissioners' attention. The statute allowed an appeal from a final order "made on a summary application in an action after judgment." To take yet another example, Senator Tracy said that the denial of the motion at issue in Negus was "a final determination of the rights of the parties in controversy." He added that the denial was "a final determination of the matter" even though, in theory, the losing party could renew

135. Id. at 48 (opinion of Sen. Tracy). The notion that the Commissioners understood the term "substantial right" to refer to matters of substance rather than form draws further support from Section 151 of the Code. Section 151 provided: "The court shall, in every stage of the action, disregard any error, or defect in the pleadings or proceedings, which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." Code § 151, 1848 N.Y. Laws 526.

Section 151—which appeared in the chapter of the Code that governed variances and amendments—was apparently based on the old statutes that governed amendments in actions at law. The old statutes drew a distinction between defects of form and defects of substance. See 2 N.Y. Rev. Stat., pt. 3, ch. VII, tit. V, § 1 (1846). Section 4 of the old statutes provided that, after judgment, defects of form could be "rectified and amended by the court, in affirmance of the judgment, so that such judgment shall not be reversed or annulled." 2 N.Y. Rev. Stat., pt. 3, ch. VII, tit. V, § 4 (1846). Section 8 provided that the specified defects "and all others of the like nature, not being against the right and justice of the matter of the suit, and not altering the issue between the parties, or the trial, shall be supplied and amended" either by the trial court or by reviewing court. 2 N.Y. Rev. Stat., pt. 3, ch. VII, tit. V, § 8 (1846).

It seems as though section 151 was a combination of old sections 4 and 8 but used different phrasing, most notably the term "substantial rights." Cf. Vandenberg v. Van Valkenburgh, 3 Barb. 217, 220 (N.Y. Sup. Ct. 1850) (observing that section 176 of the Code added "little, if any thing," to the power of amendment under old section 8).

136. See Negus, 10 Wend. at 38 (opinion of the Chancellor) (emphasis added).
137. Id. at 40 (opinion of the Chief Justice) (emphasis added).
138. Id. at 47 (opinion of Sen. Tracy).
the motion. The Commissioners apparently incorporated that phrasing into their description of the statute. In their first report, the Commissioners said that the statute made the real test of appealability whether there had been "an actual and final determination of a matter, involving a substantial right." 

While all of this is just speculation, it does make a certain amount of sense. At the time the Commissioners wrote the third subsection, they had not yet begun to focus on the specifics of special proceedings; they planned to do that later. They were instead focusing on the specifics of civil actions, which in many ways opened a Pandora's box. The Commissioners found themselves addressing a wide array of subjects, including, among others, jurisdiction, statutes of limitation, provisional remedies, right to jury trial, attorneys' fees, and appeals. Under the circumstances, it would have made perfect sense for the Commissioners to have drafted the third subsection by reworking a few phrases from an old case without giving any real thought to what they were doing. They had bigger fish to fry at the time, namely the old systems of law and equity. And they fried those fish in short order; they drafted the original Code in about five months.

139. Id. (emphasis added).
140. First Report, supra note 69, at 19 (emphasis added).
141. See supra text accompanying notes 80-81.
142. See First Report, supra note 69, at 5-66 (jurisdiction of the courts), 92-122 (statutes of limitation), 161-76 (provisional remedies), 184-85 (expanding right to jury trial beyond constitutional provisions), 204-12 (abolishing fee bills, repealing all statutes regulating attorneys' fees in civil actions or restricting right of attorney and client to agree on amount of attorney's compensation, and providing for limited indemnification of prevailing party's attorneys' fee through cost awards), 213-31 (appeals). For a discussion of the significance of the attorneys' fees provisions of the Code, see John Leubsdorf, Toward A History of the American Rule on Attorney Fee Recovery, 47 Law & Contemp. Probs. 9 (1984).
143. The legislature appointed the Commissioners on April 8, 1847. Act of Apr. 8, 1847, ch. 59, § 8, 1847 N.Y. Laws 67. The three Commissioners were David Graham, Nicholas Hill, and Arphaxed Loomis. See id. The man with whom the Code is most often associated—David Dudley Field—was not appointed at first, apparently because he was too much of a procedural radical. See Cook, supra note 93, at 190; Daun Van Ee, David Dudley Field and the Reconstruction of the Law 34 (1974). Commissioner Hill later resigned, and, on September 29, 1847, Field was appointed to replace him. Joint Res., 70th Sess., 1847 N.Y. Laws 744.

The three members of the reconstituted commission first met as a group on November 10, 1847. Arphaxed Loomis, Historic Sketch of the New York System of Law Reform in Practice and Pleadings 15, 17 (Little Falls, J.R. & G.G. Stebbins 1879). During their 10 day meeting, the Commissioners compared notes and opinions, examined the work already laid out by the old members, discussed the expediency of making their work in the form of a code and calling it by that name . . . [and] adjourned to meet in . . . January [1848] with the understanding that each member should proceed to write up such parts as he might choose.

Id. at 15.
In conclusion, section 11 was drafted with an eye toward finality. The Commissioners gave the court of appeals jurisdiction to hear appeals from a judgment—i.e., from the "final determination of the rights of the parties in the action"—and from a "final order, affecting a substantial right" and made in a special proceeding. But they did not think through what "final" meant other than in a very general sense. They also did not think through what "substantial right" meant or how it would apply in practice. That is an important point; it underscores the futility of attempting to interpret "substantial right" on the basis of its plain meaning or its intended meaning. The term did not have either type of meaning.

IV. GO WEST, YOUNG CODE

A. Ohio

Given the lack of care with which it was drafted, section 11 was not the kind of statute that other states should have blindly incorporated into their own codes. But that is what Ohio did. Procedural reform in Ohio followed much the same course as procedural reform in New York. In March 1852, the Ohio legislature appointed three commissioners and instructed them to abolish the common law forms of action and to develop "a uniform mode of proceeding, without reference to any distinction between law and equity." In January 1853, the Ohio Commissioners submitted their report to the legislature and, a few months later, the legislature enacted the Commissioners' proposals into law.

The work of the Ohio Commissioners was shaped in large part by the earlier work of the New York Commissioners. Like the New

Each commissioner came to the January 1848 meeting with "his own draft of the more important parts of the work on civil actions. The principles and leading features of the system were so well understood and agreed upon, that there was no essential difference in them, except in the arrangement and phraseology." Id. at 17. In their day-to-day work, the Commissioners tended to rely primarily on Field's manuscripts. See id. at 22.

Perhaps part of the reason why there was so much agreement among the Commissioners was that they were not writing on a completely clean slate; parts of the code that the Commissioners eventually proposed had been included in two bills that the legislature rejected in 1842. See Hepburn, supra note 62, at 83. "But, with all allowances, it is seldom that so great a work is accomplished in so short a time." Id. The Commissioners submitted their first report to the legislature on February 29, 1848. See First Report, supra note 69, at v. That was five months after Field was first appointed.

145. Act of Mar. 4, 1852, § 1, 50 Ohio Laws 115 (1852). The appointment of the Commissioners was mandated by the Ohio Constitution. See Ohio Const. of 1851, art. XIV, § 2.
146. See Hepburn, supra note 62, at 100.
147. See id. In their report, the Ohio Commissioners wrote:
York Commissioners, the Ohio Commissioners divided civil proceedings into two categories: civil actions and special proceedings. Civil actions replaced actions at law and suits in equity and were governed by the uniform procedures of the Code. Civil actions all would be commenced the same way (summons), pled the same way (facts constituting the cause of action), proven the same way (oral testimony), and end the same way (judgment).

But this procedural uniformity did not extend to special proceedings. Special proceedings were statutory proceedings that involved procedures different than the normal procedures for actions at law or suits in equity. Although the Commissioners tinkered with a few special proceedings—for example, mandamus—they left most special proceedings alone. Those proceedings continued to be governed by the procedures specified in the statutes that created them.

It is worth emphasizing that simply because a proceeding was authorized by statute did not mean that it was a special proceeding. There were a number of statutorily-created actions in Ohio at the

The undersigned would say, that keeping constantly in view our existing system and statutes upon practice, they have been guided and greatly aided by reforms of the same kind, which have been proposed and adopted, elsewhere. While they have been chiefly indebted to the extraordinary labors of the New York commissioners upon practice and pleadings, they have been assisted by those of [other states], where the example of New York has been in a great degree followed.

REPORT OF THE COMMISSIONERS ON PRACTICE AND PLEADINGS at the two unnumbered pages preceding the Table of Contents (Columbus, Osgood & Blake 1853) [hereinafter OHIO REPORT].

148. In their report, the Commissioners said that the civil action only provides a substitute for the actions at law, so called, and what are recognized as suits proper in equity; and this single action takes their place, and does no more. Any proceedings in either court, not begun by an action in a court of law, or by a suit in a court of chancery, will be begun and conducted, hereafter as formerly, unless otherwise provided.

. . . A civil action under this code will comprehend, therefore, every proceeding in court heretofore instituted by any and all the forms hereby abolished. Every other proceedings will be something else than an action, say a special proceeding.

OHIO REPORT, supra note 147, at 9.

149. See id. at 8-12.

150. See id. at 219-20. Section 604 of the Code provided:

Until the legislature shall otherwise provide, this code shall not affect proceedings on habeas corpus, quo warranto, or to assess damages for private property taken for public uses; nor proceedings under the statutes for the settlement of estates of deceased persons; nor proceedings under statutes relating to dower, divorce, or alimony; or to establish, or set aside a will; nor proceedings under statutes relating to apprentices, arbitration, bastardy, insolvent debtors; nor any special statutory remedy not heretofore obtained by action; but such proceedings may be prosecuted under the code whenever it is applicable.

OHIO STAT. ch. 87, § 604 (Swan Comp. 1854). Section 604 was patterned after Section 390 of the New York Code. See supra text accompanying note 90.
time. Most of them authorized the use of a particular action at law to enforce a statutory right.\textsuperscript{151} For example, the 1831 Act for the Prevention of Gambling (which those of us who have been to Las Vegas can appreciate) allowed individuals who lost money gambling to recover their losses from the winner by bringing an "action of debt founded on this act."\textsuperscript{152} But some of them simply authorized the use of an action to enforce the right without specifying the form of action. For example, the 1851 wrongful death statute authorized the deceased’s personal representative to bring "an action and recover damages."\textsuperscript{153}

It is also worth emphasizing that simply because a proceeding was governed by provisions in the Code did not mean that it was an action. For example, mandamus was the subject of one of the chapters of the Code\textsuperscript{154} even though the Commissioners specifically identified mandamus as a special proceeding to which the procedural rules for civil actions were inapplicable.\textsuperscript{155} The reason that the Commissioners included the chapter on mandamus is that the statutory provisions that previously governed mandamus were part of the civil practice act that they planned to repeal upon adoption of the Code.\textsuperscript{156}

151. See Ohio Report, supra note 147, at 220. These statutes created a problem for the Commissioners because they authorized forms of actions that the Commissioners planned to abolish. Rather than amending all of these statutes, the Commissioners added section 605 to the Code. Section 605 provided that, if a statute authorized an action and prescribed the mode of proceeding—in other words, if the statute authorized bringing a specific form of action such as an action on the case or action of debt and specified the use of the old procedures—then the parties could use the old procedures or, if they saw fit, use the new procedures. If the statute did not specify the mode of proceeding, then the action was treated as a civil action governed by the Code. Ohio Stat. ch. 87, § 605 (Swan Comp. 1854); see Chapman v. Rannells (Ohio Ct. Com. Pl. 1859) (explaining that the Code governed actions brought under lien statutes authorizing recovery in actions for money had and received), reprinted in 2 Ohio Decisions Series 245 (Norwalk, Lansing Printing Co. 1896).

152. Ohio Stat. ch. 51, § 11 (Swan Comp. 1854).

153. Ohio Stat. ch. 87, § 636 (Swan Comp. 1854).

154. Mandamus was the subject of Title XVIII, chapter IV of the Code. See Ohio Stat. ch. 87, §§ 569-80 (Swan Comp. 1854).

155. Ohio Report, supra note 147, at 9; see Chinn v. Trustees, 32 Ohio St. 236 (1877) (explaining that the Code provides for mandamus but does not recognize it as a civil action). Unlike civil actions, mandamus proceedings involved the use of a motion rather than a petition and the service of motion or an order to show cause rather than the service of a summons. See Ohio Stat. ch. 87, § 573 (Swan Comp. 1854).

Although the mandamus statutes in Nebraska mirrored the statutes in Ohio, mandamus in Nebraska evolved into an action in which many of the normal rules of pleading apply. See State ex rel. Krieger v. Bd. of Supervisors, 171 Neb. 117, 120-21, 105 N.W.2d 721, 724-25 (1960); State ex rel. Moore v. Chi., St. Paul, Minneapolis & Omaha R.R., 19 Neb. 476, 482, 27 N.W. 434, 437 (1886). I have been told by a number of lawyers that summonses are served in mandamus actions.

156. See Ohio Report, supra note 147, at 213.
ioners therefore had to put mandamus back in somewhere—and the Code was just as good a place as any.

So to make a long story short, "actions" and "special proceedings" were simply terms of art used to describe the proceedings for which the procedures at the trial court level changed and those for which the procedures did not change. Civil actions were proceedings that once employed the procedures used in actions at law or suits in equity and that now employed the uniform procedures of the Code. Special proceedings were everything else and continued to be governed by their own peculiar procedures as set by statute.

But the procedures on appeal were another story. Prior to the Code, decisions were reviewed by bills of review, writs of error, and writs of certiorari. The Commissioners replaced those three forms of review with one form: the petition in error. To identify what civil matters could be reviewed by petition in error, the Commissioners modified section 11 of the New York Code to fit the Ohio court system. For each of the three courts in Ohio that exercised appellate jurisdiction, the Commissioners wrote a section giving that court the power to review a "judgment rendered or final order made" by an inferior court. The Commissioners then wrote another section to define "final order." Section 512 of the Ohio Code provided:

Section 512 is really nothing more than a combination of sections 11(2) and 11(3) of the New York Code. There is one possible substantive difference, however. Section 11(3) of the New York Code allowed an appeal from "a final order, affecting a substantial right made, in a special proceeding." If "final order" meant an order that finally determined a party's right to relief (which is not clear), then the Ohio Commissioners changed the meaning. Under the Ohio Code, any order affecting a substantial right made in a special proceeding—even

157. See id. at 194.
158. See Ohio Stat. ch. 87, §§ 515, 530 (Swan Comp. 1854).
159. Those courts were the supreme court, the district court, and the court of common pleas. See Ohio Stat. ch. 87, §§ 511, 513-14 (Swan Comp. 1854).
160. Id. For example, section 511 provided:

A judgment rendered or a final order made by a probate court, justice of the peace, or any other tribunal, board, or officer, exercising judicial functions, and inferior in jurisdiction to the court of common pleas, may be reversed, vacated, or modified by the court of common pleas.

Ohio Stat. ch. 87, § 511 (Swan Comp. 1854) (now codified as amended at Ohio Rev. Code Ann. § 2505.02(B) (Anderson 1998)).
161. See Ohio Stat. ch. 87, § 512 (Swan Comp. 1854).
an order that did not finally determine a party's right to relief—was by definition a final order.

Assuming that the Ohio Commissioners made a substantive change, they most likely made that change by accident.\textsuperscript{163} The deletion of the finality requirement seems to have been a result of the way in which the Ohio Commissioners structured their statutes. The Ohio Commissioners did not clutter each section with specific language about the types of orders that were reviewable. They instead wrote three sections that all used the term "final order" and then wrote a separate section to define that term. The consequence of making "final order" a defined term rather than a free-standing term was to read finality out of the statute. That does not seem to have been the intent of the Commissioners, however. In their report, the Commissioners said that "a final determination of any controversy between parties hereafter are called judgments and final orders."\textsuperscript{164}

\textbf{B. Nebraska}

In 1858, the Territorial Legislature enacted the Nebraska Code of Civil Procedure. Much of the Nebraska Code was copied from the Ohio Code, although there were some differences. The major difference was that the Nebraska Code only applied to actions at law. It did not affect suits in equity.\textsuperscript{165} That difference was short-lived, however. In 1867, soon after Nebraska became a state, the Legislature amended the Code to abolish actions at law and suits in equity and replace them with the civil action.\textsuperscript{166} When the legislature created the civil action in 1867, it also specified that judgments and final orders in civil actions could only be reviewed by appeal.\textsuperscript{167} In 1871, however, the legislature changed its mind and returned to petitions in error as the method for reviewing judgments and final orders in civil actions.

But the petition in error did not enjoy a long reign. In 1873, appeals became the method for reviewing district court judgments and

\textsuperscript{163} There is no indication that the Commissioners gave much thought to the question of finality. The portions of their report that discussed appellate review focused on the reasons why they selected petitions in error to replace the various modes of review that existed prior to the merger of law and equity. \textit{See} \textit{Ohio Report}, \textit{supra} note 147, at 194.

\textsuperscript{164} \textit{Id.} at 194 (emphasis added).

\textsuperscript{165} The Code abolished the various actions at law and substituted the civil action in their place. \textit{Neb. Code Civ. P.}, § 3, 1858 \textit{Neb. Terr. Laws} 109. Suits in equity apparently were not regulated by statute until the 1864 when the Territorial Legislature passed an act that specifically addressed chancery practice. \textit{See} 1864 \textit{Neb. Terr. Laws} 152-64.

\textsuperscript{166} \textit{See} \textit{Act of June 19, 1867, § 1}, 1867 \textit{Neb. Laws} 71.

\textsuperscript{167} \textit{See} \textit{Act of June 19, 1867, § 6}, 1867 \textit{Neb. Laws} 72.
final orders in equitable actions\textsuperscript{168} and, in 1905, appeals became the method for reviewing district court judgments and final orders in all civil cases.\textsuperscript{169} The methods also changed in criminal cases. Until recently, criminal cases were originally reviewed on a writ of error, a writ that the clerk issued upon the filing of a petition in error.\textsuperscript{170} In 1961, the petition in error was replaced by the notice of appeal\textsuperscript{171} and, in 1982, the writ of error was eliminated.\textsuperscript{172}

The one constant through all these changes has been the statutory definition of "final order." Since 1858, a final order has been "an order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment."\textsuperscript{173} Even though the definition was written for error proceedings in civil cases, the supreme court has applied the definition to appeals in both civil and criminal cases.\textsuperscript{174} But the fact remains that the definition is really not much of a definition. It is simply a collection of words that only take on meaning in light of procedural reforms that occurred long ago.

\textsuperscript{168} See Act of Mar. 3, 1873, § 1 (appeals in equity actions), \textit{reprinted in 2 Complete Session Laws of Nebraska} 781 (Lincoln, Journal Co. 1887).

