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THE ALLOCATION OF ORIGINAL APPELLATE JURISDICTION IN MISSOURI*

[T]his cause is one of which the Supreme Court is given exclusive appellate jurisdiction. Art. 5, Sec. 3, Const. of Mo. 1945, V.A. M.S. So finding, we undertake to bring the jurisdictional merry-go-round to a halt that the dizzy riders litigant may alight at the proper landing, by directing the clerk of this court to retransfer this cause forthwith . . . to the clerk of the Supreme Court of Missouri. Stone, P.J., in Corp v. Joplin Cement Co., 323 S.W.2d 385, 386 (Mo. Ct. App. 1959).

INTRODUCTION

Missouri has four appellate tribunals: a supreme court sitting at Jefferson City and courts of appeals sitting at St. Louis, Kansas City and Springfield. Cases which fall within any of the nine categories defining the exclusive appellate jurisdiction of the supreme court must be appealed directly to that court; every other case must be appealed originally to one of the courts of appeals. That is, the original appellate jurisdictions of the supreme court

* Missouri appellate practice was singled out in the famous Address by Roscoe Pound, Twenty-Ninth Annual Meeting of American Bar Association, St. Paul, Minnesota, Aug. 29, 1906, in 29 ABA ANN. REP. pt. I, at 395, 411-12 (1906):

The state reports exhibit the same condition. In ten volumes of the Southwestern Reporter, the decisions of the Supreme Court and Courts of Appeals of Missouri show that nearly twenty per cent. involve points of appellate procedure. In volume 87, of fifty-three decisions of the Supreme Court and ninety-seven of the Courts of Appeals, twenty-eight are taken up in whole or in part with the mere technics of obtaining a review. All of this is sheer waste, which a modern judicial organization would obviate. . . .

. . . . There should be no need of new papers, no transcripts, no bandying of cases from one court to another on orders of removal and of remand, no beginnings again with new process.

Judicial power may be wasted in three ways: (1) By rigid districts or courts or jurisdictions, so that business may be congested in one court while judges in another are idle, (2) by consuming the time of courts with points of pure practice, when they ought to be investigating substantial controversies, and (3) by nullifying the results of judicial action by unnecessary retrials. American judicial systems are defective in all three respects.

and the courts of appeals are mutually exclusive, with the former specially defined and the latter, general or residual.¹ The nine categories are specified in article V, section three of the present constitution which was ratified in 1945:

The supreme court shall have exclusive appellate jurisdiction in [1] all cases involving the construction of the Constitution of the United States or of this state, [2] the validity of a treaty or statute of the United States, or any authority exercised under the laws of the United States, [3] the construction of the revenue laws of this state, [4] the title to any office under this state, [5] the title to real estate, [6] in all civil cases where the state or any county or other political subdivision of the state or any state officer as such is a party, [7] in all cases of felony, [8] in other classes of cases provided by law, and [9] until otherwise provided by law, in all cases where the amount in dispute, exclusive of costs, exceeds the sum of seventy-five hundred dollars.²

The definitions of these categories have been developed by the various appellate tribunals in jurisdictional decisions.³ This treatise has been written in nine chapters, each of which catalogues and analyzes the relevant case law.

I. HISTORY OF THE CATEGORICAL ALLOCATION OF ORIGINAL APPELLATE JURISDICTION

Prior to 1875,⁴ with the exception of the years 1865 to 1870,⁵ the supreme court was the only appellate court in the state. During this period there was some recognition that the supreme court was overworked, and in 1872 the

1. *Vogrin v. Forum Cafeterias of America*, 301 S.W.2d 406, 408 (Mo. Ct. App. 1957), *trans'd*, 308 S.W.2d 617 (Mo. 1958); *Starr v. Mitchell*, 231 S.W.2d 299, 301 (Mo. Ct. App. 1950), *trans'd*, 361 Mo. 908, 237 S.W.2d 123 (1951). The Missouri system is discussed in CURRAN & SUNDERLAND, *THE ORGANIZATION & OPERATION OF COURTS OF REVIEW, THIRD REPORT OF THE JUDICIAL COUNCIL OF MICHIGAN* 174 (1933).

2. The jurisdictional amount is presently \$15,000. MO. REV. STAT. § 477.040 (1959).

3. These cases are digested in *West's Missouri Digest*, principally under "courts," key numbers 231(1)-(3), (5)-(54). Some cases are also digested under other topics; for example, some constitutional question cases are found under "constitutional law," key numbers 11-49, and "appeal and error," key number 170(2). The felony cases are digested under "criminal law," key numbers 1017-20.

4. The 1820 constitution of Missouri (see 1 V.A.M.S. 77 (1951) for the full text) provided for a supreme court to be composed of three judges. Article V, section one provided: "The judicial power, as to matters of law and equity, shall be vested in a supreme court, in a chancellor, in circuit courts, and in such inferior tribunals as the general assembly may, from time to time, ordain and establish."

