contract becomes merged in the decree and thereby loses its contractual nature at least to the extent that modification is permitted,[9] rights thereafter resting on the decree and not the agreement;[10] and this is so even where the decree settles property rights.[11]

The logic of the court in holding that a dead man has no duty to pay alimony is unassailable, yet in reaching this result two prior Missouri cases[12] had to be expressly overruled. It is submitted that such a holding flies in the face of the statute,[13] and if permitted to stand, it will be an easy matter for the parties by contract to defeat its purpose. They should not by private agreement be permitted to abrogate laws enacted from consideration of public concern,[14] since they are presumed to contract with the statute in mind.[15] Furthermore the state has a social and financial interest in the performance of the husband's duty to support his wife,[16] and since alimony in a divorce *a vinculo* is but a statutory substitute for this common law duty,[17] it would be more in accord with the public interest to permit regulation. Indeed the statute itself reserves the power to modify the decree to comport with the changed circumstances of the parties.[18]

J. L. A.

APPEAL AND ERROR—COURTS—EJECTMENT TO RECOVER POSSESSION AS ACTION INVOLVING TITLE—[Missouri].—The petition in an ejectment suit alleged that the plaintiff was entitled to the possession of certain real estate, unlawfully withheld by the defendant and that the defendant had

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(2d) 990 (1932); Ross v. Ross, 1 Cal. (2d) 381, 35 P. (2d) 316 (1934); Armstrong v. Armstrong, 132 Cal. App. 609, 23 P. (2d) 50 (1933); Canary v. Canary, 89 Colo. 483, 3 P. (2d) 802 (1931); Maginnis v. Maginnis, 323 Ill. 113, 153 N. E. 654 (1926); Herrick v. Herrick, 319 Ill. 146, 149 N. E. 820 (1925); Wilson v. Caswell, 272 Mass. 297, 172 N. E. 251 (1930); Eddy v. Eddy, 264 Mich. 328, 249 N. W. 868 (1933); Randall v. Randall, 181 Minn. 18, 231 N. W. 413 (1930); Lewis v. Lewis, 53 Nev. 398, 2 P. (2d) 131 (1931); Reynolds v. Reynolds, 53 R. I. 326, 166 Atl. 686 (1933). For a collection of earlier cases and a statement that this is the general rule see 58 A. L. R. 630.

9. Worthington v. Worthington, 224 Ala. 237, 139 So. 334 (1932).

10. Herrick v. Herrick, 319 Ill. 146, 149 N. E. 820 (1925).

11. Belding v. Huttonlocker, 177 Iowa 440 (1916); Skinner v. Skinner, 205 Mich. 243, 171 N. W. 383 (1919); Lally v. Lally, 152 Wis. 56, 138 N. W. 651 (1912); Goldfish v. Goldfish, 184 N. Y. Supp. 512 (1920); affd. 230 N. Y. 606, 130 N. E. 912 (1921).

12. Brown v. Brown, 209 Mo. App. 416, 239 S. W. 1093 (1932); Hayes v. Hayes, 75 S. W. (2d) 614 (Mo. App., 1934).

13. R. S. Mo. 1929, secs. 1355, 1361.

14. Walter v. Walter, 189 Ill. App. 345 (1914).

15. Smith v. Smith, 94 Cal. App. 35 (1932); Herrick v. Herrick, 319 Ill. 146, 149 N. E. 820 (1925).

16. Cary v. Cary, 112 Conn. 256, 152 Atl. 302 (1930).

17. 2 Schouler, *Domestic Relations* (6th ed. 1921) sec. 1796, 1797.

18. Eddy v. Eddy, 264 Mich 328, 249 N. W. 868 (1933); R. S. Mo. 1929, secs. 1355, 1361.

committed various acts of waste upon the land; and prayed for possession of the land. The defendant alleged facts supporting a claim of ownership of the land. Judgment was rendered for the plaintiff for possession. On appeal to the Supreme Court, *held* that where an action is to recover the possession of realty, and to recover damages, and the defendant asserts ownership merely as a defence to the action for possession, and the judgment is for possession, title is only incidentally involved, and the Supreme Court is precluded from taking jurisdiction of an appeal.[1]