\textsuperscript{169} See Act of Mar. 30, 1905, § 1, 1905 Neb. Laws 657. That provision is the ancestor of what is now section 25-1912. Although 1905 marked the end of petitions in error as a means of reviewing district court judgments and final orders in civil cases, they lived on as an alternate means of reviewing county court judgments and final orders. \textit{See In re Estate of Berg}, 139 Neb. 99, 102-06, 296 N.W. 460, 461-63 (1941) (discussing the history of the error statutes). That came to an end in 1974, however, when the legislature amended section 25-1902 to eliminate county court judgments and orders from the types of matters that could be reviewed on error. \textit{See LB 733, § 2, 1974 Neb. Laws 503.}


\textsuperscript{171} \textit{See LB 394, §§ 1, 3, 1961 Neb. Laws 388-90.}

\textsuperscript{172} \textit{See LB 722, §§ 3-5, 7-9, 11-12, 1981-82 Neb. Laws 657-61.}


\textsuperscript{174} \textit{See State v. Guatney}, 207 Neb. 501, 506, 299 N.W.2d 538, 542 (1980) (holding that hearing to determine competency of accused in a criminal case is a special proceeding); \textit{Aspinwall v. Aspinwall}, 18 Neb. 463, 464-65, 25 N.W. 623, 624 (1885) (noting that the definition of "final order" for error proceedings also applies to appeals because it is the only definition of "final order" in the statutes).
V. REFOCUSING THE LAW OF SPECIAL PROCEEDINGS

Now that the cobwebs have been cleared off the historical record, it is time to assess what the record tells us. It tells us five things. First, the distinction between actions and special proceedings was based on procedure. Second, actions and special proceedings were mutually exclusive categories. Third, the term “action” as originally used in the statute was designed to cover both civil and criminal actions. Fourth, to be an appealable order, an order made in a special proceeding had to (a) affect a substantial right and (b) be final. Fifth, the finality requirement was inadvertently removed from the statute as a consequence of the drafting techniques of the Ohio Commissioners. Although the substantial right requirement survived, it was not really much of a requirement. The term “substantial right” was a make-weight term that meant “a matter of substance rather than form,” if it meant anything at all.

My proposal is that we use the lessons of history to interpret section 25-1902. That would not require a major shift in thinking. It would instead involve fleshing out the details of the current thinking. Many of the court’s definitions of the key statutory terms are not fundamentally different than the historical definitions; they are really just shorthand for the historical definitions. For example, the court has said that an action is “a civil action”\textsuperscript{176}—in other words, “a cause brought under the provisions of chapter 25 of our statutes.”\textsuperscript{177} The court has also said that an action “involves prosecuting the alleged rights between the parties and ends in a final judgment.”\textsuperscript{177} That is close to the historical definition of a civil action: an adversarial proceeding that involves the service of a summons and the use of pleadings. The historical definition is more complete, however. As a result, it is easier in terms of application, more predictable in terms of outcome, and more sensible in terms of content.

For example, the shorthand definitions indicate that divorce is a special proceeding because it is encompassed by chapter 42 rather than chapter 25. Where the Revisor of Statutes happens to put a proceeding, however, does not alter the nature of the proceeding. Divorce is an adversarial proceeding in which one spouse asserts a claim for relief against the other spouse. It requires the service of a summons, whether by personal service or publication.\textsuperscript{178} It also involves the use of pleadings.\textsuperscript{179} The petitioner will file a petition for dissolution of marriage, not a motion. Unless the respondent defaults, (s)he will file

\begin{footnotesize}
\begin{enumerate}
\item In re Interest of R.G., 238 Neb. 405, 413, 470 N.W.2d 780, 787 (1991).
\end{enumerate}
\end{footnotesize}
an answer that may include a counterclaim for divorce. Although the divorce statutes specify what must be in the petition—in other words, although they specify what must be pled to state a cause of action—they still contemplate the use of pleadings rather than motions. In short, divorce is an action, pure and simple.\(^{180}\)

Like the current definitions of “action,” the court’s current definitions of “special proceeding” are shorthand for the historical definition. The court has said that special proceedings are (1) civil statutory remedies not encompassed in chapter 25, (2) statutory proceedings which are not actions, or (3) applications authorized by law to enforce rights conferred by law.\(^{181}\) These are all variations of the historical definition: a stand-alone proceeding that does not involve the service of a summons and the use of pleadings. Again, however, the historical definition is more complete. As a result, it is easier in terms of application, more predictable in terms of outcome, and more sensible in terms of content.

For example, assume that Al plans to sue Barb for fraud but has no money. Al therefore filed an application (i.e., motion) to proceed in forma pauperis, an application which the court denied. Although in forma pauperis is encompassed in chapter 25,\(^ {182}\) the proceeding is in fact a special proceeding. It is a nonadversarial proceeding that is conducted without any pleadings. The applicant does not file a petition; (s)he instead files an application for a leave to proceed in forma pauperis.\(^ {183}\) Although the proceeding may be a prelude to an action, it is not part of the action. It is a stand-alone proceeding—in other

180. The court originally considered divorce to be an equitable action. See Aspinwall v. Aspinwall, 18 Neb. 463, 465, 25 N.W. 623, 624 (1885). The court now considers divorce to be a special proceeding. See In re Interest of R.G., 238 Neb. 405, 413, 470 N.W.2d 780, 787 (1991) (including divorce in a list of special proceedings); cf. State ex rel. Reitz v. Ringer, 244 Neb. 976, 980, 510 N.W.2d 294, 299 (1994) (holding that custody determinations are special proceedings because they are governed by chapter 42), overruled on other grounds by Cross v. Perreten, 257 Neb. 776, 600 N.W.2d 780 (1999). The case that is usually cited for the proposition that divorce is a special proceeding is Ropken v. Ropken, 169 Neb. 352, 99 N.W.2d 480 (1959). The case does not stand for that proposition, however. The issue in Ropken was whether the district court had jurisdiction to partition real estate once it determined that the parties were never married. In holding that the district court lacked jurisdiction, the court said that “[a]lthough a divorce action is tried as in equity, it is a special proceeding provided by statute.” Id. at 356, 99 N.W.2d at 484. In other words, the court said that, although divorce is an equitable action, the types of claims that can be asserted in the action are limited by statute. That is a far cry from saying that divorce is a special proceeding for purposes of section 25-1902.

181. See supra notes 21-23 and accompanying text.


words, it exists independent of any action—and will end with the or-
der either granting or denying the motion. 184

To take another example, assume that Carla threatened to sue
Don for negligence. Don learned that one of the key witnesses had
plans to leave the country. Don therefore filed a motion to perpetu-
te the witness’s testimony pursuant to Rule 27 of the Nebraska Discov-
ery Rules, 185 a motion which the court denied. Was the order denying
the motion made in a special proceeding? There is some room to argue
under the shorthand definitions. One might say that the proceeding
was encompassed within chapter 25 because the court promulgated
the Discovery Rules pursuant to section 25-1273.01. 186 But there is
no room to argue under the historical definition. A proceeding to per-
petuate testimony is a stand-alone proceeding that does not involve
the service of a summons or the use of any pleadings. That makes it a
special proceeding. 187

To take yet another example, assume that Ellen sued Frank for
breaching a contract for the sale of goods. Frank promptly filed a spe-
cial appearance on the ground that he did not have minimum contacts
with Nebraska. The court overruled the special appearance. Was the
order denying the special appearance made in a special proceeding?

184. The court entertained an appeal from an order denying leave to proceed in forma
pauperis in Jacob v. Schlichtman, 261 Neb. 169, 622 N.W.2d 852 (2001). The
court did not discuss why the order was appealable, however.

185. Rule 27 allows a person to seek a court order to perpetuate evidence when that
person “expects to be a party to an action cognizable in a court” of Nebraska “but
is presently unable to bring it or cause it to be brought.” Neb. Disc. R. 27(a)(1).
The court can order oral depositions under Rule 30, depositions on written inter-
rogatories under Rule 31, document production under Rule 34, or medical exami-
nations under Rule 35. Neb. Disc. R. 27(a)(3). The rule states that a person
seeking such an order should file a verified petition. A Rule 27 petition is not a
pleading, i.e., a statement of the facts constituting the cause of action. See Neb.
Rev. Stat. § 25-804 (Reissue 1995). There has been no action filed yet. The peti-
tion is instead a motion, i.e., an application for an order. See Neb. Rev. Stat.
§ 25-908 (Reissue 1995).

186. Section 25-1273.01 authorizes the supreme court to “promulgate rules of proce-
dure for discovery in civil cases, which rules shall not be in conflict with laws

187. The court has held that orders granting Rule 27 motions are appealable. See
Gernstein v. Lake, 259 Neb. 479, 484, 610 N.W.2d 714, 718 (2000). In doing so,
however, the court did not rely on any Nebraska statutes. It instead relied on
federal cases. The court said that the federal cases were relevant because Rule
27 of the Nebraska Discovery Rules was modeled on Rule 27 of the Federal Rules
of Civil Procedure. See id. at 483, 610 N.W.2d at 718. That is not quite right.
The question of what the words of the rule mean is different than the question of
whether an order granting or denying the relief under the rule is appealable. The
appealability question turns on the Nebraska statutes that govern appealability,
more specifically, on section 25-1902. While the federal cases may provide in-
sight into the concept of finality, that concept is relevant only if the Nebraska
statutes make it relevant (which section 25-1902 does).
The answer is not clear if one uses the shorthand definitions. On the one hand, special appearances are encompassed in chapter 25, more specifically, in section 25-516.01. On the other hand, the substantive law that will govern the special appearance comes not from chapter 25 but from the cases interpreting the Due Process Clause of the Fourteenth Amendment. The Due Process Clause creates the right not to be subjected to a binding judgment absent sufficient contacts with the forum state. Section 25-516.01 authorizes a special application to a court to enforce that right. "Where the law confers a right and authorizes a special application to a court to enforce the right, the proceeding is special, within the ordinary meaning of the term 'special proceeding.'" Furthermore, a special appearance is not in itself an action. Therefore, it is a special proceeding—or so the argument goes.

Things are much easier if one uses the historical definition. A proceeding that is part of an action cannot be a special proceeding; actions and special proceedings are mutually exclusive categories. Special proceedings are stand-alone proceedings that do not involve the service of a summons and the use of pleadings. A special appearance, however, is not a stand-alone proceeding. It is instead part of (rather than separate from) the action in which it is filed—just as motions for a continuance, motions for summary judgment, or motions for leave to file an amended pleading are part of the actions in which they are filed. Therefore, a special appearance is not a special proceeding.

Treating actions and special proceedings as mutually exclusive categories is not only easier but is also more sensible from a policy standpoint. The current definitions are so malleable that they invite interlocutory appeals. If there is some basis for arguing that an order was made in a special proceeding, then the losing party might as well file an immediate appeal. The worst case scenario for the appealing party is that the court will find that the order was not final and dismiss the appeal. That means that the expenses of the appeal, includ-

188. Section 25-516.01 allows a party to file a special appearance to challenge personal jurisdiction or service. See Neb. Rev. Stat. § 25-516.01 (Reissue 1995). For further discussion of the statute, see Rodney M. Confer, Responsive Pleadings and Motions 2-3, in Nebraska "How To" Practice Manual (Civil Procedure) (2d ed. 1995).

189. The Nebraska long-arm statute authorizes courts to assert personal jurisdiction whenever doing so would be constitutional. Neb. Rev. Stat. § 25-536(2) (Reissue 1995). The assertion of personal jurisdiction is constitutional under the due process clause of the Fourteenth Amendment when the defendant (1) engages in continuous and systematic activities in the forum state (general jurisdiction) or (2) has minimum contacts with the forum state and the claim arises out of those contacts (specific jurisdiction). See, e.g., Dunham v. Hunt Midwest Entm't, Inc., 2 Neb. Ct. App. 969, 973, 520 N.W.2d 216, 220 (1994).


ing the attorney’s fees, will be lost (which may not matter to a wel-
heeled litigant) and that no progress will have been made on the case
for well over a year (which may not matter to a defendant). The best
case scenario is that the court will find that the order is appealable
and reverse the trial court.

One way to discourage interlocutory appeals is to make finality an
explicit requirement for appeals under section 25-1902. That would
not be as significant a change as one might think. Although the court
has said that finality is not a requirement under section 25-1902, it
has often worked finality into the analysis. It did so, for example, in
Holste v. Burlington Northern Railroad Co.\textsuperscript{192} In Holste, the court
held that an order overruling a special appearance is not a final order
within the meaning of section 25-1902. The court sidestepped the
messy issue of whether the order was made in a special proceeding
and instead focused on the substantial right requirement.\textsuperscript{193} The
court then did something quite significant. It tied the substantial
right requirement to the fundamental principle of finality. After first
explaining that the Due Process Clause protects the right not to be
subject to a binding judgment, the court said that
\begin{quote}
The right not to be bound by a judgment can be vindicated in an appeal from
the final judgment and is not a substantial right for the purpose of determining
the appealability of an order; it does not affect the subject matter of the litiga-
tion, such as diminishing a claim or defense that was available to the appel-
 rant prior to the order from which the appeal is taken.\textsuperscript{194}
\end{quote}

The court made the right decision when it focused on finality. The
rule that appeals can be taken only from orders that end the case—
i.e., the final judgment rule—serves a number of purposes.\textsuperscript{195} First, it

\textsuperscript{192.} 256 Neb. 713, 592 N.W.2d 894 (1999).
\textsuperscript{193.} The court said that it was unnecessary to address the special proceeding issue
because the order did not affect a substantial right. \textit{Id.} at 726, 592 N.W.2d at 905. An order that does not affect a substantial right is not appealable regardless of
whether it is made in a special proceeding.
\textsuperscript{194.} \textit{Id.} at 716, 592 N.W.2d at 905. In reaching its decision, the court relied on the
United States Supreme Court’s decision in \textit{Van Cauwenbergh v. Biard}, 486 U.S.
517 (1988). In \textit{Van Cauwenbergh}, the Supreme Court held that the denial of a
motion to dismiss on grounds of immunity from service of process or, in the alter-
native, \textit{forum non conveniens} was not appealable under the collateral order doc-
trine. The decision in \textit{Holste}, therefore, provides another example of how the
collateral order doctrine has shaped the law of special proceedings. See infra text
accompanying notes 254-92.
\textsuperscript{195.} The court has said that the purpose of the final judgment rule “is to prevent repet-
titious and vexatious appeals, avoid jurisdictional conflicts between this court
and the District Courts in the decisional process, and to prevent delay by expedit-
ing the trial and the appellate judicial process.” Burroughs Corp. v. James E.
ther discussion of the purposes of the final judgment rule, see \textit{Jack H. Friedenthal et al., Civil Procedure} 602 (3d ed. 1999); 15A \textit{Charles Alan
Wright et al., Federal Practice and Procedure} § 3907 (2d ed. 1992) [hereinafter
\textit{Wright & Miller}].
promotes judicial efficiency. It allows an appellate court to avoid reviewing a case piecemeal. It also allows an appellate court to avoid deciding issues that may be mooted by subsequent developments in the litigation. Second, it allows the trial court to move forward on a case rather than putting it on hold for a year or so while a party pursues an interlocutory appeal. Third, it prevents one party from using the appellate process to wear down a financially weaker adversary by filing one appeal after another. Finally, it reflects proper respect for trial judges by allowing them to make their decisions without constant appellate oversight.

The support for reading finality back into the statute comes not only from policy but also from history. As previously discussed, the statute in its original form only allowed appeals from orders that were final and that affected a substantial right. The finality requirement, however, was inadvertently dropped by the Ohio Commissioners. The practical effect of that was to make “affecting a substantial right” the only restriction on appeals from orders made in special proceedings. That in turn has been a source of trouble because the substantial right requirement has never had any real content. The court can give it content, however, by interpreting the “substantial right” in light of the policies that underlie the final judgment rule—which is exactly what the court did in Holste.

Finality, however, cannot be an unbending rule. There are some interlocutory orders that are so important that a party ought to appeal them immediately rather than waiting for entry of the final judgment. Allowing immediate appeals will not represent any change in practice; it has been going on for over 50 years. The court has used the special proceedings clause to review interlocutory orders that are made in civil or criminal actions and that involve matters sufficiently important to warrant an immediate appeal. The problem is that, at the same time, the court has used the clause to review orders made in proceedings that are procedurally different than civil or criminal actions.

Using the same language for two different types of orders is risky. The risk is that, sooner or later, the line between the types of cases will disappear and the language will spiral out of control. That seems to be what happened in the 1990s, as the court found itself trapped by its own language more than once. Sometimes the court bit the bullet and forged ahead. Sometimes the court backtracked and attempted to impose coherence on an increasingly incoherent area. It spent pages, for example, trying to explain when summary judgment was a special

196. For example, the trial judge may change his or her mind, the parties may settle, the complaining party may ultimately prevail, or additional evidence may emerge that cures the error.
proceeding and when it was not. Through it all, however, the court usually reached the right results. That makes it much easier to solve the problems that the has language created. The basic solution is to change the language.

A. Procedure-Based Special Proceedings

Many of the proceedings that the courts have identified as special proceedings fall into the procedure-based category. Those include juvenile proceedings, probate, guardianship, election contests, workers' compensation, condemnation, habeas corpus, local government bond approvals and administrative proceedings. All of these use procedures different than those used in civil actions. That does not mean, however, that all procedure-based special proceedings are the same. Some are single-faceted proceedings that are designed to resolve an issue. These are normally adversarial proceedings. Others are multifaceted proceedings that are designed to administer the affairs of a person. These are normally nonadversarial proceedings. Whether a proceeding is single-faceted or multifaceted matters because it affects the question of finality. A final order in the context of a single-faceted proceeding is one that ends the proceeding. A final order in the context of a multifaceted proceeding is one that ends a distinct phase of the proceeding rather than the proceeding itself.

1. Single-Faceted Proceedings

Some special proceedings are like actions in that their purpose is to resolve a particular issue. That is true, for example, of a motion to perpetuate evidence under Rule 27 of the Nebraska Discovery Rules. The issue in the proceeding is whether the movant is entitled to perpetuate the evidence and, if so, in what manner. The proceeding will end when the court resolves that issue, either by granting or denying the motion. The order granting or denying the motion affects a substantial right because it ends the proceeding. It is therefore a final, appealable order.

To take another example, the issue in a habeas corpus proceeding is whether the person is being unlawfully deprived of his or her liberty. The proceeding will end when the court resolves that issue, either by granting or denying the writ. The order granting or denying the writ affects a substantial right because it ends the proceeding. It is therefore a final, appealable order. Any earlier orders are merely interlocutory orders that cannot be appealed until the entry of the final order.

In other words, the order granting or denying the writ is the special proceedings equivalent of a final judgment in an action.

The analogy to an action, however, only goes so far. Special proceedings sometimes involve requests for which there is no analog in a civil action. For example, a party to a workers' compensation case can seek to have the claimant undergo a medical examination after the workers' compensation court makes its award. A party to a civil action, however, realistically cannot force a plaintiff to undergo a medical examination after the entry of the final judgment. Deciding whether orders peculiar to special proceedings are appealable therefore requires doing more than making an analogy to a civil action. It requires focusing on the policies that underlie the final judgment rule.

The court did that to some extent when it decided Thompson v. Kiewit Construction Co. In Thompson, the court dismissed an appeal from an order requiring an employee in a workers' compensation proceeding to undergo a functional capacity evaluation by a physical therapist. The employer presumably sought to have an evaluation

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208. See In re Application for Writ of Habeas Corpus, 144 Neb. 820, 827, 14 N.W.2d 840, 843-44 (1944).


211. The only way that could happen is if the losing party appealed and then moved for an order to perpetuate evidence under Rule 27(b) of the Nebraska Discovery Rules.