The general assembly promptly enacted statutes providing that the supreme court should sit at different locations in the state at various times and created four judicial districts for this purpose. Mo. Laws 1804-1822, ch. 273, at 672-74 (1820); Mo. Laws 1804-1822, ch. 366, at 860-62 (1822). Statutes were enacted providing for appeals to

general assembly proposed a constitutional amendment⁶ which, when ratified,⁷ increased the number of supreme court judges from three to five.

Awareness of the excessive work load of the supreme court has been the primary force behind the changes which have been made in the appellate

the supreme court (law) or to the chancellor (equity). Mo. Laws 1804-1822, ch. 277, at 682-87 (1820). State-wide equity jurisdiction, which had vested in the chancellor, was placed in the supreme court and the circuit courts after the office of chancellor was abolished by constitutional amendment in 1822. Hyde, *Historical Review of the Judicial System of Missouri*, 27 V.A.M.S. 1, 8 (1952).

The language of article V, section one might have been interpreted to refer only to "such tribunals as are inferior to the supreme court but are superior to the circuit court." This interpretation would have permitted the legislature to create intermediate appellate courts; this ambiguity was recognized in the amendment of the section in the proposed Mo. CONST. art. V, § 1 (1845): "The judicial power, as to matters of law and equity, shall be vested in a supreme court, circuit courts, county courts, justices of the peace, and such other tribunals *inferior to the circuit courts*, as the general assembly may, from time to time, ordain and establish." (Emphasis added.)

5. In Mo. CONST. art. VI, §§ 1, 12, and 15 (1865), the first provision for intermediate courts of appeals appears:

§ 1. The judicial power, as to matters of law and equity, shall be vested in a Supreme Court, in District Courts, in Circuit Courts, and in such inferior tribunals as the General Assembly may, from time, to time, establish.

§ 12. The State, except the county of St. Louis, shall be divided into not less than five districts, each of which shall embrace at least three judicial circuits; and in each district a court, to be known as the District Court, shall be held, at such times and places as may be provided by law. Each District Court shall be held by the judges of the Circuit Courts embraced in the district, a majority of whom shall be a quorum. The District Courts shall, within their respective districts, have like original jurisdiction with the Supreme Court, and appellate jurisdiction from final judgments of the Circuit Courts, and of all inferior courts of record within the district, except Probate and County Courts. After the establishment of such District Courts, no appeal or writ of error shall lie from any Circuit Court, or inferior court of record, to the Supreme Court, but shall be prosecuted to the District Court, from the final judgments of which an appeal or writ of error may be taken to the Supreme Court, in such cases as may be provided by law.

§ 15. . . . [T]he Circuit Court of the county of St. Louis shall be composed of three judges, each of whom shall try causes separately, and all, or a majority of whom, shall constitute a court in bank, to decide questions of law, and to correct errors occurring in trials; and . . . there shall not be in said county any other court of record having civil jurisdiction, except a Probate Court and a County Court

The details of the St. Louis District Court were set forth in Mo. Laws 1866, at 70-75. For a discussion of the 1865 constitution, see LOEB, *CONSTITUTIONS AND CONSTITUTIONAL CONVENTIONS IN MISSOURI* 24 (1920).

For some reason, the legislature in 1870 proposed a constitutional amendment abolishing these district courts (Mo. Laws 1870, at 500). This amendment was ratified by the voters (Hyde, *supra* note 4, at 14) and the state reverted to the pre-1865 system of one appellate court.

6. Mo. Laws 1871, Resolutions, at 3 (Con. Res., March 1872).

7. Hyde, *supra* note 4, at 14. This change was later incorporated into the 1875 constitution. Mo. CONST. art. VI, § 5 (1875).

system. By 1875 there was general recognition of the need for a local appellate tribunal to hear the many cases being appealed from the circuit courts in the St. Louis area. The delegates to the 1875 constitutional convention submitted various proposals⁸ for the allocation of these appeals between the supreme court and a court of appeals to be established at St. Louis. The proposals featured a categorical allocation of the work load,⁹ although, as

8. The following statement indicates that the primary motivation for the creation of an intermediate appellate court was awareness of the supreme court's work load: "Now if there is any way of relieving the Supreme Court of its press of business—and that is the only purpose of this [proposed section]—we ought to do it . . ." 6 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTIONS OF 1875, at 327 (Loeb & Shoemaker ed. 1940) [hereinafter cited as 1875 DEBATES]. LOEB, *op. cit. supra* note 5, at 38-39, states that the congested docket of the supreme court was the motivation for creation of the St. Louis Court of Appeals.

9. Two of the proposals introduced at the convention are worthy of mention. In the first, a jurisdictional amount restriction was mentioned: "The Supreme Court, except in cases otherwise directed by this Constitution, shall have appellate jurisdiction in civil actions only when the amount in controversy exceeds the sum of five hundred dollars." JOURNAL OF THE MISSOURI CONSTITUTIONAL CONVENTION 1875, at 185. In the second, it was proposed that "appeal or writ of error shall lie from any circuit court or inferior court of record to the Supreme Court . . . [if] a question of constitutional law shall be involved in the proceeding . . ." *Id.* at 200.