The immediate problem in the principal case, whether an appeal in an ejectment suit in which the issues correspond to those raised in the principal case lies to the Supreme Court or to the Court of Appeals,[2] is largely a problem peculiar to Missouri. In neighboring jurisdictions either such problems do not exist or there is a simple solution of them available. In Kansas,[3] Arkansas,[4] and Oklahoma,[5] no difficulty arises as there is no intermediate Court of Appeals. In Indiana the constitution provides that the Supreme Court shall have jurisdiction as provided by statute,[6] and by statute direct appeal lies to the Supreme Court in cases involving the delivery of possession of real property or the sale thereof.[7] In Tennessee the constitution provides for appeals to the Supreme Court in all cases in which appellate jurisdiction is not conferred on the Civil Court of Appeals.[8] It is provided by statute that the Civil Court of Appeals shall have jurisdiction excepting ejectment suits.[9] Illinois permits appeals directly to the Supreme Court where a freehold is involved.[10] But a freehold must be directly and not merely collaterally, contingently, or incidentally involved

1. Ballenger v. Windes, 93 S. W. (2d) 882 (Mo., 1936) Div. 1.

2. Const. of Mo. (1875) art. 6, sec. 12, which gives the Supreme Court jurisdiction in cases involving the title to real estate. For a general discussion of the Missouri cases on this section, see Note, U. Mo. Bul., Law Series 41, p. 30. The author concludes that in regard to ejectment suits it may be safely considered the rule that appellate jurisdiction is in the Supreme Court.

3. Const. of Kan. (1859) art. 3, sec. 3, provides for a Supreme Court with such appellate jurisdiction as may be provided by law. A Court of Appeals was established in 1895, Law 1895, c. 96 sec. 2 which was abolished in 1901, Law 1901 c. 278 sec. 4-7. Today the only limitation on appeals to the Supreme Court is that the amount must exceed $100 unless title to real estate is involved which is an express exception. R. S. Kan. 1923, c. 60 sec. 3303.

4. Const. of Ark. (1874) art. 7 sec. 4, provides for a Supreme Court which has appellate jurisdiction in all cases except as otherwise provided by the constitution. Only limitation on appeals is the amount must exceed $50. Crawford Civil Code (1934) sec. 16.

5. Const. of Okl. (1907) art. 7 sec. 2 provides for appellate jurisdiction in all civil cases at law and equity.

6. Const. of Ind. (1851) art. 7, sec. 4.

7. Burns St. Ann. (1914) sec. 1392.

8. Const. of Tenn. (1834) art. 6 sec. 2.

9. Act (1907) c. 82 sec. 7. See State v. Alexander, 132 Tenn. 439, 178 S. W. 1107 (1915); Reeves v. Hayni, 138 Tenn. 717, 164 S. W. 780 (1914).

10. Const. of Ill. (1870) art. 6 sec. 11, Smith Hurd Ann. St. (1935) c. 110, sec. 199.

before appeal is permitted.[11] There it was decided in 1878 that an action of ejectment directly involves the freehold, and that appeals must be made directly to the Supreme Court.[12] Only two limitations have been placed on this case. The first is that the question concerning the freehold must be involved on the appeal, and must be assigned as error.[13] The other is that the freehold is not involved on appeal if the defendant may arrest the proceedings by making a payment or doing some act to prevent the disturbance of his title.[14]

The Missouri Courts have generally held that before an appeal lies directly to the Supreme Court title must be directly and not merely incidentally or collaterally involved.[15] The issue then arises as to whether the action of ejectment involves title directly. In *Dunn v. Miller*[16] one of the first cases on point, the Supreme Court said that ejectment is a case within the meaning of "involving title to real estate." A few years later the Court of Appeals of its own motion transferred two cases to the Supreme Court because they were ejectment suits.[17] Later the courts recognized the limitation that ejectment suits do not necessarily involve title, and if title is conceded to be in one party and the controversy is merely over possession, appeal will not lie to the Supreme Court.[18] In two very recent cases, the *Maxwell* case, decided by Division no. 1, and the *Tooker* case decided by Division no. 2, it was held that even though the judgment is for possession, if title has to be determined to reach the judgment, title is involved so as to permit appeals to the Supreme Court.[19]

The criticism of the principal case is that it expressly overrules its own divisional opinion in the *Maxwell case,* and the decision of Division no. 2, in the *Tooker case,* relying mainly on the *Nettleton Bank Case*[20] which held that the title must be taken from one person and given to another for an appeal to lie directly to the Supreme Court. However, that case is not applicable to the present case, as it dealt with an appeal from a Probate