212. 258 Neb. 323, 603 N.W.2d 368 (1999).

213. Parties to a workers' compensation proceeding who are dissatisfied with the initial determination can file an application for review by the workers' compensa-
done in order to develop evidence of a change in the employee's condition. That would have given it the support it needed to file a petition to modify a previous order finding that the employee was permanently and totally disabled. The employee claimed that the order regarding the evaluation was invalid because no one other than a physician was authorized to conduct the evaluation. The court held that the order was not appealable because it did not affect a substantial right.

Although the court recited the shorthand definition of a substantial right,\(^\text{214}\) it did not focus on that definition. It instead focused on whether the order could be reviewed at the end of the proceeding. As the court explained, the employee's challenge to "the type of professional who can conduct the [functional capacity evaluation] does not rise to the level of a substantial right. Such challenge can be effectively addressed on appeal from a bona fide final order."\(^\text{215}\) The court did not identify the order that would constitute the "bona fide final order," but presumably it would be the order granting the petition to modify.

The court's decision is debatable if one focuses on the shorthand definition of a substantial right. The right not to undergo an evaluation by someone who is not authorized by law to conduct that evaluation may be an "essential legal right"—or it may be a "mere technical right." The decision, however, is not debatable if one focuses on the policies that underlie the final judgment rule. Allowing an immediate appeal would expend appellate resources on an issue that might well be rendered moot by subsequent developments in the litigation. The employer might never file a petition to modify because the evaluation might not provide an evidentiary basis for doing so. Even if the employer filed the petition, the employee might prevail at the hearing. The issue would be alive only if the employee lost at the hearing. It could also be reviewed at that point. If the evaluation was improperly conducted and provided a basis for the modification, then the modification could be reversed and the original award reinstated.

### 2. Multifaceted Proceedings

Not all special proceedings are designed to resolve an issue. Some are designed to administer the affairs of a person. That is true, for

\(^{214}\) See Thompson v. Kiewit Constr. Co., 258 Neb. 323, 329, 603 N.W.2d 368, 372 (1999); see also supra text accompanying notes 24-25 (discussing the two "substantial right" definitions enunciated by the Nebraska Supreme Court).

\(^{215}\) Thompson, 258 Neb. at 329, 603 N.W.2d at 373.
example, of juvenile proceedings. The proceedings are actually a series of different phases involving different issues. At the very least, a juvenile proceeding will consist of two phases: the adjudication hearing and the disposition hearing. The purpose of the adjudication hearing is to protect the juvenile or, more specifically, to determine whether the juvenile is without proper support or care and therefore within the court’s jurisdiction. The purpose of the dispositional hearing is to determine the rights of the parties and the placement of the juvenile.

The adjudication order will not end the proceeding if the court determines that the juvenile is without proper support or care. But the order will end the adjudication phase of the proceeding. It is therefore a final, appealable order. A party who fails to appeal the order within 30 days of its entry is precluded from subsequently attacking that order. Even though the proceeding is still on-going, the adjudication phase is over. Any attack on the adjudication order in an appeal from a later order is in effect an impermissible collateral attack.

216. Appeals can be taken from “[a]ny final order or judgment entered by a juvenile court.” Neb. Rev. Stat. § 43-2,106.01(1) (Reissue 1998). The appeal goes to the court of appeals. When the juvenile court orders a plan other than the plan submitted by the Department of Health and Human Services, then the appeal goes to the juvenile review panel and from there to the court of appeals. See Neb. Rev. Stat. §§ 43-287.01, 43-287.06 (Reissue 1998).

The discussion of juvenile proceedings in this Article focuses on abuse, neglect, and dependency cases (section 42-247(3)) rather than on law violation cases (sections 42-247(1)-(2), (4)). For an excellent discussion of these two types of juvenile proceedings, see Roberta S. Stick, Juvenile Abuse, Neglect and Dependency Cases, in 8 NEBRASKA “How To” PRACTICE MANUAL (General Practice) (2d ed. 1998) and Margene M. Timm, Juvenile Law Violations, in 8 NEBRASKA “How To” PRACTICE MANUAL (General Practice) (2d ed. 1998).


221. A collateral attack is normally defined as a challenge in one case to the validity of the judgment entered in another case. See, e.g., Bartlett v. Dawes County Bd. of Equalization, 259 Neb. 954, 960, 613 N.W.2d 810, 816 (2000). Although they are technically part of the same case, each distinct phase of juvenile proceeding is treated as a separate case for purposes of the rule against collateral attacks.
The same is true of dispositional orders. For example, an order adopting a rehabilitation plan will not end the proceedings. But it is a final, appealable order. It resolves the issue of what the parents must do in order to be reunited with their children. A party who fails to appeal the order within 30 days of its entry is precluded from subsequently attacking that order. Even though the proceeding is still on-going, the “what’s the plan” phase is over. The next phase of the proceeding involves reviewing the parents’ progress on a regular basis and modifying the plan as necessary. Any significant modification of the plan will be a final, appealable order. Although the order modifying the plan will not end the juvenile proceedings, it will end the modification proceeding within the juvenile proceedings. Any subsequent modification in effect will be its own proceeding and end with its own final order.


225. See In re Interest of Joshua M., 251 Neb. 614, 629, 555 N.W.2d 548, 559 (1997); In re Interest of J.H., 242 Neb. 908, 914, 497 N.W.2d 346, 353 (1993); see also In re Interest of Clifford M., 6 Neb. Ct. App. 754, 577 N.W.2d 547 (1998) (observing that child’s mother could challenge plan provision on self-incrimination grounds even though she did not file timely appeal from the order approving the plan because the self-incrimination grounds could not have been raised on an appeal from the order).

226. See In re Interest of Teela H., 3 Neb. Ct. App. 604, 529 N.W.2d 134 (1995) (involving an appeal from order modifying plan from unsupervised visitation of two weekends per month to supervised visitation, with the amount and manner of the supervised visitation to be set by a psychiatrist). But cf. In re Guardianship of Rebecca B., 260 Neb. 922, 621 N.W.2d 289 (2000) (holding that order adopting case plan that was almost identical to earlier case plan was not appealable; appeal was an impermissible collateral attack on the earlier order); In re Interest of Sarah K., 258 Neb. 52, 601 N.W.2d 780 (1999) (holding that a previously approved plan was not appealable; appeal was an impermissible collateral attack on the earlier order that had approved the plan).

227. When it comes to final orders, juvenile proceedings are much like divorce proceedings. Both of them are collections of separate yet connected proceedings that can yield a number of appeals over the course of their lives. A divorce decree is a final, appealable order. See Neb. Rev. Stat. § 42-372 (Reissue 1998). But it is not necessarily the final word on the rights and obligations of the parties. Either party may later seek to modify the provisions of the decree. In order to modify the decree, the party must establish that there has been a material change in circumstances since the entry of the decree or, if the decree has been modified, since the entry of the last modification order. See, e.g., Elsome v. Elsome, 257 Neb. 889, 896, 601 N.W.2d 537, 543 (1999); see also Tworek v. Tworek, 218 Neb. 808, 809, 359 N.W.2d 764, 765 (1984) (finding that modification of support provisions was improper because father failed to show a material change in circumstances; a modification proceeding “is not a retrial of the original case or a review of the equities of the original decree”). The order that finally resolves all of the issues raised in the modification proceeding is a final, appeala-
Eventually, the state may seek to terminate a parent's parental rights. The termination proceeding will involve factual issues similar to those raised in the adjudication and earlier disposition hearings but a different burden of proof and fundamentally different legal issue: whether the parent's right should be terminated.228 As such, it will be yet another discrete phase of the juvenile proceeding. The order terminating the parents' parental rights will not end the juvenile proceeding—the juvenile will still be within the court's jurisdiction229—but it will end the termination phase of the proceeding. The order will be a final, appealable order.230

Juvenile proceedings are not the only special proceedings that are in fact a collection of separate proceedings. Probate proceedings are another. The purpose of probate proceedings is to manage and settle the decedent's estate.231 That may require the resolution of a number of discrete disputes. One such dispute may be the appointment of the personal representative. An order granting or denying a motion to appoint a personal representative will not end the probate proceeding—but it will end the dispute over who will be the personal representa-

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228. A number of the grounds for adjudicating a juvenile to be within the jurisdiction of the juvenile court under section 43-247(3) are similar to the grounds for terminating a parent's parental rights under section 43-292. For example, a juvenile whose parent fails to provide the juvenile with necessary care falls within the court's jurisdiction. The failure to provide that care also provides a basis for terminating parental rights if the parent was financially able to provide the care and willfully neglected to do so. NEB. REV. STAT. §§ 42-247(3)(a), 42-292(3) (Reissue 1998). The State's burden of proof in the adjudication hearing will be preponderance of the evidence. The State's burden in the termination proceeding will be clear and convincing evidence. NEB. REV. STAT. § 43-279.01 (Reissue 1998).

229. See NEB. REV. STAT. § 43-295 (Reissue 1998).


tive. It is therefore a final, appealable order. The same is true of an order removing or refusing to remove the personal representative.

The court has said that an order refusing to remove a personal representative affects a substantial right because the Probate Code confers broad powers on the personal representative, many of which (s)he can exercise without a prior court order. It is not clear, however, why the scope of the personal representative’s power makes an order refusing to remove him or her an order affecting a substantial right. One explanation is that the order is an important one. A better explanation, however, is that an immediate appeal is consistent with the policies that underlie the final judgment rule. The motion to remove the personal representative is a discrete phase that comes to an end with the entry of the order granting or denying the motion. There is no meaningful risk of duplicative review; the issues raised by the motion are unlikely to arise in other phases of the probate proceeding. While it is theoretically possible to delay review of the order until the end of the probate proceeding, doing so would be inefficient and potentially harmful. The longer the personal representative fails to discharge his or her duties to the estate—whether it be by malfeasance or inaction—the less likely it becomes that the resulting harms can be undone.

This kind of reasoning explains why a number of other orders in probate proceedings are final, appealable orders. They include, among others, orders admitting or denying to admit a will to probate (orders that finally resolve the discrete issue of whether the will is valid), orders denying a motion to vacate an order admitting a will to probate (orders that finally resolve the discrete issue of whether the earlier order should be vacated), orders construing a will (orders that fi-


235. See In re Estate of Foxley, 254 Neb. 204, 575 N.W.2d 150 (1998) (involving an appeal from order admitting will and holographic codicil to probate); In re Estate of Kleeb, 211 Neb. 763, 320 N.W.2d 459 (1982) (involving an appeal from order admitting will to probate); In re Estate of Schrack, 183 Neb. 155, 158 N.W.2d 614 (1968) (involving an appeal from order refusing to admit will to probate).

236. See In re Estate of Seidler, 241 Neb. 402, 490 N.W.2d 453 (1992) (involving an appeal from denial of order to vacate pursuant to section 30-2436 of the Probate Code); In re Estate of Rolenc, 7 Neb. Ct. App. 833, 585 N.W.2d 526 (1998) (involving an appeal from denial of order to vacate pursuant to section 30-2437 of the Probate Code).
nally determine the discrete issue of what a particular provision means), orders allowing or disallowing claims against the estate (orders that finally resolve the discrete issue of whether a particular claim must be paid), orders allowing or disallowing a spouse's election for his or her statutory share (orders that finally resolve the discrete issue of whether the spouse has waived his or her right to the share), and orders granting or denying homestead, exempt property, and spousal support allowances (orders that finally determine the discrete issue of whether the allowances are available). An immediate appeal of these orders is warranted because it is much more efficient to review orders affecting the disposition of the estate's assets before those assets leave the estate.

Not every order in a probate proceeding is immediately appealable, however. An order granting a claimant leave to present a claim after expiration of the statutory time limits, for example, is not a final order. It is instead the opening salvo in a self-contained proceeding to determine whether the claim must be paid. In other words, it merely allows the proceeding to go forward. The personal representative may allow the claim (in which case the claimant will be paid) or disallow the claim. If (s)he disallows the claim, the claimant can file a petition for allowance of the claim. After the hearing on the petition,


239. See In re Estate of Peterson, 221 Neb. 792, 381 N.W.2d 109 (1986) (involving an appeal from order disallowing spouse's petition for an elective share on ground that antenuptial agreement was valid); In re Estate of Kopecky, 6 Neb. Ct. App. 500, 574 N.W.2d 549 (1998) (involving an appeal from order allowing spouse's petition for an elective share on ground that postnuptial agreement was invalid).


241. Probate is an on-going proceeding in which claims and bequests are paid on a periodic basis. See Neb. Rev. Stat. § 30-2465 (Reissue 1995) (stating that personal representative “shall proceed expeditiously with the settlement and distribution” of the estate); Neb. Rev. Stat. § 30-2469 (Reissue 1995) (stating that personal representative may begin paying claims two months after date of first publication of notice to creditors). One incentive for the prompt payment of general pecuniary devises is that they earn interest at the legal rate beginning one year after the personal representative's appointment. See Neb. Rev. Stat. § 30-24,102 (Reissue 1995).

242. See In re Estate of Emery, 258 Neb. 789, 793, 606 N.W.2d 750, 754 (2000); In re Estate of Golden, 120 Neb. 226, 229-30, 231 N.W. 833, 835-36 (1930). By contrast, an order denying a claimant leave to present a claim is a final, appealable order. See Golden, 120 Neb. at 229, 231 N.W. at 835. That makes sense because such an order finally resolves the issue whether the claim must be paid.
the court will enter an order either allowing or disallowing the claim. That is the order that ends the proceeding because that is the order that determines whether the claim must be paid. If the personal representative wants to challenge the court's order granting the claimant leave, then (s)he can do so on an appeal from the order allowing the claim.243

Admittedly, there are some advantages to allowing an immediate appeal of the order granting the claimant leave. If the appellate court on appeal determines that leave should not have been granted, then the parties and the system would be spared the cost of unnecessary litigation. Yet there would also have been some disadvantages. An immediate appeal would delay the proceedings and squander judicial resources on an issue that could be rendered moot if the personal representative or court subsequently decided to allow the claim. The advantages might outweigh the disadvantages if the order could not be effectively reviewed at the end of the proceeding. But it can. As a matter of policy, therefore, an immediate appeal is unwarranted.

The court used much the same kind of reasoning when it decided In re Interest of Clifford M.244 In that case, the State filed a motion to terminate the mother's parental rights. The mother in turn moved to dismiss the State's motion on the ground that the motion was based on an improper retroactive application of a statutory amendment.245

243. See In re Estate of Golden, 120 Neb. at 229-30, 231 N.W. at 835-36. This kind of reasoning seems to have been at work in the court's 2000 decision in In re Estate of Peters, 259 Neb. 154, 609 N.W.2d 23 (2000). After Peters's estate was closed, the personal representative realized that a charitable bequest had not been paid and that, as a result, excess payments had been made to the other beneficiaries. He then sought to be reappointed as personal representative so that he could recover the excess payments and pay the charitable bequest. The county court entered an order reappointing him personal representative. The other beneficiaries appealed, claiming that the order was made in a special proceeding and affected a substantial right. According to the beneficiaries, the order affected a substantial right because it required them to defend distributions that had been made years beforehand. The court disagreed.

The court first discussed a Michigan case in which the Michigan Court of Appeals stated that "the test of finality of a probate order is whether it affects with finality the rights of the parties in the subject matter." Id. at 159, 609 N.W.2d at 27 (quoting In re Miller Estate, 307 N.W.2d 450, 451 (Mich. Ct. App. 1981)) (emphasis added). The court then noted that the order reappointing the personal representative in Peters did not require the beneficiaries to pay anything back. It also did not affect any of the defenses that they might have to the personal representative's claim. All it did was require them to defend themselves against that claim. That was not enough to justify an immediate appeal. As the court said, "[t]he fact that the heirs may be forced to defend a lawsuit does not affect a substantial right." 259 Neb. at 159, 609 N.W.2d at 27.

244. 258 Neb. 800, 606 N.W.2d 743 (2000).

245. The State's original motion to terminate the mother's parental rights was filed in December 1996 and was based in part on section 43-292(7). At the time, section 43-292(7) provided that parental rights could be terminated if the child had been
The juvenile court denied the mother's motion to dismiss and also denied her separate motion to renew visitation. On appeal, the court held that, although the order denying the motion to dismiss was made in a special proceeding, the order did not affect a substantial right. The court based its holding on the traditional definition of a final order: one that disposes of the whole merits of the case and leaves nothing for further consideration of the court. That was not true of the order denying the mother's motion to dismiss, however. The juvenile court had not yet resolved the issue of whether the mother's parental rights should be terminated. Once the juvenile court resolved that issue—in other words, once the court entered a final order—the mother could challenge the order on the same ground that she raised in her motion to dismiss (improper retroactive application of statutory amendment). As the court said, to the extent that there was any merit to the mother's motion to dismiss, "the substance of her challenge . . . can be preserved at the termination hearing, if any, and considered on appeal therefrom."

The court's decision in Clifford M. is a classic example of the final judgment rule: orders entered during a proceeding are interlocutory in out-of-home placement for 18 consecutive months and the parent had failed to correct the conditions leading to the placement. See LB 1184, § 15, 1991-92 Neb. Laws (amended 1998). The State's second motion to terminate was filed in July 1998 and was based on section 43-292(7) as amended. The amended version of section 43-292(7) became effective on July 1, 1998, and provided that parental rights could be terminated if the child had been in out-of-home placement for 15 or more of the most recent 22 months. NEB. REV. STAT. § 43-292(7) (Reissue 1998).

246. See Clifford M., 6 Neb. Ct. App. at 806-07, 606 N.W.2d at 748.
247. Id. at 807, 606 N.W.2d at 749. The court also held that the order denying the mother's motion for visitation was not a final order. The court said that the order did not affect a substantial right because the State's motion to terminate the mother's parental rights was not based on the mother's failure to stay in contact with her children. The court added that the mother "remains free to regain visitation upon a showing that such visitation is in the best interests of the children." Id. at 808, 606 N.W.2d at 749.

This decision is part of a line of decisions in which the court has declined to review juvenile court orders that maintain the status quo. See In re Guardianship of Rebecca B., 260 Neb. 922, 930-31, 621 N.W.2d 289, 295-96 (2000); In re Interest of Sarah K., 258 Neb. 52, 56, 601 N.W.2d 780, 783-84 (1999); In re Joshua M., 251 Neb. 614, 627, 558 N.W.2d 548, 558 (1997). Declining review has its advantages and disadvantages. On one hand, it reduces the number of cases on the court's docket, facilitates the orderly progress of the juvenile proceeding, and eliminates the potential for collateral attacks on earlier orders from which no appeal was taken. On the other hand, it leaves a parent without recourse when the juvenile court consistently refuses to modify an order despite evidence that circumstances have changed such that modification is in the best interest of the child. It might be better to make an analogy to modifications in divorce proceedings, see supra note 227, and allow an appeal when the motion is based on changed circumstances. A motion to modify based on changed circumstances assumes rather than attacks the validity of the prior order.
orders that can only be appealed at the end of the case. But there is a twist. In the context of multifaceted special proceedings that are designed to administer the affairs of a person, the word “case” means a discrete phase of the proceedings. An order that ends a discrete phase of the proceedings affects a substantial right because it finally resolves the issues raised in that phase. In short, the primary consideration is not whether the right at issue is important in some abstract sense but whether the right has been finally determined.  