Some time later the judiciary committee reported to the convention, presenting both a majority and minority report. When the majority report was read, the following amendment to the report was offered from the floor of the convention:

Appeals shall lie from the decision of said St. Louis Court of Appeals, to the Supreme Court; and writs of error may issue from the Supreme Court to the said Courts of Appeals in the following cases only: In all cases where the amount claimed exclusive of costs exceeds \$2,500; in cases involving the construction of the Constitution of the State, or the revenue laws thereof, or the title to any office under the State; in cases involving the title to real estate, in cases where a county or other political subdivision of the State, or any State officer is a party, and in all cases of felony. 1875 DEBATES 316.

The debate on this amendment centered about the fact that cases which involved a construction of the federal constitution were not included as cases appealable to the Missouri Supreme Court. This meant that these cases could be taken from the St. Louis Court of Appeals directly to the United States Supreme Court. While it was conceded that this might save litigants time and money, the substitute provision was defeated. *Id.* at 316-23.

The majority report was adopted with only a few minor language changes. For example, the words "amount claimed" in the original report were replaced by the phrase "amount in dispute" in order to conform to federal court terminology. *Id.* at 329. The jurisdictional section of the majority recommendation, as approved by the convention with these minor changes and adopted by the voters as Mo. CONST. art. VI, § 12 (1875), is set forth in text accompanying note 10 *infra*.

Section five of the minority report offered by the judiciary committee was not debated and apparently was not seriously considered.

Writs of error may issue from the Supreme Court to the appellate courts, and appeals shall be allowed from the appellate courts to the Supreme Court in all cases of felony, in all cases involving a right of franchise, title to real estate, questions of revenue and taxation, and construction or constitutionality of a statute, and in all cases of debt, damages, and possession of personal property, when the amount

adopted, the 1875 constitution did not employ these categories to define the *original* appellate jurisdiction of the supreme court. Rather, it provided that all appeals from the circuit courts in specified counties should be directed to the St. Louis Court of Appeals, and that only those falling within the enumerated categories would be entitled to a second appellate hearing in the supreme court.

Article VI, section twelve of the 1875 constitution, defining the cases which were appealable from the St. Louis Court of Appeals to the supreme court as a matter of right, employed eight of the present nine categories¹⁰ of original appellate jurisdiction:

Appeals shall lie from the decisions of the St. Louis Court of Appeals to the Supreme Court, and writs of error may issue from the Supreme Court to said court in the following cases only: [1] In all cases where the amount in dispute, exclusive of costs, exceeds the sum of two thousand five hundred dollars; [2] in all cases involving the construction of the Constitution of the United States or of this State; [3] in cases where the validity of a treaty or statute of, or authority exercised under the United States is drawn in question; [4] in cases involving the construction of the revenue laws of this State, or [5] the title to any office under this State; [6] in cases involving title to real estate; [7] in cases where a county or other political subdivision of the State or any State officer is a party, [8] and in all cases of felony.

Only one court of appeals was established at this time; a minority report of the judiciary committee proposing three intermediate appellate courts was rejected by the convention.¹¹

It was soon evident that the provisions of the 1875 constitution were inadequate to solve the problem of the supreme court's work load. Thus, in 1883 the general assembly proposed¹² a constitutional amendment which, when ratified in 1884, expanded the territorial jurisdiction of the St. Louis Court of Appeals,¹³ established the Kansas City Court of Appeals,¹⁴ and

involved is five hundred dollars and over. JOURNAL OF THE MISSOURI CONSTITUTIONAL CONVENTION 1875, at 339.

One suggestion made from the floor of the convention was that litigants be given an option whether to appeal to the St. Louis Court of Appeals or the supreme court. This was rejected, since it would not further the purpose of relieving the supreme court of its crowded docket. 1875 DEBATES 323-25.

10. The ninth category, added in 1945, was "other classes of cases provided by law," which is discussed in Chapter Eight and in text accompanying note 27 *infra*.

11. 1875 DEBATES 330-31. "In this connection it should be stated that Missouri was the first State in the Union to use an intermediate appellate court whose personnel, both formally and substantially, was entirely divorced from any connection with any other courts . . ." CURRAN & SUNDERLAND, *op. cit. supra* note 1, at 154.

12. Mo. Laws 1883, at 215-16.

13. 1884 amend., § 1.

14. 1884 amend., § 2.

authorized the general assembly to (1) establish a third court of appeals, and (2) alter the "amount in dispute" minimum.¹⁵ By section five of this amendment the method of appeal was modified so that the eight categories originally enumerated in article VI, section twelve now defined cases over which the supreme court was to exercise *exclusive original* appellate jurisdiction. That is, the cases the supreme court could previously hear on appeal from the St. Louis Court of Appeals it would now hear originally, by issuing writs of error directly to the circuit courts.¹⁶ All other appeals were to go initially to either the St. Louis or Kansas City Court of Appeals. Thus, the system of mutually exclusive jurisdiction was created in basically the form in which it presently exists.¹⁷