11. Wilson v. Labhardt, 350 Ill. 165, 182 N. E. 752 (1932); Kogy v. Lube, 357 Ill. App. 512, 192 N. E. 559 (1934).

12. Hartshorn v. Dawson, 2 Ill. App. 80 (1878).

13. Carney v. Quinn, 358 Ill. 446, 193 N. E. 455 (1935).

14. Becker v. Fink, 273 Ill. 560, 113 N. E. 49 (1916).

15. If neither party asks for an adjudication of title yet it is necessary for the court to determine title in order to render the judgment, then title is only incidentally involved, and no appeal lies to the Supreme Court. Davis v. Watson, 158 Mo. 192, 59 S. W. 65 (1900); Hilton v. City of St. Louis, 129 Mo. 192, 31 S. W. 771 (1895); Nettleton Bank v. McGaughey's Estate, 318 Mo. 948, 2 S. W. (2d) 771 (1928).

16. Dunn v. Miller, 96 Mo. 324, 9 S. W. 640 (1888).

17. Bell v. Winkleman, 73 Mo. App. 451 (1898); Mitchell v. Blatt, 76 Mo. App. 408 (1898).

18. Sasse v. Sparkman, 53 S. W. (2d) 261 (Mo., 1932). See cases cited in the opinion.

19. Tooker v. Missouri Power and Light Co., 80 S. W. (2d) 691, 101 A. L. R. 365 (Mo., 1935) by Division 2; Williams v. Maxwell, 82 S. W. (2d) 270 (Mo., 1935) by Division 1.

20. Nettleton Bank v. McGaughey's Estate, 318 Mo. 938, 2 S. W. (2d) 771 (1928).

Court order to sell real estate for the payment of a widow's allowance and not ejectment.[21] Also, the *Nettleton Bank Case*,[22] cited with approval *Force v. Van Patton*,[23] which held that ejectment is an action which involves title to real estate, and permits direct appeal to the Supreme Court. Not only is the authority of the principal case faulty, but also the logic of the proposition is with the dissenting opinion. Ejectment today is more than a possessory action, it is a mode of trying title and the plaintiff must recover on the strength of his own title and not the weakness of his adversaries.[24] In the present case title was put in issue by the defendant pleading facts showing him to be the owner. Thus under the decisions of the *Tooker* case and the *Maxwell* case appeal should lie to the Supreme Court. As is pointed out in the most recent decision on the subject,[25] by Division no. 2, that until there is a decision en banc on the point, because of the absurd conflict between Division no. 1 in the *Ballenger* case and Division no. 2 in the *Tooker* case, appeals to the Supreme Court will turn not upon the constitutional provision but rather upon the Division to which the case is assigned.

R. L. S.

ATTORNEY AND CLIENT—DISBARMENT OF JUDGES—[Oklahoma].—On his return to private practice, disbarment proceedings were commenced against a former county judge for private acts of moral turpitude[1] committed while he occupied his judicial office. *Held;* the Board of Governors of the state bar (of Oklahoma) have the jurisdiction and authority to hear charges against a practicing lawyer of disbarable offenses involving moral turpitude rendering him unfit to be permitted to continue the practice of law, even though the offenses evidencing such loss of character occurred while he theretofore held judicial office.[2]

This case is in line with the weight of authority, although the Oklahoma

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21. Supra, note 20.

22. Supra, note 20.

23. Force v. Van Patton, 149 Mo. 499, 50 S. W. 906 (1899) which holds that ejectment is an action which involves title to real estate.

24. Ballenger v. Windes, 93 S. W. (2d) 882 (Mo. 1936). The dissent points out that at the time of Blackstone ejectment was the only way to try title. This was the rule in Missouri down to 1897 when a special statute was enacted to try title. Mo. St. Ann. sec. 1520, p. 1682. In Missouri the action of ejectment to do away with the fiction of lease, entry and ouster, allows the plaintiff to plead only possession. R. S. Mo. 1929, sec. 1365-1370. However, the plaintiff must prove he is legally entitled to possession and must recover by the strength of his own title and not the weakness of his adversaries when title is put in issue. Brown v. Simpson, 201 S. W. 898 (Mo., 1918).

25. Welsh v. Brown, 96 S. W. (2d) 345 (Mo., 1936) by Div. 2.

1. The case does not specify the particular acts of moral turpitude involved.

2. Weston v. Board of Governors of State Bar, 61 P. (2d) 229 (Okla., 1936).