There may be times, however, when a right is so important that it warrants recognizing an order as final, or to put things differently, recognizing the order as one that puts an end to a distinct phase of the proceedings. That may explain the court’s decision in In re Interest of R.G. As previously noted, the court in R.G. decided to allow an immediate appeal from a pre-adjudication detention order in a juvenile proceeding. At the time that the court made that decision, the statutes specified that the adjudication hearing had to be held no later than 6 months after the petition was filed. If the parents could not appeal until after the adjudication hearing, then they could lose up to six months of time with their children, time that they could never recapture. Given the impact of the order on the parents “recognized liberty interest in raising their children,” the court’s decision to allow an immediate appeal may well have been the correct decision at the time.

It is not clear, however, whether it would be the correct decision today. The statutes now require that the adjudication hearing be held

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248. Focusing on finality would have made it easier for the court of appeals to decide In re Interest of Jaden H., 10 Neb. Ct. App. 87, 625 N.W.2d 218 (2001). Jaden was a juvenile proceeding in which the State sought to terminate a couple’s parental rights to one of their children, Jaden. The State filed a motion for partial summary judgment based on collateral estoppel. Through its motion, the State sought to preclude the parents from re-litigating various issues that had been determined adversely to them in an earlier proceeding to terminate their parental rights to their other two children, Destiny and Suede. After the juvenile court granted the State’s motion, the couple appealed.

The appeal should have been dismissed because the order was not final. It did not determine whether the couple’s parental rights would be terminated; it merely limited the issues that would be contested at the hearing to determine whether the couple’s parental rights would be terminated. The court of appeals, however, had to work its way through a maze of decisions: (1) the decisions holding that juvenile proceedings are special proceedings, (2) the decisions holding that partial summary judgment proceedings are not special proceedings, (3) the decisions holding that specific statutes control over general statutes (with the court of appeals substituting “holdings” for “statutes”), and (4) the decisions holding that orders affect a substantial right when they diminish defenses. See id. at 91-93, 625 N.W.2d at 225-26. The court of appeals lost its way and held that the order was appealable.

249. R.G., 238 Neb. 405, 470 N.W.2d 780 (1999), is discussed supra in the text accompanying notes 30-37.

250. See supra note 36.

within 90 days (three months) of the filing of the petition. As a result, the potential impact of the order on the parents' rights is less than it once was and may no longer be sufficient to offset the costs of allowing an immediate appeal. An appeal will take at least a year and divest the juvenile court of jurisdiction to proceed with the disposition hearing. In addition to delaying the proceedings, an appeal will also invite piecemeal review; the issues at the detention hearing will often be similar to the issues at the adjudication hearing. It might therefore be more efficient to defer review until after the adjudication hearing by treating the detention order as an interlocutory order. While that would delay the parent's opportunity to appeal, it would only delay it for a few months.

In conclusion, an order that ends a distinct phase of a multifaceted special proceeding ought to be treated as final order. That is the easy part. The hard part is deciding what constitutes a distinct phase. That is where the policies that underlie the final judgment rule come into play. There may be times when the importance of the rights at issue and the impact of the order on those rights outweigh the costs of allowing an immediate appeal. Those costs may vary, depending on the circumstances. For example, immediate review of some orders may facilitate rather than undermine the orderly progress of the proceeding or may be necessary to ensure meaningful review of issues worth reviewing. Immediate review of other orders may not be. The answers will often be obvious—but not always. Whatever the ultimate answer may be in a particular case, it is important for the court to go beyond labels and to explain its reasoning. That will help to


253. See In re Interest of Joshua M., 251 Neb. 614, 626, 558 N.W.2d 548, 558 (1997) (holding that appeal from detention order divested juvenile court of jurisdiction to rule on motion to terminate parental rights); see also In re Interest of Tabatha R., 255 Neb. 818, 828-29, 587 N.W.2d 109, 117 (1998) (finding that appeal from dispositional order divested juvenile court of jurisdiction to enter order requiring release of father's medical records in preparation on motion to terminate parental rights); In re Interest of Andrew H., 5 Neb. Ct. App. 716, 719, 564 N.W.2d 611, 614 (1997) (holding that appeal from adjudication order divested juvenile court of jurisdiction to enter dispositional order).

It is not clear whether the pendency of an appeal from a detention order divests the juvenile court of jurisdiction to hold an adjudication hearing. In Joshua M., the adjudication and termination hearings were combined into one hearing. That hearing was held approximately six months after the mother appealed from the pre-adjudication detention order. See 251 Neb. at 619, 558 N.W.2d at 554. Although the court said that the juvenile court lacked jurisdiction to terminate the mother's parental rights because of the appeal, it said nothing about the effect of the appeal on the juvenile court's jurisdiction to adjudicate whether the child was within section 43-247(3). The court's silence suggests that the court believed that the juvenile court had the power to proceed with the adjudication hearing despite the appeal from the detention order.
create a coherent body of case law, which is important to judges and lawyers alike.

**B. Policy-Based Special Proceedings**

The second type of special proceeding does not consist of orders that are made in a special proceeding. It instead consists of interlocutory orders that are made in an action but labeled as being made in a special proceeding. The label is attached when the order involves matters sufficiently important to warrant an immediate appeal. In that sense, the special proceedings label is an exception to the final judgment rule and is much like the collateral order doctrine in federal court. Under the collateral order doctrine, an interlocutory order is immediately appealable if it (1) finally decides an important matter (2) that is separate and distinct from the merits and (3) and is effectively unreviewable at the end of the litigation. What often separates a collateral order from a noncollateral order is the judicial sense that the order involves matters that are too important to await review at the end of the litigation. That sense is reflected at the state level primarily in the court's use of section 25-1902's requirement that the order must affect a substantial right.

1. **The Old Wine: Special Proceedings**

The special proceedings exception to the final judgment rule traces its roots to the court's 1881 decision in *Turpin v. Coates*. In *Turpin*, the court held that an order discharging garnishees was reviewable even though no final judgment had been entered in the action. The court said that the order affected a substantial right because discharging the garnishee deprived the plaintiff of the security he otherwise


255. See Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 877-78 (1994) (holding that order vacating settlement agreement was not a collateral order; right not to stand trial conferred by a private agreement is not sufficiently important to warrant an immediate appeal); Lauro Lines S.R.L. v. Chasser, 490 U.S. 495, 502-03 (1989) (Scalia, J., concurring) (observing that implicit in the statement that a right can be vindicated by an appeal from a final judgment is the conclusion that the right is not important enough to warrant an immediate appeal). The relative importance of the right at issue was a consideration that the Court identified as relevant in the case that first recognized the collateral order doctrine, Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). In Cohen, the Court described collateral orders as those "which finally determine claims of right separate from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to be deferred until the whole case is adjudicated." Id. at 546 (emphasis added).

256. 12 Neb. 321, 11 N.W. 300 (1882).
would have had for any judgment that might later be entered against
the defendant. The court also said that the order was made in a
special proceeding, which the court defined as a "special statutory
remedy which is not in itself an action." The garnishment proceed-
ing was apparently treated as a separate proceeding because it in-
volved matters separate from the merits. As the court said, "the
action, when there is personal service, in no manner depends on the
attachment. There may be a just cause of action, and no grounds for
order of the attachment.

The court could have limited its decision in Turpin to proceedings
that are connected to, but separate from, the action itself. Garnish-
ments are arguably separate proceedings because they involve per-
sons (the garnishees) who are not parties to the action. An order
discharging the garnishees is final—and therefore ought to be appeal-
able—because it puts an end to those separate proceedings. The
court, however, subsequently took a different approach.

In 1952, the court decided Sullivan v. Storz and expanded the
scope of special proceedings to include proceedings that are part and
parcel of the action. The plaintiff in Sullivan sued the defendant for
seduction and for breaching his promise to marry her. The trial court
subsequently stayed the action for approximately two years pursuant
to a federal statute, the Soldiers' and Sailors' Civil Relief Act. The
court held that the order denying the motion was appealable
because it had been made in a special proceeding and affected a sub-

257. See id. at 323, 11 N.W. at 301.
258. Id.; see also Seidentopf v. Annabil, 6 Neb. 524, 527 (1877) (noting that order on
motion to discharge attachment is made during a special proceeding and may be
reviewed during the pendency of the action).
259. Turpin, 12 Neb. at 323, 11 N.W. at 301 (quoting Watson & Co. v. Sullivan, 5 Ohio
St. 43, 45 (1855)). The quote comes from the portion of the court's opinion in
which it discussed the Ohio Supreme Court's opinion in Watson & Co. The court
opened its discussion of Watson & Co. by saying that the Nebraska final order
statute "is a copy of section 512 of the code of Ohio." Id. at 322, 11 N.W. at 301.
The court's discussion of Watson & Co. and its subsequent pronouncement (with-
out explanation) that an order discharging garnishees was made in a special pro-
ceeding suggests that the court agreed with the reasoning of Watson & Co.
260. 156 Neb. 177, 55 N.W.2d 499 (1952).
261. The Act provides that if a party to an action is in the military and moves for a
stay, the court must grant the stay unless it determines that the party's military
service will not affect his or her ability to prosecute or defend the action. See 50
U.S.C. app. § 521 (1994). The trial court's decision to stay the action seems
rather questionable given that the action was pending in Douglas County and the
defendant was a captain in the Strategic Air Command who was stationed at
Offutt Air Force Base in Douglas County. See Sullivan, 156 Neb. at 178-79, 55
N.W.2d at 501. Perhaps the trial court was influenced by the tense military situa-
tion of the times. The case was brought during the Korean and Cold Wars.
SPECIAL PROCEEDINGS

stential right. The court explained that the order affected a substantial right because it unreasonably and unnecessarily deprived the plaintiff of her right to a trial. Although the court did not explain why the order was made in a special proceeding, it did recite the same definition of special proceeding that it formulated in Turpin: “every special statutory remedy which is not in itself an action.” This suggests that the statutory authorization for the order was the basis for saying that it was made in a special proceeding.

Much the same seems true of the order at issue in the court’s 1980 decision in State v. Guatney, the first criminal case in which the court used the special proceedings clause of section 25-1902 to justify an interlocutory appeal. The trial court determined that the defendant in a criminal case was incompetent to stand trial. Pursuant to section 29-1823 of the Criminal Code, the trial court entered an order committing the accused to a mental facility until such time as he regained his competency. The court held that the order was immediately appealable even though the criminal action was still pending. The order was made in a special proceeding because section 29-1823 is a “statutory remedy which is not itself an action.” The order affected a substantial right because it “denied the [defendant] a right to a speedy trial . . . and ha[d] likewise denied the [defendant] his liberty for an undetermined time.”

Although the statutory basis for the orders in Sullivan and Guatney may have been the determining factor in those cases, it is quite possible that the determining factor was something else. The court may have decided that an interlocutory appeal was appropriate as a matter of policy and then used the special proceedings label as a means to justify it.

262. See Sullivan, 156 Neb. at 180, 55 N.W.2d at 502.
263. Id. at 180, 55 N.W.2d at 502.
265. Id. at 506, 299 N.W.2d at 542 (quoting Sullivan v. Storz, 156 Neb. 177, 180, 55 N.W.2d 409, 502 (1952)).
266. Id. at 507-08, 299 N.W.2d at 543. In 1997, the legislature amended section 29-1823 to reduce the likelihood of an accused being committed indefinitely. The statute as amended requires the court to hold a hearing every six months to determine whether the accused is competent to stand trial or whether there is a substantial likelihood that the accused will become competent in the foreseeable future. See Neb. Rev. Stat. § 29-1823(2) (Cum. Supp. 2000). It also requires the court to hold a hearing if the Department of Health and Human Services files a report stating that the Department believes that the accused is competent to stand trial. See Neb. Rev. Stat. § 29-1823(3) (Cum. Supp. 2000).

Like an order under the old version of the statute, an order under the amended version is an appealable order. See State v. Jones, 258 Neb. 695, 605 N.W.2d 434 (2000). In Jones, the court relied on Guatney to hold that an order committing an accused and scheduling a review hearing in six months was a final order. Echoing its reasoning in Guatney, the court said that the order affected a substantial right because it deprived the accused of “his liberty for unascertainable and significant amount of time.” Id. at 699, 605 N.W.2d at 438.
justification. The issues raised by those orders—whether the defendant’s ability to conduct his defense in *Sullivan* was affected by his military service and whether the defendant in *Guatney* was competent to stand trial—were distinct from the merits of the action. As a result, there was no danger of duplicative review. Furthermore, the orders could not be meaningfully reviewed at the end of the litigation. It would make no sense to ask years later whether the trial court erred in refusing to vacate a stay or in keeping a criminal defendant in a mental facility. In short, the orders at issue in *Sullivan* and *Guatney* are examples of orders that would be collateral orders at the federal level.267

267. Although stay orders are not normally appealable in federal court, see, e.g., *Wolfson v. Mut. Benefit Life Ins. Co.*, 51 F.3d 141, 144 (8th Cir. 1995), stay orders that effectively put the plaintiff out of court are appealable. They are final orders and, even if they were not, they would be collateral orders. See *Moses H. Cone Mem' Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 9-12 (1983). One way in which a stay order can effectively put the plaintiff out of court is by subjecting the plaintiff to indefinite and unnecessary delay. See *Rojas-Hernandez v. Puerto Rico Elec. Power Auth.*, 925 F.2d 492, 494-95 (1st Cir. 1991) (indicating that indefinite and unnecessary delay inherent in order refusing to set trial date until after completion of state court proceedings effectively put plaintiff out of court); *Am. Mfrs. Mut. Ins. Co. v. Stone*, 743 F.2d 1519, 1522-24 (11th Cir. 1984) (observing that indefinite and unnecessary delay inherent in order staying federal action until completion of state court proceedings effectively put plaintiffs out of court); *Wimberly v. Rogers*, 557 F.2d 671, 673 (9th Cir. 1977) (holding that order staying civil rights action until plaintiff was released from prison was a collateral order); *Hines v. D'Artois*, 531 F.2d 726, 731 (5th Cir. 1976) (holding that order staying employment discrimination action until plaintiffs pursued administrative remedies was a collateral order because it effectively put the plaintiffs out of court for at least eighteen months).

Competency issues in federal criminal cases are resolved in three stages. First, if there are reasonable grounds to believe that the defendant is mentally incompetent, the court can commit the defendant for up to thirty days (with a possible fifteen day extension) for purposes of having him or her undergo a psychiatric evaluation. See 18 U.S.C. §§ 4241(a)-(b), 4247(b) (1994). The majority of courts have held that a stage one order of commitment is immediately appealable under the collateral order doctrine. See *United States v. Deters*, 143 F.3d 577, 580-81 (10th Cir. 1998); *United States v. Davis*, 93 F.3d 1286, 1289 (6th Cir. 1996). *But see* United States v. *Barth*, 25 F.3d 253, 255 (2d Cir. 1994).

Second, if the court subsequently determines that the defendant is mentally incompetent, the court must commit the defendant for up to four months to determine whether there is a substantial probability that the defendant will become competent in the foreseeable future. See 18 U.S.C. § 4241(d) (1994). The majority of courts have held that a stage two order of commitment is immediately appealable under the collateral order doctrine. See *United States v. Boige-grain*, 122 F.3d 1345, 1349 (10th Cir. 1997); *United States v. Donofrio*, 896 F.2d 1301, 1303 (11th Cir.) (1990). *But see* United States v. *Ohnick*, 803 F.2d 1485, 1486 (9th Cir. 1986) (holding that only a stage three order is a final order).

Third, if the court subsequently determines that there is not a substantial probability that the defendant will become competent and further determines that the defendant is dangerous to others, the court must commit the defendant until such time as (s)he is no longer dangerous. See 18 U.S.C. §§ 4241(d), 4246
The similarities between special proceedings and collateral orders became clearer in 1990 when the court decided State v. Milenkovich. The issue in Milenkovich was whether the denial of a plea in bar that raised a double jeopardy claim was immediately appealable. In holding that it was, the court relied heavily on the United States Supreme Court's decision in Abney v. United States. The Supreme Court in Abney held that an order denying a double jeopardy claim was immediately appealable as a collateral order. The claim itself was separate from the merits of the criminal action (whether the defendant was guilty) and could not be meaningfully reviewed at the end of the litigation. The right not to be tried twice for the same offense would be lost, the Court said, "if the accused were forced to 'run the gauntlet' a second time before an appeal could be taken."

In Milenkovich, the Nebraska Supreme Court took the requirements of the collateral order doctrine and translated them into the language of special proceedings. The court said that the order denying the defendant's plea in bar was made in a special proceeding because the plea in bar statute "authorizes a defendant to bring a special application to a court to enforce the defendant's constitutional right to avoid double jeopardy. The application is not made as a step in determining the merits of any issue in the criminal prosecution itself." In other words, the order was separate from the merits. The court explained why the order affected a substantial right by using the same reasoning that the Supreme Court used to explain why the order in Abney could not be meaningfully reviewed at the end of the litigation. The court in Milenkovich said: "As the Abney decision points out, there is no question that a determination of a nonfrivolous double jeopardy claim affects the substantial right not to be tried twice for the same offense." In other words, the right would be lost unless the order could be immediately appealed.

The need for an immediate appeal also played a major role in the court's subsequent decision in State v. Jacques. In Jacques, the court held that an order denying a motion to discharge on speedy trial

(1994). A stage three order of commitment is immediately appealable under the collateral order doctrine. See, e.g., Higgins v. United States, 205 F.2d 650, 652 (9th Cir. 1953).
270. Id. at 659.
271. Id. at 662.
272. Milenkovich, 236 Neb. at 48, 458 N.W.2d at 751 (emphasis added).
273. Id. at 48, 458 N.W.2d at 751; see also State v. Hansen, 249 Neb. 177, 183-84, 542 N.W.2d 424, 429-30 (1996) (holding that a denial of plea in bar raising double jeopardy claim based on civil driver's license revocation was a final order because the defendant would be forced to run the gauntlet twice).
274. 253 Neb. 247, 570 N.W.2d 331 (1997).
The order was a final order under section 25-1902.275 The order was made in a special proceeding because a motion to discharge “is a statutory remedy which is not itself an action.”276 The order affected a substantial right because the “right to a speedy trial is obviously an essential legal right, not a mere technical right. . . . [T]he rights conferred on an accused criminal by [the speedy trial statutes] would be significantly undermined if appellate review of nonfrivolous speedy trial claims were postponed until after conviction and sentence.”277

The opposite was true of the rights at issue in State v. Pruett.278 The County Attorney filed an information against Pruett with two counts: (1) manslaughter and (2) use of a firearm to commit a felony. The information alleged that the manslaughter was unintentional.279 Pruett moved to quash the second count on the ground that, as a matter of law, a defendant cannot be charged with using a firearm to commit an unintentional act. After the trial court denied the motion to quash, Pruett appealed. The court dismissed his appeal for lack of a final order, however. The order denying the motion to quash did not affect a substantial right—and was therefore not final—because it could be effectively reviewed at the end of the litigation. As the court said, “If Pruett were to be convicted of the charges, he would not be

275. Id. at 254, 570 N.W.2d at 336. A criminal defendant is entitled to be brought to trial within six months. See Neb. Rev. Stat. § 29-1207 (Reissue 1995). If (s)he is not, then (s)he is entitled to an “absolute discharge from the offense charged and for any other offense required by law to be joined with that offense.” Neb. Rev. Stat. § 29-1208 (Reissue 1995). The substantive issue in Jacques was whether a particular period of time should have been excluded from the computation of the six month period. See infra note 285.