"Establishment of the Courts of Appeals was a great aid to the Supreme Court by relieving it of appeals in misdemeanor cases and in civil cases involving limited amounts. However, more help was soon necessary, and, by the Amendment of 1890, the Supreme Court was increased from five to seven judges and it was authorized to sit in two divisions"¹⁸ In the first decade of the twentieth century the general assembly exercised the powers granted to it by the 1884 amendment.¹⁹ A third court of appeals was established at Springfield²⁰ and the "amount in dispute" minimum was raised to \$4,500 in 1901²¹ and to \$7,500 in 1909.²² "Even with these measures, the Supreme Court was unable to keep up with its growing docket and further assistance was given in 1911²³ by authorizing it to appoint four Commissioners to sit with the court during the argument of causes, and to write opinions for adoption by the court."²⁴

15. 1884 amend., § 3. The 1875 provision had set this minimum at \$2,500.

16. 1884 amend., § 5:

In all causes or proceedings reviewable by the Supreme Court, writs of error shall run from the Supreme Court directly to the circuit courts and to courts having the jurisdiction pertaining to circuit courts, and in all such causes or proceedings, appeals shall lie from such trial courts directly to the Supreme Court, and the Supreme Court shall have exclusive jurisdiction of such writs of error and appeals, and shall in all such cases exclusively exercise superintending control over such trial courts.

17. "In Missouri it is strenuously insisted that the three Courts of Appeals are not intermediate courts of review. Their decisions, it is pointed out, are final within their constitutional jurisdiction." CURRAN & SUNDERLAND, *op. cit. supra* note 1, at 153.

18. Hyde, *supra* note 4, at 16. This amendment was proposed by the general assembly (Mo. Laws 1889, at 322).

19. See notes 13-16 *supra* and accompanying text.

20. Mo. Laws 1909, at 393-95.

21. Mo. Laws 1901, at 107-08.

22. Mo. Laws 1909, at 397. This amount limitation remained in effect for fifty years, until it was raised to \$15,000 in 1959 (Mo. Laws 1959, S.B. 7).

23. Mo. Laws 1911, at 190.

24. Hyde, *supra* note 4, at 16. The present number of authorized commissioners is six.

The crowded supreme court docket remained a problem. Indicative of this fact are opinions by courts of appeals which express reluctance at the necessity of transferring to the supreme court because of that court's crowded docket.²⁵ Although not as acute as formerly, this problem persists today.²⁶ Nevertheless, the drafters of the present constitution—drafted during 1943-1944 and ratified in 1945—apparently did not address themselves to the problem of appellate jurisdiction. Instead, the only change made in the section relating to appellate jurisdiction was the inclusion of provisions for enlargement of the supreme court's jurisdiction.

In the new jurisdictional provision (article V, section three), another category was added to the original eight: "in other classes of cases provided by law." Although this addition has had little effect,²⁷ another category was revised so as to actually broaden the scope of supreme court jurisdiction. Added to what is now the sixth category was a provision for supreme court review when the state is a party.²⁸

There was a change in the wording of the category which had read "cases involving the validity of . . . any authority exercised under the United States," so that it now reads "validity of . . . authority exercised under *the laws of* the United States." None of the cases discovered and cited in Chapter Two indicates that this language change has had any effect on the case law in this area, and it is not clear why it was made. Ironically, when the present article V, section three was recommended to the convention by the committee on the judicial department, what little debate that ensued concerned this minor change. When an objection was raised from the floor that the change would unduly enlarge the supreme court's jurisdiction, one delegate responded:

I can't see any difference between any authority whether there is any authority under the United States in the question or any authority under the laws of the United States. I don't think the addition of the word 'laws' makes any change. Now, the words 'under the United States' means under the sovereignty of the United States, under the exercise of any of the sovereign powers of the United States, and those sovereign powers are exercised in two ways—first, by the Constitution

25. *E.g.*, *Whitsett v. City of Carthage*, 184 S.W. 1185, 1187 (Mo. Ct. App. 1916), *trans'd.* See PROCEEDINGS OF THE THIRTY-FIRST ANNUAL MEETING OF THE MISSOURI BAR ASSOCIATION 28-29, 140 (1913).

26. See § 9.010, note 3 for discussion of APPELLATE PRACTICE COMM., REPORT OF SPECIAL COMM. ON MONETARY JURISDICTION OF APPELLATE COURTS.

27. See Chapter Eight. Article V, section three is quoted in full in text accompanying note 2 *supra*.

28. See § 6.010.

of the United States itself, second by the statutes of the United States I don't see where it makes any difference . . . at all and I just can't understand the objection.²⁹

That article V, section three was not given sufficiently careful consideration by the convention³⁰ is reflected by the failure of the delegates to raise

29. DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION 1943-1944, at 2572 [hereinafter cited as 1943-1944 DEBATES].

30. On March 10, 1944, Committee Number Five, considering the Judicial Department, recommended an appellate jurisdictional provision, which was finally adopted verbatim as article V, section three. JOURNAL OF THE MISSOURI CONSTITUTIONAL CONVENTION 1943-1944, ninety-ninth day, at 21. The committee had worked about six months on the whole judicial article which was submitted to the convention on March 10. During that period it had considered thirty-five proposals for change. Righter, *The Judicial Section of the Proposed New Mo. Constitution*, 13 U. KAN. CITY L. REV. 1 (1944).

The proposals considered are collected in PROPOSALS OF THE MISSOURI CONSTITUTIONAL CONVENTION 1943-1944. Eight proposals favored changes in the existing system of appellate jurisdiction. However, only two completely rejected the existing categorical allocation of mutually exclusive jurisdiction. PROP. NO. 4, § 4 provided that the supreme court should have only that appellate jurisdiction "as may be provided by law." PROP. NO. 142, art. V, §§ 1, 9 provided for an "administrative council" to be composed of various members of the judiciary which would "have authority to prescribe by rules the appellate jurisdiction of the Supreme Court and Courts of Appeals."

The other six proposals featured various changes in the enumerated categories. PROP. NO. 21, § 2 retained seven of the eight original categories (amount in dispute was deleted) and added a provision for exclusive supreme court jurisdiction "in such other cases as the Administrative Council by rules shall prescribe." This proposal also contained the wording changes that were finally drafted into the present clauses two and six of article V, section three (for an explanation of these changes see notes 28-29 *supra* and accompanying text). Section twenty-three of this proposal provided for the administrative council, to be composed of various judges.

PROP. NO. 175, § 2 deleted the title to realty, construction of revenue laws, title to office and amount in dispute categories. It retained what is now clause six except that it dropped "counties and other political subdivisions" and added "state a party." It also incorporated the wording change finally written into the present clause two, and narrowed the felony category to only those cases involving death or life imprisonment sentences.

PROP. NO. 219, § 2 retained with certain revisions the original eight categories. It employed the changes that were finally made in the present clauses two and six, and also raised the "amount in dispute" minimum to \$10,000.

PROP. NO. 274, § 4 deleted the category of "amount in dispute," but with one exception, featured all of the other eight categories in the form in which they presently exist. The exception was that the phrase "validity of authority exercised under the laws of the United States" was not contained in this proposal. It is noteworthy that of the eight proposals, this was the only one that featured a category of "other classes of cases provided by law," as contradistinguished from the provision in some of the others for establishment of "other classes" by rules promulgated by an administrative council.

PROP. NO. 290, § 1 provided that "appeals shall lie . . . to the Supreme Court in all cases and proceedings wherein any order or decision of the Public Service Commission of Missouri is reviewed." This proposal was no doubt engendered by several jurisdic-

the jurisdictional amount from the minimum of \$7,500 that had been enacted in 1909.³¹ This limitation was not raised until 1959, when the figure was set at \$15,000.³²

It is also interesting that the drafters of the 1945 constitution did not attack the practical problems attending the development of the complicated body of case law which defines the jurisdictional categories. Judge Storckman's dissent in the 1963 case of *Feste v. Newman*³³ reflects judicial regret that such action was not taken:

The problems connected with appellate jurisdiction *have been of concern to the Bench and Bar for some time*. Judges of the appellate courts are acutely aware of the waste of manpower and delay arising under

tional decisions concerning the commission which were rendered during the 1930's (see § 6.051(a), note 33).

PROP. No. 351, § 4 dropped the amount in dispute category and provided for exclusive supreme court appellate jurisdiction in such "other cases as the administrative council by rules shall prescribe." It retained all of the other original categories and also contained the changes finally made in the present clauses two and six.

Difficult to discern in these proposals is any indication of a uniform awareness of the problems needing attention. Some, notably those which either raised the "amount in dispute" minimum or dropped that category altogether, indicated a desire to lessen the work load of the supreme court. Others recognized an inherent lack of flexibility in constitutional definition of categories which are incapable of being modified by a legislative or rule-making body. However, with the exception of the two which completely dropped the categories of exclusive supreme court appellate jurisdiction, these proposals provided only for *additional* supreme court jurisdiction. This indicates a failure to realize the problem of the court's work load. This failure neutralized the contemplated increase in jurisdictional flexibility. See § 8.020. The addition of "state a party" to the present clause six also increased the supreme court's work load (note 28 *supra* and accompanying text).

No material was available indicating what thoughts were voiced in the committee's consideration of the proposals (no official transcript was made of the committee hearings). But, as seen in the text accompanying note 29 *supra*, the only issue of appellate jurisdiction receiving much attention when the committee reported to the convention was the insignificant wording change in the present clause two. The chairman of the committee, Richard S. Righter, reporting on the proceedings in *The Judicial Section of the Proposed New Mo. Constitution*, 13 U. KAN. CITY L. REV. 1 (1944), offers a possible explanation for the absence of substantial change in the allocation of appellate jurisdiction. Much attention was given to the division and commissioner systems in the appellate courts, to the supervisory powers of the supreme court, to the proposed abolition of the justice of the peace system, and to the improvement of administrative review. His only reference to appellate jurisdiction is: "We did not change the present appellate jurisdiction of the Supreme Court or the Courts of Appeals. . . ." Righter, *supra* at 10. Apparently these other problems in judicial administration were felt to be more pressing and received the primary consideration of the committee and the convention.