Like orders denying a speedy trial claim based on sections 29-1207 and 29-1208, orders denying speedy trial claims under the Sixth Amendment and the Interstate Agreement on Detainers are final, appealable orders. See State v. Kula, 254 Neb. 962, 965-66, 579 N.W.2d 541, 545 (1998) (Sixth Amendment); State v. Williams, 253 Neb. 619, 625-26, 573 N.W.2d 106, 111 (1997) (Interstate Agreement on Detainers).

276. Jacques, 253 Neb. at 254, 570 N.W.2d at 336. The court also said that a motion to discharge is a special proceeding because “a motion to discharge is a legally conferred right that authorizes a special application to a court for enforcement.” Id.

277. Id. at 252, 570 N.W.2d at 335 (quoting State v. Gibbs, 253 Neb. 241, 245, 570 N.W.2d 326, 330 (1997)). The court also said that “a motion to discharge unquestionably affects the subject matter of the litigation because denial of such a motion effectively denies an appellant’s speedy trial rights.” Id. Therefore, the motion also fits the “diminishes a defense” definition of a substantial right.

278. 258 Neb. 797, 606 N.W.2d 781 (2000).

prohibited from raising on appeal the issue of whether one can be charged with using a weapon to commit an unintentional act."

It is difficult to distinguish *Jacques* and *Pruett* using the court's shorthand. The orders in both cases arguably affected a substantial right because they both affected an essential legal right rather than a mere technical right. The right to a speedy trial (*Jacques*) is neither trivial nor a matter of form. The same is true of the right not to be tried for a nonexistent crime (*Pruett*). Furthermore, the orders in both cases affected the subject of the litigation by diminishing a defense available to the defendant. The order in *Jacques* rejected the defendant's speedy trial defense while the order in *Pruett* rejected the defendant's no-such-crime defense.

It is also difficult to distinguish *Jacques* and *Pruett* if one focuses simply on the availability of effective review. Delaying review would not affect the rights at issue in either case; it would only delay their vindication. An appeal from an order denying a motion to discharge may vindicate the right to a speedy trial—but it cannot restore the right. The right was irretrievably lost the minute the statutorily-mandated period ran. The remedy for the loss of that right will be the same regardless of whether the appeal is taken immediately or after the entry of the final judgment. The court will reverse and remand with instructions to discharge the defendant. Admittedly, that remedy will not be quite as satisfying if it comes from an appeal after a final judgment. The defendant will have incurred the inconvenience and expense of a trial that (s)he could have avoided through an immediate appeal. But the same can be said of so many parties who find themselves on the losing end of an interlocutory order, including the defendant in *Pruett*. The consequence of delaying the appeal in *Pruett* was to force Pruett to defend himself against a charge that he committed a crime that may not exist.

The availability of effective appellate review might provide a basis for distinguishing the cases if one recasts the rights at issue. One might make an analogy to the double jeopardy clause and say that the

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280. *Pruett*, 258 Neb. at 799, 606 N.W.2d at 782; see also State v. Bjorklund, 258 Neb. 432, 445, 604 N.W.2d 169, 191 (2000) (finding that order denying new trial in a criminal case did not affect a substantial right because all of the grounds raised in the new trial motion could be addressed on an appeal from the final judgment).

281. The court in *Pruett* attempted to justify its conclusion that the order did not affect a substantial right by pointing out that the order did not diminish any of Pruett's defenses to the manslaughter count. See *id.* at 799, 606 N.W.2d at 782. It is unclear what the court was trying to say. It may have been trying to say that the order did not diminish a defense available with regard to the manslaughter count or it may have been trying to say that the presence of the firearm count did not affect Pruett's defense of the manslaughter count. In either case, the explanation focused on the manslaughter count—which seems odd given that the order was directed to the firearm count.
right to a speedy trial encompasses a right not to be tried at all once the statutory period runs.\footnote{282} Such a right could not be vindicated on an appeal from the final judgment; by then, the defendant would have been forced to undergo a trial that the speedy trial statutes were designed to prevent. One could then recast the right in \textit{Pruett} as a right not to be convicted (as opposed to tried) for a nonexistent crime. Such a right could be vindicated by an appeal from the final judgment. In fact, any appeal from an earlier ruling—whether it be a ruling on a motion to quash or a motion to dismiss at the close of the State's case—would be premature because there would be no violation of the defendant's substantial rights unless and until (s)he is convicted.

But recasting the rights along these lines is semantical gamesmanship. Any right can be cast as a right that cannot be effectively reviewed on an appeal from the final judgment. That is a point that the United States Supreme Court made in \textit{Digital Equipment Corp. v. Desktop Direct, Inc.}\footnote{283} The parties in \textit{Digital Equipment} entered into a settlement agreement pursuant to which the plaintiff dismissed its action against the defendant. The plaintiff later moved to vacate the dismissal on the ground that the defendant had made various misrepresentations during the settlement negotiations. After the district court vacated the dismissal, the defendant appealed.

The defendant argued that the order vacating the dismissal was appealable as a collateral order. The settlement agreement created a right not to go to trial, the defendant argued, a right that would be irretrievably lost absent an immediate appeal. The Supreme Court rejected the defendant's argument and emphasized that appellate jurisdiction should not, and cannot, depend on a party's agility in . . . characterizing the right asserted. This must be so because the strong bias . . . against piecemeal appeals almost never operates without some cost. A fully litigated case can no more be untried than the law's proverbial bell can be unrung, and almost every pretrial or trial order might be called "effectively unreviewable" in the sense that relief from error can never extend to rewriting history. Thus, erroneous evidentiary rulings, grants or denials of attorney disqualification, . . . and restrictions on the rights of intervening parties . . . may burden litigants in ways that are only imperfectly reparable by appellate reversal of a final district court judgment, . . . and other errors, real enough, will not seem serious enough to warrant reversal at all, when reviewed after a long trial on the merits . . . . But if immediate appellate review were available every such time, [the] final decision rule would end up a pretty puny one, and so the mere identification of some interest that would be "irretrievably lost" has never sufficed.

\footnote{282} The federal courts have rejected attempts to analogize the speedy trial rights created by the Sixth Amendment and by the federal speedy trial statutes to the rights created by the Double Jeopardy Clause. \textit{See United States v. MacDonald, 495 U.S. 850, 860-61 (1978)} (explaining delay rather than the trial itself is what violates the Sixth Amendment right to speedy trial); \textit{United States v. Reale, 834 F.2d 281, 283 (2d Cir. 1987)} (same); \textit{see also infra note 285}.

\footnote{283} 511 U.S. 863 (1994).
to meet the third [requirement of the collateral order doctrine, that the order is effectively unreviewable on an appeal from the final judgment].

When all is said and done, there are only two ways to distinguish *Jacques* and *Pruett*. First, the right to a speedy trial implicates issues separate from the merits. Assuming that the appellate court rejects the defendant's speedy trial claim and the defendant is later convicted, the court will not need to revisit any of the speedy trial issues on the appeal from the conviction. Therefore, an immediate appeal would not involve the kind of inefficient review that the final judgment rule is designed to prevent. Second, in the court's view, the right to a speedy trial is much more important than the right not to be charged with a nonexistent crime. Because the right to a speedy trial is so important, the denial of that right warrants immediate review. In short, the discrete nature of the issues and importance of the right justify making an exception to the final judgment rule.

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284. *Id.* at 872. The Court concluded the order did not meet the third requirement because the right was not sufficiently important to justify making an exception to the final judgment rule. *See id.* at 877-81.

285. Both *State v. Gibbs*, 253 Neb. 241, 570 N.W.2d 326 (1997)—the first supreme court case to hold that an order denying a motion to discharge is immediately appealable—and *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997)—a case decided one week after Gibbs—involved the computation of the six-month time period under the state speedy trial act. In Gibbs, the district court vacated the defendant's conviction and ordered a new trial because of a fatally defective information. Rather than filing a new information in the original case, the State filed a new information in a new case. The defendant subsequently filed two motions for continuance in the new case and a motion for discharge in the original case. The issue on appeal was whether the delay attributable to the continuances in the new case should have been excluded in computing the time for trial.

In Jacques, the defense counsel stated at the pretrial conference that he planned to file a motion to suppress in order to stop the speedy trial clock. He did not file the motion until seventy-nine days after the pretrial conference, however. The issue was whether the period between the pretrial conference and the filing of the motion was excludable from the computation of the time for trial.

286. The federal courts do not allow an immediate appeal from orders denying speedy trial claims. Regardless of whether the claims are based on the Sixth Amendment or on the Speedy Trial Act, 18 U.S.C. §§ 3161-74 (1994), the orders denying such claims fail to satisfy the requirements of the collateral order doctrine. *See*, e.g., United States v. Bratcher, 833 F.2d 69, 72 (6th Cir. 1987).

Because prejudice is a key element of a constitutional speedy trial claim, the denial of a pretrial motion to dismiss on speedy trial grounds is neither final nor separate from the merits. *See* United States v. MacDonald, 435 U.S. 850, 858-59 (1978). Furthermore, the right to a speedy trial does not "encompass a 'right not to be tried' which must be upheld prior to trial if it is to be enjoyed at all. It is the delay before trial, not the trial itself, that offends against the constitutional guarantee of a speedy trial." *Id.* at 861. Therefore, an order denying a speedy trial claim can be effectively reviewed on an appeal from the final judgment. *See id.*

Like an order denying a constitutional speedy trial claim, an order denying a statutory speedy trial claim can be effectively reviewed on an appeal from the final judgment. As the Second Circuit has explained,
2. The New Bottles: Collateral Orders

Although it seems as though the court is creating these exceptions to the final judgment rule by thinking in terms of collateral orders but talking in terms of special proceedings, it is not clear that the court sees collateral orders and special proceedings as one and the same. In Richardson v. Griffiths,287 the court held that an order disqualifying the defendant's lawyer in a civil case was not appealable under section 25-1902 because it did not affect the subject matter of the litigation by diminishing a claim or defense.288 The court said that the claims and defenses in the action would be the same no matter who represented the defendant. Therefore, the order disqualifying the defendant's attorney did not affect a substantial right.289

The court nevertheless allowed the appeal by recognizing what it called "an exception to the final order requirement."290 Even though the court did not label the exception as "the collateral order exception," the label certainly fits. The court said that the exception applies if (1) the order "involves issues collateral to the basic controversy" and (2) "an appeal from the final judgment would not be likely to protect the [party's] interests."291

The right to a speedy trial is meant to protect the defendant from delay, not from the trial itself. That right can be vindicated by acquittal or by reversal on direct appeal from a final judgment of conviction. . . . By further delaying the trial, allowing a speedy trial exception to the rule requiring finality of judgments as a predicate for appellate jurisdiction would disserve the very interests the [speedy trial] act seeks to protect. United States v. Reale, 834 F.2d 281, 283 (2d Cir. 1987); see also United States v. Buchanan, 946 F.2d 325, 327 (4th Cir. 1991) (same); United States v. Mehrmanesh, 652 F.2d 766, 769-70 (9th Cir. 1980) (same).

288. See id. at 830, 560 N.W.2d at 434. A party can challenge the denial of motion to disqualify by filing a motion for a writ of mandamus, at least when the ground for disqualification is an alleged conflict of interest. See State ex rel. Creighton Univ. v. Hickman, 245 Neb. 247, 512 N.W.2d 374 (1994); State ex rel. Firstier Bank v. Buckley, 244 Neb. 39, 505 N.W.2d 838 (1993). Mandamus is issued to compel the performance of an act, not to prevent the performance of an act. See Greenwalt v. Wal-Mart Stores, Inc., 253 Neb. 32, 45, 557 N.W.2d 560, 569 (1997); State ex rel. Bates v. Morgan, 154 Neb. 234, 239, 47 N.W.2d 512, 515 (1951). In other words, mandamus can be used to compel the lower court to disqualify counsel (do something)—but it cannot be used to prevent the lower court from disqualifying counsel (do not do something). That presumably explains why the defendant in Richardson filed an appeal rather than seeking a writ of mandamus.
289. See Richardson, 251 Neb. at 830, 560 N.W.2d at 434; see also State v. Schlund, 249 Neb. 173, 176, 542 N.W.2d 421, 423 (1996). In Schlund, the court held that an order disqualifying court-appointed counsel in a criminal case did not affect a substantial right for two reasons. First, there is no right to counsel of one's choice when counsel is court-appointed. Second, an order disqualifying counsel does not affect the subject matter of the litigation.
290. Richardson, 251 Neb. at 831, 560 N.W.2d at 435.
291. Id. at 831, 560 N.W.2d at 435 (quoting Maddocks v. Ricker, 531 N.E.2d 583, 588 (Mass. 1988)).
lawyers met both of those requirements. It involved an issue collateral to the underlying action (i.e., separate from the merits): whether one of the attorneys in the law firm representing the defendants had previously represented the plaintiff on the same subject matter. Furthermore, an appeal from the final judgment "would not likely protect the [defendants'] interests in the counsel of their own choosing and in the time and expense associated with hiring new counsel."292

Perhaps the reason that the court in Richardson did not see special proceedings and collateral orders as one and the same is because the court stepped into the analytical quicksand that its shorthand definitions keep stirring. The "diminishing a defense" shorthand for "substantial right" is just a collection of meaningless words and should be dropped. When dealing with policy-based special proceedings, the court should instead use the language of the collateral order doctrine: an order is immediately appealable if it (1) finally decides an important matter (2) that is separate and distinct from the merits and (3) is effectively unreviewable at the end of the litigation.293 The reason the court should use that language is simple. It squares with what the court is doing.294


The federal courts do not allow immediate appeals from orders granting or denying motions to disqualify. See Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 438-40 (1985) (holding that an order granting motion to disqualify is not a collateral order; such an order is not separate from the merits and, assuming prejudice is not required to reverse an erroneous disqualification, such an order can be effectively reviewed on an appeal for the final judgment); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 377-78 (1981) (holding that an order denying motion to disqualify counsel is not a collateral order; such an order can be effectively reviewed on an appeal from the final judgment).

293. See supra note 253.

294. Like the Nebraska Supreme Court, the Ohio Supreme Court eventually began using the special proceedings clause of the final order statute to review interlocutory orders. See D'Amato v. Gen. Motors Corp., 423 N.E.2d 452 (Ohio 1981). In D'Amato, the Ohio Supreme Court adopted a balancing test for determining whether interlocutory orders are appealable under the special proceedings clause. "This test weighs the harm to the 'prompt and orderly disposition of litigation,' and the consequent waste of judicial resources, resulting from the allowance of an appeal, with the need for immediate review because appeal after final judgment is not practicable." Id. at 456. The court abandoned the test twelve years later because it was too unpredictable. See Polikoff v. Adam, 616 N.E.2d 213, 217 (Ohio 1993). For further discussion of the Ohio Supreme Court's battle with the special proceedings clause, see Daniel I. Gitlin, Note, Special Proceedings in Ohio: What Is the Ohio Supreme Court Doing with the Final Judgment Rule?, 41 Clev. St. L. Rev. 537 (1993).
The doctrine, however, must remain rooted in section 25-1902. An appellate court has only the jurisdiction that the statutes give. The court glossed over that fact in Richardson when it recognized an exception to the final judgment rule for which it cited no statutory basis. It is unlikely that the omission of a statutory cite was inadvertent. Section 25-1902 specifies three types of final orders, which implies that there are no others. The court therefore has no statutory basis for recognizing another type of final order. By contrast, the federal courts are in a much different position. The federal statutes give the federal courts jurisdiction of appeals from "final decisions"—but do not define the phrase "final decisions." As a result, the federal courts enjoy quite a bit of leeway when it comes to interpreting that phrase.

Yet it is possible to justify incorporating the collateral order doctrine into the section 25-1902. The vehicle for doing that is the doctrine of legislative acquiescence. "Ordinarily, where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent." In 1950, the court began interpreting the statute to encompass collateral orders. While the court's interpretation is neither supported by the language nor the history of the statute, the legislature apparently approves of it; the legislature has not made any substantive changes to the statute or passed any legislation prohibiting the court from asserting jurisdiction over collateral orders. Therefore, the collateral order doctrine should now be regarded as a part of section 25-1902.

That is how it should be. The final judgment rule is not perfect. Delaying review until the end of the case creates a risk that the parties and the system will have to expend resources on proceedings that will have to repeated on remand or that should never have occurred in the first place. Furthermore, some orders may have immediate consequences which will be difficult, if not impossible, to undo later. The collateral order doctrine allows a court to take those imperfections


296. One of the canons of statutory construction is "expressio unius est exclusio alterius," which means "the expression of one thing is the exclusion of the others." Pfizer Inc. v. Lancaster County Bd. of Equal., 260 Neb. 265, 272, 616 N.W.2d 326, 335 (2000); see also Papillion/LaVista Sch. Principals & Supervisors Org. v. Papillion/LaVista Sch. Dist., 252 Neb. 308, 314, 562 N.W.2d 335, 339 (1997) (same); Harrington v. Grieser, 154 Neb. 685, 689, 48 N.W.2d 753, 755 (1951) (same).


into account and make a particularized determination of whether, on balance, the final judgment rule ought to apply to a particular class of orders.

Making that determination will not always be easy. The three elements of the collateral order doctrine are not simple, black-and-white standards that should be applied mechanically. They incorporate a number of competing considerations that have to be carefully balanced. Those considerations include the systemic preference for delaying appeals until the end of the case; the intrinsic importance of the right at issue; the likelihood of the trial courts making erroneous decisions with respect to the right at issue; the effectiveness of review at the end of the litigation; the likelihood of parties using immediate appeals as a tactical weapon to beat down their adversaries; the effect that an immediate appeal will have on the trial process; and the likelihood that if the court affirms the order, it will have to revisit the same facts or law on an appeal from the final judgment (i.e., the likelihood of duplicative review).

3. To Appeal or Not to Appeal, That Is the Question

Because the elements of the collateral order doctrine cannot be applied mechanically, the doctrine can be somewhat unpredictable. That in turn creates a problem for litigants. They cannot be sure whether a particular interlocutory order is immediately appealable unless the court has already decided that the order is or is not immediately appealable. Thus, litigants therefore have to make a guess, and the costs of guessing wrong are high. The court has taken the position that the failure to file an immediate appeal from an appealable interlocutory order constitutes a waiver of any right to challenge that order on an appeal from the final judgment.

In State v. Jacques, a case discussed earlier, the trial court denied Jacques' motion to discharge for lack of a speedy trial. Rather than immediately appealing the trial court's order, Jacques waited until he was convicted and sentenced nearly four months later—in other words, until the entry of a final judgment. His decision made sense at the time because the supreme court had routinely reviewed speedy trial claims on appeals from a final judgment. The court of appeals,
however, decided that Jacques' failure to appeal the district court's order within 30 days deprived it of jurisdiction to review the order.\textsuperscript{302} On Jacques' petition for further review, the supreme court agreed with the court of appeals and held that it correctly refused to consider Jacques' speedy trial claim.\textsuperscript{303}

That is not what the court should have held, however. The appeal statutes give the appellate courts jurisdiction of appeals from judgments and final orders and say that a party must file his or her notice of appeal within 30 days of the entry of the judgment or final order.\textsuperscript{304} The statutes do not specifically say whether a party must immediately appeal an interlocutory order that is appealable under section 25-1902. The statutes are instead ambiguous. They can be read to say that a party must file an immediate appeal. But they can also be read to say that a party has a choice. The party can either challenge the order on an appeal from the order itself or on an appeal from the final judgment.