31. See note 22 *supra*.

32. Mo. Laws 1959, S.B. 7 (now Mo. REV. STAT. § 477.040 (1959)).

33. 368 S.W.2d 713 (Mo. 1963) (en banc), *trans'd.*

present constitutional provisions Changes in the constitutional provisions relating to appellate jurisdiction are perhaps the most satisfactory solution³⁴

In fact, the bench and bar have been concerned about these problems since before the turn of the century. In a proposed constitutional amendment of 1895,³⁵ the general assembly recognized that some confusion existed in the case law definitions;³⁶ the amendment attempted clarification,³⁷ but was defeated at the polls.

34. *Id.* at 719. (Emphasis added.) The duplication of effort and waste of judge-hours are manifested in *Emerson Elec. Mfg. Co. v. City of Ferguson*, 359 S.W.2d 225 (Mo. 1962), *trans'd*, 376 S.W.2d 643 (Ct. App. 1964). "We have read all of the five-volume record of this case, largely to ascertain whether any ground of jurisdiction appeared." *Id.* at 230. The very length of the opinion is another indication of the time spent by the court in considering jurisdiction.

35. Mo. Laws 1895, at 286-87.

36. This statement in a 1916 law review note also indicated the continuing concern over the appellate system:

It is a sufficient indictment of the system that such bandying of a case should be possible. *This fault is not the courts'—it is inherent in the Missouri system of court organization.* It is bad enough that the plaintiff should be made to wait so many years and to conduct such expensive litigation to get the redress to which he is entitled

But there are more serious results Such confusion tends to undermine the confidence in the whole judicial system; it entails a serious congestion of dockets when so much of the courts' time must be consumed in deciding questions of jurisdiction among themselves [I]n short, it is to some degree responsible for the existing situation in the appellate courts, all of which are overworked and two of which are notoriously behind their dockets. 12 U. MO. BULL. L. SER. 47-48 (1916). (Footnotes omitted.) (Emphasis added.)

Reference was here made to the case of *Rourke v. Holmes St. Ry.* which has perhaps the most bizarre history in Missouri appellate practice. A first appeal in this case was taken to the supreme court, which reversed and remanded without discussion of jurisdiction. 221 Mo. 46, 119 S.W. 1094 (1909). A second appeal was taken to the Kansas City Court of Appeals from the judgment rendered in the new trial granted by the supreme court. The court of appeals noted that the case fell within Mo. Laws 1911, at 190. (This act amended Mo. Laws 1909, at 397, which raised the "amount in dispute" minimum to \$7,500, and was passed to facilitate the re-allocation of appeals pending at the time of the increase which did not meet the new amount. The act provided that only those pending cases over which the supreme court had previously exercised jurisdiction and made a decision or ruling should be retained by the supreme court. All other cases not meeting the new amount should be transferred to the courts of appeals.) Therefore, the court of appeals transferred the case to the supreme court. 166 Mo. App. 207, 148 S.W. 161 (1912). The supreme court held the statute unconstitutional on the ground that it went beyond the powers specifically granted by the constitution to the general assembly to effect changes in appellate jurisdiction. The case was retransferred to the court of appeals. 257 Mo. 555, 166 S.W. 272 (1914) (en banc). The court of appeals noted that the supreme court had based the retransfer solely upon the unconstitutionality of the statute, voicing no opinion on whether jurisdiction could be vested in that court because a constitutional question was involved in the substance of the case. The court of appeals felt that such a question was involved and retransferred the case to the supreme court. 177 S.W. 1102 (Ct. App. 1915). The supreme court disagreed and retransferred the case to the court of appeals. 181 S.W. 77 (Mo. 1915)

One purpose of this study is to make a detailed analysis of (to paraphrase Judge Storckman³⁸) the complexities and inefficiencies inherent in the present system—those defects of which the bench and bar have long been aware and which could best be remedied by a constitutional amendment.³⁹

II. INTRODUCTION TO MISSOURI APPELLATE PRACTICE

The typical situation in which jurisdictional decisions are rendered by either the supreme court or a court of appeals occurs when an original appeal has been taken to an appellate court directly from the trial court. The court's inquiry into its jurisdiction may be occasioned by motion of a party alleging that the court is without jurisdiction and must transfer the case to the proper forum (to the court of appeals from the supreme court or vice versa).⁴⁰ If the parties do not raise this issue, the court is required to inquire *sua sponte* into its jurisdiction and must transfer on its own motion if this is

(en banc). On May 1, 1916 the court of appeals reversed and remanded the case for a new trial. 12 U. MO. BULL. L. SER. 47 (1916).

37. Section 2. The meaning of the terms used in section 12, article 6 of the constitution is hereby defined as follows:

By amount in dispute is meant the money value of the real dispute at the date of the judgment appealed from, and the court shall look into the entire record for the purpose of ascertaining such value.

Cases involving the construction of the constitution of the United States or of this state, or the validity of a treaty or statute of the United States, are those cases only where that point has been raised in good faith by some pleading or instruction in the trial court.

Cases involving the construction of the revenue laws of this state are cases only wherein either party in the trial court claims some right under a construction of such laws, which construction his adversary denies to be the true construction by some pleading or instruction.

The title to any office under this state means only the title of an officer whose duties are co-extensive with the state, or who is required by law to be commissioned by the governor; and no one is a state officer who does not answer this description.

A county or other political subdivision of a state includes only counties, and cities exercising the functions of a county, but no minor subdivisions.

Cases involving title to real estate are cases only wherein the decree or judgment rendered affects directly the title of the appellant to certain real estate, and actions of ejectment. . . .

38. See text accompanying note 34 *supra*.

39. The drafters of the 1945 constitution performed only a patchwork revision on the appellate jurisdiction provision, although they did effect many changes in the judicial article as a whole. Therefore, pre-1945 arguments in favor of a general revision of the judicial article are applicable to a consideration of the current need for change in the appellate jurisdiction provision. See, *e.g.*, Grimm, *The Article on Judiciary in the Constitution of Missouri*, 7 ST. LOUIS L. REV. 145, 146 (1922):

As is well known, the present article on the Judiciary has been amended several times, and presents the appearance of a building to which additions have been made and which has undergone some repairs. To carry out the figure, the question arises, does the building as it now exists meet our requirements, or can it be made to meet them by further additions or repairs, or would it be the part of wisdom to remodel or reconstruct it entirely? This is a large and important question, to answer which it is necessary not only to determine to what extent the present structure has answered our purposes, and further whether, granting it is defective, we have the wisdom to plan and execute something better.

lacking.⁴¹ However, not all of the cases defining the jurisdictional categories have arisen in this context. The supreme court possesses powers of a supervisory nature in addition to those inherent in its capacity as a court of original appeal.⁴² Article V, section four of the present constitution provides

40. The case may be transferred with opinion. Or it may be transferred without opinion, in which situation the citator and case reporter systems will not reveal the decision unless the opinion of the court to which the case is transferred discusses jurisdiction and mentions the fact of the transfer. This treatise is only an analysis of Missouri case law; no docket study was made to determine the number of transfers not indicated in reported cases.

Once the supreme court and courts of appeals had been given appellate jurisdiction, some provision was necessary to facilitate transfer between the courts when a case was improperly appealed. Mo. Laws 1885, at 121 originally set forth the procedure for such transfer:

Section 1. In the event of any case being sent from a lower court on appeal or writ of error to the wrong court of appeals or the supreme court, it shall be the duty of the court to which the case has thus been sent, immediately on such fact coming to its attention, to direct its clerk to forward the transcript therein, with the order of transfer, to the clerk of the proper court of appeals. And in the event of any case being sent improperly on appeal or writ of error from a lower court to either of the courts of appeal when the same should have been sent to the supreme court, it shall be the duty of such court of appeals, immediately on such fact coming to its attention, to order the transfer of the same to the supreme court by its clerk, who shall at once send the same to the clerk of the supreme court, accompanied by a copy of said order. On the receipt of such record by the proper clerk he shall at once file the same in his office, and the case shall be proceeded with in the court to which it is transferred as if the same had gone there directly from the trial court.

The proposed amendment of 1896 contained another provision relating to the duty to transfer. The gist of the proposal (Mo. Laws 1895, at 286) was to permit a motion to transfer by either the litigants or the court on its motion in the court of appeals before decision on the ground that jurisdiction was properly in the supreme court. If the case were not transferred, the decision of the court of appeals could not be subject to challenge because rendered without jurisdiction. Although this proposal obviously would have halted some jurisdictional transfers, most significant is its provision for machinery by which supreme court jurisdiction could be pre-empted. This proposal is inconsistent with the idea that the categories of supreme court jurisdiction are immutable and within that court's peculiar or special competence. The proposal assumes that the purpose of the enumerated categories was solely to accomplish an arithmetic division of the case load and, therefore, if the court of appeals decides a case over which the supreme court has jurisdiction, the constitutional provision has not been violated.

Mo. CONST. art. V, § 11 now provides for transfers:

In all proceedings reviewable on appeal by the supreme court or a court of appeals, appeals shall go direct to the court having jurisdiction thereof, but want of jurisdiction shall not be ground for dismissal, and the proceeding shall be transferred to the appellate court having jurisdiction thereof.

41. *E.g.*, *Vogrin v. Forum Cafeterias of America*, 301 S.W.2d 406 (Mo. Ct. App. 1957), *trans'd*, 308 S.W.2d 617 (Mo. 1958).

42. See generally Hyde, *supra* note 4, at 22-23, for a discussion of the supreme court's responsibility for the operation of all courts in the state. Specifically discussed is the power to temporarily transfer trial judges to other trial courts or to appellate courts; the power to create temporary new divisions in the courts of appeals, manned by

that: "The supreme court, courts of appeals, and circuit courts shall have a general superintending control over all inferior courts and tribunals in their jurisdictions and may issue and determine original remedial writs."⁴³ The supreme court can take remedial action when it decides that one of the courts of appeals is acting without jurisdiction,⁴⁴ therefore, some of the authoritative cases cited in this treatise were original actions brought in the supreme court.