\textsuperscript{302} State v. Jacques, No. A-95-1291, 1997 Neb. App. LEXIS 36, at *4-5 (Feb. 25, 1997). The court of appeals relied on its earlier decision in State v. Nearhood, 2 Neb. Ct. App. 915, 518 N.W.2d 165 (1994). That case involved the denial of a motion to dismiss based on the failure to try the defendant within the time limits specified by the Interstate Agreement on Detainers Act. The court of appeals held that the order was immediately appealable under the special proceeding clause of section 25-1902. See \textit{id.} at 920, 518 N.W.2d at 169. It did not discuss the consequences of failing to take an immediate appeal from such an order, however.

\textsuperscript{303} State v. Jacques, 253 Neb. 247, 254, 570 N.W.2d 331, 336 (1997). This was not the first case in which the court held that it lacked jurisdiction to review a collateral order on an appeal from the final judgment. The first case came twenty months earlier. See State v. Sinsel, 249 Neb. 369, 543 N.W.2d 457 (1996) (holding that the court had no jurisdiction to review an order denying defendant's double jeopardy challenge because defendant failed to appeal order within thirty days). This was also not the first case in which the court decided that an order denying a motion to discharge was appealable. The first case came one week earlier. See State v. Gibbs, 253 Neb. 241, 570 N.W.2d 326 (1997).

\textsuperscript{304} Section 25-1912 governs appeals from the district courts and provides: "The proceedings to obtain a reversal, vacation, or modification of judgments and decrees rendered or final orders made ... shall be by filing ... , within thirty days after the entry of such judgment, decree, or final order, a notice of intention to prosecute such appeal ... [and paying the docket fee]." \textit{Neb. Rev. Stat.} \textsection{} 25-1912(1) (Cum. Supp. 2000). Section 25-2729 governs appeals from the county courts and provides: "In order to perfect an appeal ... the appealing party shall within thirty days after the entry of the judgment or final order complained of [file a notice of appeal and pay the docket fee]." \textit{Neb. Rev. Stat.} \textsection{} 25-2729 (Cum. Supp. 2000).
The second reading is the better one. It takes into account the unpredictability of the collateral order doctrine and protects parties from the consequences of guessing wrong. Without that protection, prudent parties would heed the old adage, "better safe than sorry," and immediately appeal any order that might be classified as a collateral order. Requiring parties to file immediate appeals to protect themselves, however, would be counterproductive from a systemic standpoint. It would "turn the policy against piecemeal appeals on its head," swell the court's docket, and create chaos at the trial court level.

Related statutes should be construed together "so as to maintain a consistent and sensible scheme." Here that involves construing the appeals statutes to allow a party to challenge a collateral order by filing an appeal within 30 days of the entry of either the order or the judgment. That is how the federal courts construe the federal statutory scheme, and that is how the Nebraska courts should construe the Nebraska statutory scheme.

On a final note, it should be emphasized that giving parties the choice of when to appeal should only be done in policy-based special proceedings. It should not be done in multifaceted, procedure-based special proceedings. Those special proceedings are a collection of distinct phases, each of which ends with its own final order. The phases are conducted on the assumption that the orders entered in the earlier phases are valid. To allow a party to challenge an earlier order on an appeal from a later order—for example, to allow a party to challenge the adjudication order in a juvenile proceeding four years later

305. In re Chicken Antitrust Litig., 669 F.2d 228, 236 (5th Cir. 1982).
308. In federal court, a notice of appeal in civil cases must be filed within thirty days (or, if the government is a party, within sixty days) of the entry of the judgment or order from which the appeal is taken. FED. R. APP. P. 4(a). In criminal cases, the defendant's notice of appeal must be filed within ten days of either (a) the entry of the judgment or order from which the appeal is taken or (b) the filing of a notice of appeal by the government, whichever occurs later. FED. R. APP. P. 4(b).

309. Doing so will not undermine the purpose for imposing time limits on appeals in civil or criminal actions. The purpose is to promote finality by providing "a precisely ascertainable point of time at which litigation comes to an end." Files v. City of Rockford, 440 F.2d 811, 814 (7th Cir. 1971). That point will still be thirty days after the entry of judgment. A party who fails to appeal within thirty days of the entry of the order cannot appeal the order (or any other aspect of the case) until the entry of judgment. If the party fails to file a notice of appeal within thirty days after the entry of judgment, the litigation is over.
on an appeal from the denial of a motion to modify the rehabilitation plan—could have a serious disruptive effect on the proceedings overall. It would mean that nothing would be ever final; everything could always be challenged. That warrants treating orders entered in multifaceted special proceedings differently than orders entered in actions.309

C. Orders Made on Summary Applications

In addition to allowing an appeal from an order made in a special proceeding, section 25-1902 authorizes an appeal from "an order affecting a substantial right made . . . upon a summary application in an action after judgment." This type of final order is the forgotten stepchild of appellate practice. There is no definition of this type of final order in the cases. Furthermore, there are only a few cases in which the orders at issue were specifically identified as being made upon a summary application in an action after judgment. They include orders amending a return of service after judgment in a divorce action;310 orders requiring the sheriff to return an order of sale in a mortgage action;311 orders denying a motion to approve a supersedeas bond;312 and orders involving execution of the judgment—for example, orders requiring a defendant to appear for a debtor's examination.313

The court has actually hedged its bets on orders involving execution of the judgment. It has said that they are made both in a special proceeding and upon a summary application in an action after judgment.314 That cannot be. Historically, special proceedings were civil proceedings that were not actions.315 If an order was made in a proceeding that was not an action, then logic indicates that it was not made upon summary application "in an action." In other words, special proceedings and summary applications are mutually exclusive.

309. Another reason for treating actions differently is that taking an appeal from an interlocutory order in an action disrupts the orderly progress of the case while waiting until the entry of a final judgment in an action does not.

310. See De Lai v. De Lair, 146 Neb. 771, 775, 21 N.W.2d 498, 500 (1946). The ex-wife in De Lai sought to have the sheriff's return amended because the return said that the sheriff had effected residence service when he had in fact effected personal service. That mattered because residence service is not allowed in divorce actions as a matter of first resort. See Neb. Rev. Stat. § 43-352 (Reissue 1999) (providing that only personal service and substitute service pursuant to section 25-517.02 are permissible in divorce actions).

311. See State ex rel. Harris v. Laflin, 40 Neb. 441, 446, 58 N.W. 936, 938 (1894).


314. See Bourlier v. Keithley, 141 Neb. 862, 865, 5 N.W.2d 121, 123 (1942); Clarke, 49 Neb. at 802, 69 N.W. at 104.

315. See supra text accompanying notes 79-80.
So what is a summary application? The term "summary application" means a short request—in other words, a motion. The only reasonable interpretation of the words of the statute, therefore, is that an order "upon a summary application in an action after judgment" is an order ruling on a post-judgment motion in an action. That interpretation would cover a number of orders that the courts have reviewed without identifying any statutory basis for doing so—for example, orders on motions to vacate a default judgment, to re-tax costs, to modify a permanent injunction, to award attorneys' fees, and to award expenses under Rule 37(c) of the Nebraska Discovery Rules. It would also cover orders on some matters that the courts have classified as special proceedings but that are in fact summary applications in an action after judgment—for example, motions


317. The court has held that orders vacating a default judgment are appealable orders, see supra note 46, but has not yet identified a statutory basis for its holding.


321. Rule 37(c) of the Nebraska Discovery Rules provides that

[i]f a party fails to admit the . . . the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the . . . truth of the matter, he or she may . . . apply to the court for an order requiring the other party to pay him or her the reasonable expenses incurred in making that proof, including reasonable attorney's fees.

Neb. Disc. R. 37(c). In Kaminski v. Bass, 252 Neb. 760, 567 N.W.2d 118 (1997), the court reviewed an order denying a Rule 37(c) motion but did not explain why it was a final order. The court hinted, however, that the order was made in a special proceeding. The key issue on appeal was whether a trial judge could consider the trial testimony in ruling on a Rule 37(c) motion if the trial transcripts were not formally offered into evidence at the hearing. The plaintiff argued that the trial judge could not do so because a Rule 37(c) hearing is a special proceeding. The court said that implicit in the plaintiff's argument was the idea that the proceedings on a Rule 37(c) motion are "independent and separate from the proceedings of the underlying trial." Id. at 766, 567 N.W.2d at 123. The court agreed with that idea. Id. at 768, 567 N.W.2d at 124.
for post-conviction relief, motions to vacate the forfeiture of bail, and motions to vacate a dismissal for want of prosecution.

What seems to have happened is that, over time, special proceedings have supplanted summary applications in the appellate lexicon. It would be better if summary applications were resurrected as a separate category; that would make it easier to develop a coherent definition of "special proceeding." But it is not crucial that they be resurrected. While there is a technical difference between summary applications and special proceedings, there is no practical difference between them. Regardless of whether an order is classified as being made upon a summary application in an action after judgment or in a special proceeding, the order is not appealable unless it affects a substantial right. Whether the order does so turns on the same principles of finality that were previously discussed in the context of special proceedings.

For example, the court classified the order at issue in Jarrett—an order vacating a dismissal for want of prosecution—as having been made in a special proceeding. That was incorrect. The court should have classified the order as having been made upon a summary application in an action after judgment. But however it may have classified the order, the court should have found that the order was not final and therefore did not affect a substantial right. The only effect of the order was to allow the litigation to go forward and to sub-


324. See Jarrett v. Eichler, 244 Neb. 310, 313, 506 N.W.2d 692, 695 (1993) (finding that order vacating dismissal was made in a special proceeding).

325. For example, consider a proceeding to modify the custody, support, or visitation provisions of a divorce or paternity decree. Such a proceeding is currently classified as a special proceeding. See State ex rel. Reitz v. Ringer, 244 Neb. 976, 980-81, 510 N.W.2d 294, 299 (1994) (paternity); Paulsen v. Paulsen, 10 Neb. Ct. App. 269, 272, 634 N.W.2d 12, 15 (2001) (divorce). Modification could be classified as an action, however, on the ground that it involves the use of pleadings and the service of a summons. See Neb. Uniform D. Ct. R. 4D. Alternatively, it could be classified as a summary application after judgment in an action on the ground that it is really a supplemental rather than an independent proceeding. See State ex rel. Gurnon v. Harrison, 245 Neb. 295, 299, 512 N.W.2d 386, 389 (1994) (paternity); Miller v. Miller, 153 Neb. 890, 899, 46 N.W.2d 618, 623-24 (1951) (divorce). But however the proceeding is classified, the underlying policy consideration remains the same: finality. There is generally no reason to allow an appeal until the end of the proceeding. Therefore, the only order in the proceeding that will affect a substantial right is the order that ends the proceeding by finally determining the rights of the parties (until the next modification, that is). See supra note 226.

326. See supra text accompanying notes 47-48.
ject the defendant to a possible trial. As the court has said on more than one occasion, the "[o]rdinary burdens of trial do not affect a substantial right."327 The court held otherwise in Jarrett and allowed the appeal. That was a mistake.

VI. BIDDING FAREWELL TO ORDERS THAT PREVENT JUDGMENTS

The last type of final order in Nebraska is one "affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment."328 The court has said that this type of order is one that ends the litigation, in other words, one that disposes "of the whole merits of the case" and leaves "nothing for further consideration of the court."329 But that cannot be. An order that disposes of the whole merits of an action is a judgment, not a final order. Section 25-1301(1) says that "[a] judgment is the final determination of the rights of the parties in an action."330 Section 25-1902 says that a final order is, among other things, an order in an action that "in effect determines the action and prevents a judgment." An order cannot be a judgment and prevent a judgment at the same time.

The court has not actually used the "prevents a judgment" clause of section 25-1902 to review judgments in civil actions, however. It has instead used the clause to fill in holes in the statutory scheme. More specifically, it has used the clause to review two types of orders: (1) appellate orders reversing and remanding a case for further proceedings and (2) trial court orders disposing of one or more but not all of the parties or causes of action in a case. Using section 25-1902 to review those orders, however, is not only unnecessary but is also inconsistent with the language of the statute itself.


A. The Contemporary Uses

1. Reversals and Remands

In its 1978 decision in Martin v. Zweygardt, the supreme court held that an order of an intermediate appellate court is not final when it remands the case for a new trial. The court reversed itself 16 years later in Rohde v. Farmers Alliance Mutual Insurance Co. In Rohde, the plaintiff sued the defendant in county court for breach of contract. At trial, the county court granted the defendant's motion for a directed verdict. On appeal, the district court reversed and remanded the case for a new trial. The plaintiff then appealed to the court of appeals, which dismissed the appeal for lack of a final order. The supreme court reversed.

The court held that the district court's order was a final order. Although the court did not specifically say that the order fell under the "prevents a judgment" clause of section 25-1902, that is the clear implication of the decision. The court listed the three types of final orders in Nebraska but discussed the requirements for only one type: an order that determines an action and prevents a judgment. The court then went on to say that the district court's order was final because it terminated the proceedings in the district court and could be enforced without any further action by the district court.

If the court did in fact hold that the order at issue in Rohde was a final order within the meaning of section 25-1902, then the court was wrong. The order did not determine the action and prevent a judgment. It instead vacated the original judgment and instructed the
county court to hold a new trial. The new trial is what would determine the action and, at the conclusion of that new trial, the county court would enter a new judgment. The only thing the order prevented was enforcement of the original judgment.

While it is easy to criticize the court's use of section 25-1902, it is not easy to offer an alternative. The problem is that, odd as it sounds, there is no statutory provision that clearly authorizes the court of appeals to review a decision made by the district court in its capacity as an appellate court. The statutes allow the court to review a “judgment” or a “final order” of the district court. An appellate decision of the district court, however, is not a judgment as that term is defined in the Code. The statutory definition of “judgment”—“the final determination of the rights of the parties in an action”—only applies to the final determination made by a court exercising original jurisdiction (i.e., a trial court).

That conclusion finds support in both the organization of the Code and the report of the Ohio Commissioners. The Code is organized to track the development of a civil action chronologically. It discusses service of process, then pleading, then provisional remedies, then trials, then judgments, then execution of judgments, and then appellate review. The fact that the definition of judgment appears after trials and before appellate review suggests that the definition only encompasses a trial court’s determination of an action. That is also how the Ohio Commissioners described it. In their report, they said:

335. Neb. Rev. Stat. § 25-1911 (Reissue 1995). Section 25-1911 is the descendent of section 522 of the 1858 Code. Section 522 provided that a “judgment rendered or final order made by the district court, may be reversed, vacated or modified by the supreme court, for errors appearing on the record.” Neb. Code Civ. P. § 522, 1858 Neb. Terr. Laws 197. Although section 522 provided for review by the supreme court, most district court decisions today are initially reviewed by the court of appeals. Section 24-1106 provides that, except for cases involving the imposition of the death penalty or the constitutionality of a statute, cases that were appealable to the supreme court prior to September 6, 1991, are now appealable to the court of appeals. Neb. Rev. Stat. § 24-1106(1) (Reissue 1995). That includes district court cases. A number of district court decisions, however, are initially reviewed by the supreme court pursuant to its power to remove cases from the court of appeals. See Neb. S. Ct. R. 2(C). The court usually removes cases in order to regulate the workload of the two courts.


337. In the 1858 Code, service of process was discussed in sections 54-78 (Title V), pleading was discussed in sections 81-143 (Title VII), provisional remedies were discussed in sections 144-258 (Title XIII), trials were discussed in sections 259-309 (Title IX), judgments were discussed in sections 386-411 (Title XI), executions were discussed in sections 432-504 (Title XIV), and error proceedings (i.e., review) were discussed in sections 520-41 (Title XVI). See 1858 Neb. Terr. Laws 117-58, 170-74, 178-93, 196-201. The Code still follows that same organization today.
The code provides that the final determination of the rights of the parties in civil actions, will be the judgment. If we have but one form of proceeding, one state of practice, we should have one common name for the act of the court which determines the suit. Call the old decree in chancery, a judgment, and you will comprehend the code in this particular.338

An appellate decision of the district court is also not a final order as that term is defined in the Code. The definition covers certain types of orders made in actions and special proceedings, but an appeal is neither an action nor a special proceeding. Actions and special proceedings are proceedings instituted in courts of original jurisdiction.339 Appeals are the means by which the judgments and orders in those proceedings are reviewed.

There is a possible solution to the problem, however. One might say that the Code's definition of "judgment" was not intended to be the exclusive definition, or at least not for purposes of the sections of the Code that address appellate review. Those sections originally contained phrases such as "the judgment of the appellate court," a "judgment of reversal," and "any judgment that may be rendered ... upon the affirmance" of the lower court's judgment.340 Those phrases would have made no sense if "judgment" only referred to a trial court's judgment. The use of those phrases suggests that in the sections of the Code that discuss appellate review, the drafters used the word "judgment" more generically to encompass both the final determination of an action by a court exercising original jurisdiction and the final determination of a review proceeding by a court exercising appellate jurisdiction.341

338. OHIO REPORT, supra note 147, at 16-17; see also id. at 11 ("As judgments will take about the same forms as our present judgments and decrees; so, too, they will be executed in a similar way, according to the nature of the case and the relief awarded.").

339. With one exception, all of the special proceedings that the New York Commissioners addressed in their final report were original rather than appellate proceedings. The one exception was the writ of certiorari, which the New York Commissioners planned to rename as the "writ of review." FINAL REPORT, supra note 92, at 535. The only question on a writ of certiorari would have been whether the inferior tribunal, board, or officer acted without jurisdiction. Id. at 536.


The Code also provided that when the supreme court affirmed a judgment or final order, the court "shall also render judgment against the plaintiff in error" for five percent of the amount due under the lower court's judgment or final order unless the court determined that there were reasonable grounds for the error proceedings. See NEB. CODE CIV. P. § 536, 1858 Neb. Terr. Laws 200.

341. The problem is a product of the way that the Ohio Commissioners drafted the error statutes. As previously mentioned, the Commissioners wrote a separate section for each of the courts that exercised appellate jurisdiction and gave each
Arguably, then, when the court of appeals or supreme court is reviewing a decision of the district court in its capacity as an appellate court, the court of appeals or supreme court is reviewing a judgment of the district court. That is not an intellectually satisfying solution to the problem of having no clear statutory authority to review such a decision; the solution has a manufactured feel to it. But it is a better solution than trying to twist section 25-1902 to cover a situation that the language of the statute simply does not cover.

2. Multiple Claim / Multiple Party Litigation

Until recently, the court also used section 25-1902 to justify reviewing orders that do not dispose of the whole merits of the case but instead dispose of one party or one cause of a action in a case with multiple parties or causes of action. Those orders had been appealable in Nebraska for some time before the court applied section 25-1902 to them. In 1972, the court decided *Green v. Village of Terrytown* and held that an order disposing of one or more but not all of the defendants in a multiple party case was immediately appealable. In 1983, the court decided *Interholzinger v. Estate of Dent* and held that an order disposing of one but not all of the causes of action in a case was immediately appealable. In neither case did the court cite any statute that supported its decision.

The court attempted to fill the statutory hole in 1994 when it decided *Fritsch v. Hilton Land & Cattle Co.* That case involved a dispute over two land sales contracts. In the first, the plaintiffs sold 1025 acres of land to the defendant and, in the second, the plaintiffs bought back 298 of the 1025 acres. The plaintiffs later sued for rescission of court the power to review the judgments and orders of the courts and tribunals immediately below that court in the chain of command. See *Ohio Stat.*, ch. 87, §§ 511, 513-14 (Swan Comp. 1854). In drafting the statutes, however, the Commissioners failed to take into account the possibility of multi-level review.

That possibility existed in Ohio because the district courts and the courts of common pleas had both original and appellate jurisdiction. See *Ohio Stat.*, ch. 32, §§ 19, 33 (Swan Comp. 1854). For example, the court of common pleas could render a judgment in action that was originally filed there and could also render a judgment in error proceedings that were brought there to review a judgment rendered by a justice of the peace. The first judgment would be a judgment as defined in the Code (final determination of an action) but the second judgment would not be.

In contrast to the Ohio Commissioners, the New York Commissioners took into account the possibility of multi-level review when they drafted the original Code. They gave the court of appeals the power to review the determinations made by various courts "[i]n a judgment in an action commenced therein, or brought there from another court." Code § 11(1), 1848 N.Y. Laws 499 (emphasis added).

342. 188 Neb. 840, 199 N.W.2d 610 (1972).
344. 245 Neb. 469, 513 N.W.2d 534 (1994).
the second contract, and the defendant counterclaimed for specific performance of both contracts. The case proceeded to trial. The trial court found for the defendant, dismissed the plaintiff's petition, and granted the defendant specific performance. That did not end the litigation, however. There was still an equitable accounting to be done in connection with the grant of specific performance.

The court nevertheless held that it had jurisdiction to review the trial court's ruling. Although the ruling did not put an end to the litigation, it did put an end to the plaintiff's claim for relief. Therefore, it was a final order under the "prevents a judgment" clause of section 25-1902. As the court said, "There is no doubt that the trial court's dismissal of the [plaintiffs'] petition for rescission is a final order because it prevents a judgment in favor of the [plaintiffs]." 345

Two years later, the court took an analytical detour when it decided Currie v. Chief School Bus Service, Inc. 346 The plaintiff in that case sued for negligence. The defendant counterclaimed for attorney fees and costs, alleging that the plaintiff's negligence claim was frivolous. 347 The district court granted the defendant's motion for sum-

345. Id. at 476-77, 513 N.W.2d at 540.
347. The counterclaim was based on Neb. Rev. Stat. § 25-824(2) (Reissue 1995). Section 25-824 authorizes an award of attorney's fees against a party who brought an action "which a court determines is frivolous or made in bad faith." The court in Currie held that the counterclaim was a proper counterclaim because it arose out of the same transaction as the plaintiff's claim. 250 Neb. at 877-78, 553 N.W.2d at 474; see also Neb. Rev. Stat. § 25-813 (Reissue 1995) (stating that counterclaim must arise out of the same transaction as plaintiff's claim).

Although the court was correct about the transactional relationship, it was incorrect about the counterclaim being a proper one. A counterclaim "must be a claim upon which the defendant could, at the date of the commencement of the plaintiff's suit, have maintained an action on the defendant's part against the plaintiff." Becker v. Hobbs, 256 Neb. 432, 438, 590 N.W.2d 360, 364 (1999) (quoting Davis Erection Co. v. Jorgensen, 248 Neb. 297, 305, 534 N.W.2d 746, 751 (1995)); see also Weller v. Putnam, 184 Neb. 692, 699, 171 N.W.2d 767, 772 (1969) (same); State ex rel. Douglas v. Ledwith, 204 Neb. 6, 18, 281 N.W.2d 729, 737 (1979) (requiring counterclaim to be "an existing, valid, and enforceable cause of action") (quoting McGerr v. Marsh, 148 Neb. 50, 58, 26 N.W.2d 374, 378 (1947)); Gurske v. Keplin, 61 Neb. 517, 519, 85 N.W. 557, 558 (1901) (holding that matters occurring subsequent to the commencement of original suit cannot be asserted as a counterclaim); Samuel Maxwell, Law of Pleading 543 (Chicago, Callaghan & Co. 1892) (observing that a counterclaim under the Code must show an existing liability on the part of the plaintiff to the defendant).

The defendant's counterclaim in Currie depended on the adjudication of the plaintiff's claim; until that claim was adjudicated, the court could not determine whether the plaintiff's claim was frivolous or made in bad faith. Therefore, the counterclaim was not in existence at the commencement of the action and, as such, was not a proper counterclaim. See Bio-Vita, Ltd. v. Rausch, 759 F. Supp. 33 (D. Mass. 1991); Allstate Ins. Co. v. Valdez, 29 F.R.D. 479, 481 (E.D. Mich. 1962). But see Fidelity Mut. Life Ins. Co. v. Kaminsky, 820 S.W.2d 878, 880-81 (Tex. App. 1991). The counterclaim should have been treated as a motion on a
mary judgment on the plaintiff's claim. After the plaintiff appealed the district court's disposition of her claim, the district court adjudicated the defendant's counterclaim and entered judgment for the defendant. The supreme court reversed, holding that pendency of the plaintiff's appeal deprived the district court of jurisdiction to adjudicate the counterclaim.348

In doing so, the court did not rely on the "prevents a judgment" clause of section 25-1902. The court instead relied on the "special proceeding" clause. The court said that the order granting the defendant summary judgment was a final order because summary judgment is a special proceeding and the adverse disposition of the plaintiff's claim on summary judgment affected the plaintiff's substantial rights. Therefore, the order was appealable as "an order affecting a substantial right made in a special proceeding."349 While the order did not fully adjudicate the case, the appeal of that order was sufficient to transfer jurisdiction of the entire case to the appellate court.

The court continued down the same path a year later when it decided Tess v. Lawyers Title Insurance Corp.350 Tess sued two title companies and asserted two causes of action against each: breach of contract and negligence. The trial court granted summary judgment in favor of the first company on both causes of action and granted summary judgment in favor of the second company on the negligence cause of action. Tess appealed. The court held that the trial court's summary judgment rulings were appealable even though the breach of contract cause of action was still pending against the second company. Although it did not specifically say which clause of section 25-1902 made them final orders, the court implied that it was the "special proceeding" clause. After identifying the three types of appealable orders, the court discussed the facts and reasoning of only one section 25-1902 case: Currie. The court then went on to discuss the orders at issue in Tess.351 That supports the inference that, like the orders in Currie, the orders in Tess affected a substantial right and were made in a special proceeding.

matter collateral to the merits, a motion that the trial court could have entertained despite the pendency of the appeal. Cf. Kaminiski v. Bass, 252 Neb. 760, 766-67, 567 N.W.2d 118, 123 (1997) (holding that a hearing on motion for attorney's fees is a legal proceeding separate from underlying trial on the merits of the case); Malicky v. Heyen, 251 Neb. 891, 560 N.W.2d 773 (1997) (entertaining appeal from sanctions imposed under section 25-824 where motion was filed and determined after the underlying case was determined). The order disposing of the motion would have been appealable under the "summary application" clause of section 25-1902.

348. Currie, 250 Neb. at 881, 553 N.W.2d at 476.
351. See id. at 507-08, 557 N.W.2d at 701-02.
A year later, the court began to have second thoughts about what it was doing or, perhaps more accurately, what it was saying. In *O'Connor v. Kaufman*,352 the court decided that summary judgment is only a special proceeding when it disposes of a cause of action as opposed to one or more issues. The plaintiff in *O'Connor* claimed that the defendants had interfered with her right to use a well on their land and, for her remedies, the plaintiff sought an injunction and damages. The district court granted partial summary judgment to the plaintiff on the issues of liability and injunctive relief. The court then set the issue of damages for trial. Because the issue of damages was still pending, the cause of action was still pending. Therefore, the order granting the plaintiff partial summary judgment was not made in a special proceeding and, as a result, the order was not a final, appealable order.

The court subsequently retraced its steps and went back to where it started: the "prevents a judgment" clause of section 25-1902 is what allows appeals from orders that dispose of one or more but not all of the causes of action in a case with multiple causes of action. In 1999, the court decided *Hernandez v. Blankenship*353 and held that an order declining jurisdiction under the Nebraska Child Custody Jurisdiction Act was not a final order. In the course of doing so, the court put a new spin on its two year old decision in *Tess* and said that the orders in *Tess* had been appealable under the "prevents a judgment" clause of section 25-1902. According to the court, the "prevents a judgment" clause of the statute covers what

is sometimes described as a "death knell" order; that is, the decision by the court effectively ends the litigation. This is clearly seen in *Tess*, where the court dismissed a cause of action with prejudice, preventing a judgment regarding that cause of action, and dismissed a defendant, preventing a judgment regarding that defendant.354

There is a problem with this spin, however. It simply does not square with what actually happened. The orders in *Tess* did not effectively end the litigation; a negligence cause of action was still pending against one of the defendants. The order dismissing the breach of contract claim against that defendant did not prevent a judgment regarding that cause of action; a judgment regarding that cause of action (and all the other causes of action) would be entered at the end of the litigation. The order dismissing the other defendant did not prevent a judgment regarding that defendant; a judgment regarding that defendant (and the other defendant) would be entered at the end of the litigation. The only thing that prevented—or more accurately, delayed—a judgment in *Tess* was the court's willingness to entertain an appeal

352. 255 Neb. 120, 582 N.W.2d 350 (1998).
354. Id. at 238, 596 N.W.2d at 295.
from rulings that determined *part* of the action. The clause simply does not fit the situation.

Perhaps the reason the court tried to make it fit is that the court needed a statutory basis for entertaining appeals from orders that resolved one or more but not all of the causes of action in a multiple party or multiple cause of action case. But that is no longer the case. In 1999, the legislature enacted what is now section 25-1315.355 That section—which is modeled on Rule 54(b) of the Federal Rules of Civil Procedure—provides that orders that dispose of one or more but not all of the claims or parties in a case with multiple claims or parties are interlocutory orders. They can only be made final (and therefore appealable) if the trial court expressly finds that there is no just cause for delay and expressly directs the entry of a final judgment on the claim or as to the party which was the subject of the order. As a result, the court's earlier decisions allowing appeals from orders in multiple party/multiple claim cases are no longer valid.356

355. Section 25-1315 was originally codified as section 25-706(5). It was moved to section 25-1315 in 2000. *See* LB 921, 96th Leg., 2d Sess. §§ 4, 10 (Neb. 2000).
356. *See* Scottsdale Ins. Co. v. City of Lincoln, 260 Neb. 372, 373, 617 N.W.2d 806, 807 (2000) (taking "the opportunity to remind the practicing bar" of the effect of section 25-705(6)); Chief Indus., Inc. v. Great N. Ins. Co., 259 Neb. 771, 777-79, 612 N.W.2d 225, 230-31 (2000) (declaring that an order granting summary judgment on one cause of action was not appealable because the order was made after the effective date of section 25-705(6) and the trial court did not make the determinations required by the statute); Neb. Popcorn, Inc. v. Wing, 258 Neb. 60, 63, 602 N.W.2d 18, 22 (1999) (stating order dismissing one defendant was appealable because it was made prior to the effective date of section 25-705(6)).

The use of section 25-1902 in multiple claim cases seemed to enjoy a resurgence in *Airport Authority of Greeley v. Dugan*, 259 Neb. 860, 612 N.W.2d 913 (2000). The Airport Authority instituted condemnation proceedings to condemn land belonging to the Dugans. After the board of appraisers assessed the damages, the Dugans took an appeal to the district court. In their appeal, the Dugans asserted two causes of action. The first sought to enjoin the condemnation on the ground that the Airport Authority failed to comply with various statutory requirements; the second cause of action challenged the award of damages as insufficient. The district court denied the Dugans' request for injunctive relief and issued a writ of assistance placing the Airport Authority in possession of the property. The Dugans then appealed.

The supreme court held that it had jurisdiction to review the order denying the Dugans injunctive relief even though the district court had not yet ruled on the Dugans' challenge to the award of damages. In doing so, the court seemed to rely on the "prevents a judgment" clause of section 25-1902. The court said that "the denial of a temporary injunction [it was actually a permanent injunction] in the condemnation proceeding is an order that affects a substantial right and determines the action with regard to the request for equitable relief." *Id.* at 866, 612 N.W.2d at 918.

The "prevents a judgment" clause of section 25-1902, however, had no application in *Dugan*. Condemnation is a special proceeding, not an action. *See supra* note 203. Whether the order should have been appealable under the second clause of section 25-1902 is debatable. Even though the order put the Airport Authority in possession of the property, one could say that the order did not affect
B. The Historical Meaning

So far, none of the uses to which the court has put the "prevents a judgment" clause square with its language. That raises the question of what, if anything, the language means. The answer is "nothing." The language was taken from section 512 of the Ohio Code which in turn was taken from section 11(2) of the New York Code. The language did not mean anything when it was first adopted in New York over 150 years ago. It is therefore not surprising that, after having been on the books in Nebraska for over 140 years, the language still does not mean anything.

Section 11(2) of the New York Code gave the court of appeals jurisdiction to hear appeals from "an order affecting a substantial right, made in such action, when such order in effect determines the action, and prevents a judgment from which an appeal might be taken." The Commissioners included this subsection in the final report that they submitted to the legislature in 1850, but they did not provide much of an explanation. All they said in their report was that "[t]he second subdivision, which provides for an appeal from an order, in certain cases, appears proper." What those certain cases are is anyone's guess. It is extremely difficult to envision an order that would satisfy all three requirements of section 11(2). While it may be possible to finesse the first two requirements, the third requirement is problematic. For example, an order striking a defense from the defendant's answer might preordain the outcome of an action. As such, the order might be classified as one that "in effect" determined the action and affected a substantial right. Yet the order would not prevent a judgment from which an appeal might be taken. A judgment would be rendered after trial.

To take another example, an order finding that the plaintiff was entitled to reformation of a contract and appointing a master to ascertain the balance due under the reformed contract would resolve the substantive issues in the action. As such, the order might be classified as one that "in effect" determined the action and affected a substantial right. Yet the order would not prevent a judgment from which an appeal might be taken. A judgment would be rendered after confirmation of the master's report.

Perhaps the reason that the third requirement of section 11(2) is so problematic is that it may have been the product of inept drafting. Section 11(2) seems to have been a reworked version of section 349(3)
of the Code. Section 349 was the statute that governed interlocutory appeals within the supreme court, the superior court, and the court of common pleas; it allowed the general term (i.e., the appellate branch of the court) to review certain types of orders made by a single judge of that court. At the time the Commissioners submitted their final report, section 349 read as follows:

An appeal may . . . be taken from an order made by a single judge of the same court . . . in the following cases:
1. When the order grants or refuses a provisional remedy;
2. When it involves the merits of the action, or some part thereof;
3. When the order decides a question of practice which in effect determines the action without a trial, or precludes an appeal;
4. When the order is made, upon a summary application in an action after judgment, and affects a substantial right.

Section 349(3) was not a section that the Commissioners proposed or discussed in their reports. It was added by the legislature in 1849.360 Section 349(3) also had a short life; it was repealed in 1851.361 That makes it extremely difficult to say with any degree of certainty what the statute meant. It is possible to make some educated guesses, however. The wording of section 349(3) indicates that there were two different categories of appealable orders on matters of practice.362 The first category involved orders that in effect deter-

360. Section 349(3) was originally enacted in 1848 as section 299 and included the first two subsections. Code § 299, 1848 N.Y. Laws 551. As originally enacted, the section was identical to what the Commissioners proposed in their first report. See First Report, supra note 69, at 222. In their second report, the Commissioners proposed the addition of what eventually became the fourth subsection. See Second Report of the Commissioners on Practice and Pleadings 45 (Albany, Weed, Parsons & Co. 1849). In 1849, the legislature added that subsection along with the third subsection. Amended Code § 349, 1849 N.Y. Laws 684. In their final report, the Commissioners proposed that section 349 be amended to allow an appeal in the five following cases:
1. When the order grants or refuses a provisional remedy [subsection (1) of the 1849 amended version]:
2. When it grants or refuses a new trial [new]:
3. When it involves the merits of the action, or some part thereof [subsection (2) of the 1849 amended version]:
4. When the order affects a substantial right, and involves the construction of the constitution or of a provision of this code [new]:
5. When the order is made, upon a summary application in an action after judgment, and affects a substantial right [subsection (4) of the 1849 amended version].

Final Report, supra note 92, at 503. It seems as though subsection (4) as proposed by the Commissioners was designed to replace subsection (3) of the 1849 amended version; both involved orders on matters of practice. In none of their reports did the Commissioners explicitly discuss the 1849 amended version of section 349(3) or propose the addition of that subsection.
361. See Amended Code § 349, 1851 N.Y. Laws 900-01.
362. It is not quite clear what the term "question of practice" meant. One possibility is that it meant questions addressed by court rules or nonstatutory practices. Cf.
mined the action without a trial and the second category involved orders that in effect precluded an appeal. Those had to be different categories of orders; the statute used the disjunctive “or” rather than the conjunctive “and.”

The first category might have included orders that dismissed the action for failure to prosecute. For example, the Code provided that the plaintiff only had to serve the defendant with a copy of the complaint if the defendant made a written demand within 10 days after service of the summons.363 If the plaintiff failed to serve a copy of the complaint after such a demand, the defendant could move to dismiss the action.364 An order granting a motion to dismiss the action because of an unreasonable delay on the part of the plaintiff in serving a copy of the complaint would involve a matter of practice and would determine the action without a trial.365 The same would be true of


That possibility draws some support from sections 469 and 470 of the Code. Section 469, which was part of the original Code, provided that the “present rules and practice of the courts, in civil actions, inconsistent with this act are abrogated.” Amended Code § 469, 1849 N.Y. Laws 704. Section 470, which was added in 1849, required the supreme court judges to promulgate rules for the supreme court, the court of common pleas, the superior court, and the county court “to carry into effect the provisions of this act, and such other rules as they deem proper not inconsistent with this act.” Amended Code § 470, 1849 N.Y. Laws 704. Section 470 also expressly abrogated the existing rules of the supreme court as of September 1, 1850. Id. The legislature may have enacted section 349(3) with the expectation that the new rules might include gap-filling rules on the grounds for dismissals and the mechanics of perfecting appeals.

Motions to dismiss for failure to serve a copy of the complaint were generally based on section 274 of the Code. Section 274 provided that, in an action involving multiple defendants, the court could dismiss a complaint “in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants, or to proceed in the cause against the defendant or defendants served.” Amended Code § 274, 1849 N.Y. Laws 670. By its own terms, section 274 only applied to actions involving multiple defendants. The courts, however, entertained motions to dismiss an action under section 274 even when there was only one defendant. See, e.g., Colvin v. Bragden, 5 How. Pr. 124 (N.Y. Sup. Ct. 1850).

The Code did not specify the time within which a complaint had to be served. The courts filled that gap by requiring service within a reasonable time and by analogizing to former rules of practice. See Munson v. Willard, 5 How. Pr. 263, 263-64 (N.Y. Sup. Ct. 1850); Littlefield v. Murin, 4 How. Pr. 306 (N.Y. Sup. Ct. 1849).

The Code defined a trial as “the judicial examination of the issues between the parties, whether they be issues of law or fact.” Amended Code § 252, 1849 N.Y.
orders that dismissed the action for failure to appear at trial or for failure to notice the action for trial in a timely manner.\textsuperscript{366}

The second category might have included orders dismissing an appeal because the appealing party either failed to comply with the requirements for perfecting an appeal under the Code or failed to comply with the rules of the appellate court.\textsuperscript{367} Dismissals on those grounds would involve matters of practice and, in the words of the statute, would preclude an appeal. Although the appeal itself would be decided by the general term of the court, some motions to dismiss an appeal could be decided by a single judge at special term.\textsuperscript{368} If the

\textsuperscript{366} Laws 666. Under the Code, issues were created the by pleadings. An issue of law was created by a demurrer to the complaint, answer, or reply. Amended Code § 249, 1849 N.Y. Laws 665. In other words, a decision on a demurrer was a trial of an issue of law. An issue of fact was created by allegations in the complaint that were denied in the answer, allegations of new matter in the answer that were denied by the reply, or by allegations of new matter in the reply. See Amended Code § 250, 1849 N.Y. Laws 665. Because a motion was not a pleading, a ruling on a motion was not a trial. Cf. Dodd v. Curry, 4 How. Pr. 123, 124 (N.Y. Sup. Ct) (opinion undated; most likely 1849) (stating that dismissal of complaint is not technically a trial within the meaning of the Code but is treated as such for the purpose of awarding costs).

\textsuperscript{367} See Cusson v. Whalon, 5 How. Pr. 302 (N.Y. Sup. Ct. 1851). In Cusson, the court granted a motion to dismiss a complaint because the plaintiff failed to notice the action for trial in a timely fashion. The motion was authorized by a supreme court rule that the court described as regulating a matter of practice. Id. at 303. The effect of granting the motion was to terminate the case; the relief sought was dismissal of the action. See id. at 303-04.

\textsuperscript{368} In order to perfect an appeal, the appellant had to serve a timely notice of appeal on both the adverse party and the clerk of the court that entered the judgement or order from which the appeal was taken. See Amended Code § 327, 1849 N.Y. Laws 680. The appellant also had to give a written undertaking by two sureties in the form and amount specified by the Code. See Amended Code § 334, 1849 N.Y. Laws 681. The undertaking had to be filed with the clerk of the court and served on the adverse party. See Amended Code §§ 340, 343, 1849 N.Y. Laws 682-83. That was true of appeals taken to the court of appeals and appeals of judgments taken to the general terms of the supreme court, court of common pleas, and superior court. See Amended Code §§ 345, 348, 1849 N.Y. Laws 683-84.

An appeal could be dismissed if the appellant failed to comply with the requirements of the Code. See Tripp v. DeBow, 5 How. Pr. 114 (N.Y. Sup. Ct. 1850). An appeal could also be dismissed if the appellant failed to comply with the rules of the appellate court. See Livingston v. Miller, 1 Code Rptr. 117 (N.Y. Sup. Ct. 1849) (granting motion for judgment on appeal because appellant failed to serve copy of judgment roll on adverse party as required by the rules of the supreme court).

\textsuperscript{368} It seems as though a motion to dismiss an appeal could be decided at special term when the appeal was taken from a judgment rendered by an inferior court. When the appeal was taken from a judgment rendered by a single judge of the same court, however, a motion to dismiss could only be decided by the general term. See People ex rel. Larocque v. Murphy, 1 Daly's Rpts. 462, 466-67 (N.Y. C.P. 1865); Barnum v. Seneca County Bank, 6 How. Pr. 82 (N.Y. Sup. Ct. 1851). Cf. Griswold v. Van Deusen, 2 E.D. Smith Rpts. 178 (N.Y. C.P. 1853) (noting that
judge granted the motion to dismiss the appeal, then section 349(3) presumably allowed the aggrieved party to appeal that order to the general term of the court.

Assuming that the Commissioners reworked section 349(3) into section 11(2)—which seems to be a reasonable assumption given the similarity in the language—then something must have been garbled in transmission. The Commissioners apparently took two different clauses aimed at two different types of orders and collapsed them into one clause aimed at one type of order. Orders that decided a question of practice that (1) in effect determined the action without a trial or (2) precluded an appeal became orders affecting a substantial right that in effect determined the action and prevented a judgment from which an appeal might be taken. The end result of replacing "or" with "and" was the creation of a hybrid provision that seems to make no sense.

That raises the question of whether the Commissioners had any idea of what they were doing. The answer is a qualified maybe. One possibility is that the Commissioners were attempting to give the court of appeals jurisdiction to review orders that were made at general term and that dismissed an appeal. Under the Code, an appellate court entered a judgment on an appeal. Arguably, judgments on an appeal did not include decisions that dismissed an appeal. They instead included decisions that affirmed, reversed or modified the judgment or order from which the appeal was taken. Section 330 of the Code—a section entitled "Judgment on Appeal"—provided that, "[u]pon an appeal from a judgment or order, the appellate court may reverse, affirm or modify the judgment or order appealed from."370

An order of the general term that dismissed an appeal would in effect determine the action; it would leave intact the judgment or order from which the appeal was taken. Such an order would also prevent a judgment on the appeal; it would prevent the general term from affirming, modifying, or reversing the judgment or order from which the appeal was taken. As a result, the order would prevent a judgment from which an appeal might be taken to the court of appeals.

motion to dismiss appeal should be made at special term where the appeal is taken from justice's court); Blood v. Wilder, 6 How. Pr. 446 (N.Y. Sup. Ct. 1852) (ordering appeal from county court judgment dismissed at special term); Bradley v. Van Zandt, 3 Code Rptr. 217 (N.Y. Sup. Ct. 1851) (allowing only general term of supreme court to decide motion to dismiss appeal from judgment rendered by single judge of supreme court); Van Heusen v. Kirkpatrick, 5 How. 422 (N.Y. Sup. Ct. 1851) (requiring motion to dismiss appeal from county court judgment to be decided at special term); Tripp v. DeBow, 5 How. Pr. 114 (N.Y. Sup. Ct., 1850) (dismissing appeal from county court judgment made at special term and affirmed at general term).

This possibility draws some support from *Genter v. Fields*\(^{371}\) and *Bates v. Voorhees*,\(^{372}\) two cases in which the court of appeals held that section 11(2) allowed the court to review an order made by the general term of the supreme court that dismissed an appeal. Yet it seems unlikely that the Commissioners wrote section 11(2) to give the court of appeals jurisdiction to review orders dismissing appeals to the general term. If that is what the Commissioners had in mind, then they would have used more direct language. The language of section 11(2)—"[i]n an order affecting a substantial right, made in such action, when such order in effect determines the action, and prevents a judgment from which an appeal might be taken"—seems to be a rather odd way of saying "in an order when such order dismisses an appeal from a judgment in such action."

More to the point, an order that dismissed an appeal would presumably be a final order. Yet the word "final" does not appear in section 11(2). Section 11(2) says "an order," not "a final order." The omission of the word "final" suggests that section 11(2) was aimed at interlocutory orders, a suggestion consistent with the overall phrasing of section 11(2). The phrase "in effect determines the action" implies that the action has not yet been finally determined. The phrase "prevents a judgment from which an appeal might be taken" implies that the order was entered before any judgment was rendered in the action. That phrase might mean an order that somehow prevented a judgment from ever being rendered—or it might mean an order that prevented a judgment from being rendered at that point because the order did not end the action.

That raises another possibility. Section 11(2) may have been an ineptly worded attempt by the Commissioners to give the court of appeals jurisdiction to review a limited class of interlocutory orders that involved a construction of the Code. In their final report, the Commissioners said that some judges had interpreted the Code as though it were "an inflexible statutory rule" rather than "a system of regulation, having in view, as its sole object, the furtherance of justice and a disregard of technical strictness."\(^{373}\)

To ensure a more liberal interpretation of the Code, the Commissioners proposed expanding the appellate jurisdiction of the general term of the supreme court to encompass interlocutory appeals from orders "affecting a substantial right made in... an action, involving the construction of... a provision of this code."\(^{374}\) The Commission-

\(^{371}\) 2 Abbott's N.Y. Rpts. 253 (1864).
\(^{372}\) 20 N.Y. 525 (1859).
\(^{373}\) Final Report, supra note 92, at 5.
\(^{374}\) Final Report, supra note 92, at 28. The quoted language is from proposed section 42(2). Section 42(2) would have allowed appeals from orders involving either a construction of the constitution or the Code. Although the Commissioners did
ers also proposed adding the same language to section 349 in place of the then-existing language of section 349(3). The effect of adding that language would have been to allow appeals to the general term of the supreme court, the court of common pleas, or the superior court of orders made by a single judge of the same court when those orders affected a substantial right and involved a construction of the Code.

Given that the Commissioners sought to expand the appellate jurisdiction of the lower courts to encompass orders that involved an interpretation of the Code, it stands to reason that they also sought to expand the appellate jurisdiction of the court of appeals to encompass at least some of those orders. It also stands to reason that the Commissioners would have used more restrictive language in order to prevent the court of appeals from being deluged with interlocutory appeals. The Commissioners may have found the seeds of that restrictive language in section 349(3), a provision that they did not write and apparently reworked in a rather careless manner.

The language as reworked may not have made any sense but it did have two attributes: the language was restrictive and also had a nice ring to it. It is possible that the language subsequently took on a life of its own, perhaps because the legislature saw the language as a more elegant statement of old section 349(3). In other words, the legislature

not explain why they included orders involving a construction of the constitution, one possibility is that the Code itself had been attacked as unconstitutional. See Anonymous, 1 Code Rptr. 49 (Special Term of unspecified New York court 1848) (rejecting constitutional challenge to Code); THIRD REPORT, supra note 102, at 8-11 (discussing various constitutional objections to the Code).

Proposed section 42(2) was one response that the Commissioners made to the tendency of the judges to interpret the Code strictly. See THIRD REPORT, supra note 102, at 9. Another was a proposed revamping of section 467 of the 1849 Code. That section provided that the “rule of common law, that statutes in derogation of that law are to be strictly construed, has no application to this act.” Amended Code § 467, 1849 N.Y. Laws 704. The section as revamped by the Commissioners would have kept the quoted the language (with slight grammatical changes) and added the following sentence: “The Code establishes the law of this state, respecting the subjects to which it relates; and its provisions, and all proceedings under it, are to be liberally construed, with a view to promote its objects, and to assist the parties in obtaining justice.” FINAL REPORT, supra note 92, at 4 (proposed section 3). The legislature did not add that sentence. See Code as amended, § 1, 1851 N.Y. Laws 904 (no amendment made to section 467).

375. See FINAL REPORT, supra note 92, at 503; note 359, supra.
376. When they proposed the initial version of section 11, the Commissioners underscored the need to limit the number of cases subject to review by the court of appeals. See FIRST REPORT, supra note 92, at 18 (“One of the most certain means of preventing unjust delay in the conduct of legal controversies, is to protect the court of last resort from being borne down by an unnecessary amount of litigation.”). That seems to explain why they originally limited appeals to judgments and final orders (which excluded review of orders granting or denying new trials) and expressly precluded appeals in cases that had been originally brought in a justice’s court. See id. at 20-22.
may have adopted section 11(2) and incorporated the same language into section 349, not because the legislature had a clear understanding of what the language meant or what purpose it served, but because the language sounded better than the language of old section 349(3).

The conclusion that section 11(2) had no meaning and served no purpose finds support in the case law—or more accurately, in the absence of case law. The language of section 11(2) remained intact for 25 years.377 During those 25 years, there were only three cases in which the court of appeals found an order appealable under section 11(2). Two were the Genter and Bates cases mentioned earlier.378 The other was the rather odd case of Edson v. Dillaye.379 In Edson, the special

377. The language of section 11(2)—"in effect determines the action and prevents a judgment from which an appeal might be taken"—was changed in 1876 to "in effect determines the action, and prevents a final judgment." Code of Remedial Justice, ch. 448, § 190, 1876 N.Y. Laws 34. That language was in turn eliminated in 1917 when, for the most part, appeals to the court of appeals became a matter of discretion rather than of right. See Act of Apr. 30, 1917, ch. 280, §§ 1-2, 1917 N.Y. Laws 996-97.

The corresponding language in the 1851 version of section 349(3) remains a provision of the statute that governs the jurisdiction of the Appellate Division of the Supreme Court. See N.Y. Civ. Prac. L. & R. § 5701(a)(2)(vi) (Supp. 2001). According to commentators, the provision is obsolete. 7 JACK B. WEINSTEIN ET AL., NEW YORK CIVIL PRACTICE § 5701.20, at 57-38 (1991). It has been invoked only three times this century. It was invoked once to allow an appeal from an order striking an amended complaint, see Simmons v. Capra, 75 N.Y.S.2d 574 (App. Div. 1947) (stating without explanation that order was appealable under section 609, subdivisions 4 (order affecting a substantial right) and 5 (order that in effect determines the action and prevents a judgment)), and twice to allow an appeal from a penalty order for failing to provide discovery, see Kirsch v. Herculean Prods. Co., 190 N.Y.S. 417 (App. Div. 1923) (invoking an appeal from order granting motion to strike answer and enter default judgment as discovery sanction; because default judgment is not appealable, order granting motion to strike prevented judgment from which appeal could be taken); Banes v. Rainey, 114 N.Y.S. 986 (App. Div. 1909) (invoking an appeal from order dismissing complaint and entering judgment as discovery sanction; assuming judgment is unappealable, order is appealable because it led to entry of judgment from which appeal could not be taken).

The discovery cases suggest one way of giving some meaning to the original language of section 11(2). Both before and after adoption of the Code, default judgments were not appealable in New York. See, e.g., Dorr v. Birge, 5 How. Pr. 323 (N.Y. Sup. Ct. 1850); Jones v. Kip, 1 Code Rptr. 119 (N.Y. C.P. 1849). Arguably, section 11(2) may have been designed to allow an appeal from an order that led to a default judgment; an appeal could not be taken from the judgment itself. But see Briggs v. Bergen, 23 N.Y. 162, 163 (1861) (holding that order striking sham answer not appealable under section 11(2)). That seems unlikely, however, for the same reasons that it is unlikely that section 11(2) was designed to allow an appeal from an order dismissing an appeal. See supra text accompanying note 371.

378. See supra text accompanying notes 371-72.
379. 17 N.Y. 158 (1858).
term of the supreme court denied the defendant's motion to vacate a judgment. On appeal, the general term reversed the special term and vacated the judgment. The plaintiff then appealed the decision of the general term to the court of appeals.

The court of appeals decided that section 11(2) authorized the plaintiff's appeal. The reported opinion—which may have reflected only the views of the judge who wrote it—said that, by vacating the judgment, the general term had determined that the plaintiff no longer had a valid cause of action and "virtually directed a perpetual stay of all further proceedings in the action." As such, the order in effect determined the action and prevented a judgment. The opinion, however, did not explain why the decision of the general term "virtually directed a perpetual stay." The opinion also did not mention any of the earlier cases in which the court of appeals held that it lacked jurisdiction to review orders granting or denying motions to vacate a judgment.

One wonders whether the talk of a perpetual stay

380. The opinion was written by Judge Strong. One judge did not sit in the case, one expressed no opinion, one dissented, and the remainder "concurred in the judgment without stating the grounds of their concurrence in respect to the merits." Id. at 162. It is not clear whether the other judges concurred in the grounds given by Judge Strong for hearing the appeal.

381. Id. at 160-61.

382. There is a possible explanation. The case involved a note that had apparently been given as collateral for a mortgage. The special term granted the plaintiff's motion to strike the defendants' answer, and the defendants subsequently appealed that order to the general term. The general term affirmed. See id. at 159-60.

After the general term affirmed the order granting the motion to strike, the defendants moved at special term to vacate the judgment. The motion to vacate was apparently based on the ground that the note had been satisfied by the sale of the mortgaged property, a sale that took place at some point after the motion to strike was granted but before judgment was entered. The special term denied the motion to vacate. On appeal, the general term reversed the special term and vacated the judgment. See id.

There is no indication that, in vacating the judgment, the general term vacated its earlier decision affirming the order granting the motion to strike. If not, then arguably the case was left in a state of limbo. A judgment could not be rendered for the defendants because their answer had been stricken. A default judgment could not be rendered for the plaintiff because the general term had determined that the note had been satisfied and that the plaintiff had no cause of action.

383. See Jones v. Derby, 16 N.Y. 242, 244-46 (1857) (holding that order made at general term setting aside judgment and execution was not appealable under section 11(2) or section 11(3)). Both before and after Edson, the court of appeals ruled that orders on motions to vacate a judgment were not appealable under section 11(3) as orders made on a summary application after judgment. According to the court, orders made on a summary application were limited to final orders "in proceedings based upon the judgment and assuming its validity." Starke v. Dinehart, 40 N.Y. 342, 343 (1869); see also Clarke v. City of Rochester, 34 N.Y. 355, 356 (1866) (same); Salles v. Butler, 27 N.Y. 638, 639-40 (1863) (same); Bank of Genessee v. Spencer, 18 N.Y. 150, 152 (1858) (same); Thompson v. Bullock, 16
was simply talk designed to justify the review of an unreviewable order.

In conclusion, section 11(2) "comes to us on faded parchment." The language of the statute is too obscure and the historical record is too sparse to offer any meaningful insights into the purpose and meaning of section 11(2) or its progeny. When all is said and done, there are only two statements that one can make about the statute with any degree of confidence. First, section 11(2) cannot be interpreted on the basis of its plain meaning. The section has no plain meaning because it makes no sense. Second, section 11(2) cannot be interpreted on the basis of its intended meaning. Even if the Commissioners and the legislature attached a specific purpose and meaning to section 11(2), both its purpose and meaning have been lost to history.

C. The Farewell

The court's use of the "prevents a judgment" clause to cover various holes in the statutory scheme is understandable. But it is also unwise. It undermines the court's credibility because it puts the court in the position of attributing a meaning to a statute that is patently inconsistent with the language of the statute. The "prevents a judgment" clause ought to be written off as superfluous. One of the basic principles of statutory construction is that a court must, "if possible, give effect to every word, clause, and sentence of a statute, since the Legislature is presumed to have intended every provision of a statute to have a meaning." It is not possible to give effect to the "prevents a judgment" clause of section 25-1902, however. The clause has never meant anything—and it never will.

VII. CONCLUSION

The law on final orders in Nebraska is a mess. The primary responsibility for that mess belongs to the legislature. It has left the court to struggle with a bad statute for over 140 years. The court can clean up the mess, however, by jettisoning some of its language, by adopting a new set of definitions, by placing a greater emphasis on policy, and by being more complete in its explanations. The last is

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perhaps the most important. The more careful and complete the court's explanations are, the easier it is for lawyers to do their job. They can make informed decisions about when to appeal and, when their decisions are challenged, they can make arguments rather than assertions. That in turn benefits the court. It reduces the number of cases on the court's docket and gives the court the benefit of arguments with content rather than assertions with citations.