There is a matter of terminology in the Missouri case law which is potentially confusing to the reader unaware of the fact that "transfer" and "certification" are often used interchangeably by the courts to refer to jurisdictional transfers as well as transfers to the supreme court to review decisions of the courts of appeals. Both the old and new constitutions contain provisions by which the supreme court may make the *final* disposition of an appeal even though it would have no jurisdiction to hear the original appeal. Section six of the 1884 amendment provided that cases decided by the courts of appeals could be *certified* to the supreme court for final disposition:

When any one of said courts of appeals shall in any cause or proceeding render a decision which any one of the judges therein sitting shall deem contrary to any previous decision of any one of said courts of appeals, or of the Supreme Court, the said Court of Appeals, must, of its own motion . . . *certify* and *transfer* said cause or proceeding . . . to the Supreme Court, and thereupon the Supreme Court must rehear and determine said cause or proceeding, as in case of jurisdiction obtained by ordinary appellate process

It will be noticed that the effect of this provision was conditioned upon action taken by judges of the courts of appeals, and gave the supreme court no power to order the certification of a case *on its own motion*. The purpose of this provision was to assure uniformity in the case of law of the state.⁴⁵

additional judges, to keep dockets up to date; and the power to establish rules of procedure for all courts. Judge Hyde's view is that the judicial article of the 1945 constitution in these particulars "has greatly increased the responsibility of the Missouri Supreme Court, not only by making it the head of the state judicial system, but also by giving it added duties which are unique in judicial history. This is most significant evidence of the confidence of the people of Missouri in the courts and affords new opportunities for improving the administration of justice." *Ibid*. Although the new judicial article provided for a general increase in efficiency, it is unfortunate that the drafters did not use the opportunity to revise the jurisdictional section and eliminate in one step the difficulties which arose under the old section.

43. The corresponding section in the 1875 constitution (article VI, section three) granted generally the same power to the supreme court, except that it stated specifically the writs which could issue: "habeas corpus, mandamus, quo warranto, certiorari and other original remedial writs."

44. See § 9.013.

45. See *Keller v. Summers*, 262 Mo. 324, 171 S.W. 336 (1914).

In this respect it proceeded hand-in-hand with the power of the supreme court to quash an opinion of the court of appeals in an original action for certiorari when a conflict of decisions was apparent.⁴⁶ One difference between the two procedures was that the supreme court acquired jurisdiction of a case certified to it because a dissenting judge in the court of appeals deemed the majority in conflict with previous opinions,⁴⁷ whereas exercise of the power to quash by certiorari was conditioned upon a finding of conflict by the supreme court.⁴⁸ That the use of these procedures gave rise to several problems, especially that of defining a "conflict" in the cases, is reflected in the extensive body of case law that developed under them.⁴⁹

Article V, section ten of the 1945 constitution has now superseded the older procedures by which the supreme court could render the final decision in cases over which it had not exercised original appellate jurisdiction:

Cases pending in any court of appeals shall be transferred to the supreme court when any member of the court of appeals or any division thereof dissents from the majority opinion and certifies that he deems said opinion to be contrary to any previous decision of the supreme court or of any of the courts of appeals, and may, after opinion, be transferred to the supreme court by order of either the court of appeals or the supreme court because of the general interest or importance of a question involved in the case, or for the purpose of re-examining the existing law, or pursuant to supreme court rule. The supreme court may finally determine all causes coming to it from any court of appeals, whether by certification, transfer or certiorari, the same as on original appeal.⁵⁰

46. "The purpose of this peculiar form of certiorari is to secure uniformity in opinions, and harmony in the law." *State ex rel. Vulgamott v. Trimble*, 300 Mo. 92, 101, 253 S.W. 1014, 1016 (1923) (en banc).

47. *Schmohl v. Travelers' Ins. Co.*, 197 S.W. 60 (Mo. 1917) (en banc); *Keller v. Summers*, 262 Mo. 324, 328, 171 S.W. 336, 337 (1914).

48. *State ex rel. Gentry v. Hostetter*, 343 Mo. 1090, 1095-96, 125 S.W.2d 72, 75 (1939); *State ex rel. Vulgamott v. Trimble*, 300 Mo. 92, 101, 253 S.W. 1014, 1016 (1923) (en banc). Also, by certiorari the supreme court could only quash the decision of the court of appeals; it had no jurisdiction to decide the appeal. It could, on the point of contrariety of decisions, state what rule ought to govern the hearing made by the court of appeals, but it had to send the case back for final disposition by the court of appeals. *Schmohl v. Travelers' Ins. Co.*, *supra* note 47, at 63. The theory of quashing by certiorari was that the court of appeals exceeded its jurisdiction by announcing any rule or principle of law conflicting with controlling decisions of the supreme court. *State ex rel. American Car & Foundry Co. v. Daues*, 313 Mo. 681, 282 S.W. 389 (1926) (en banc).

49. This case law is digested in *West's Missouri Digest* under "courts," key number 231(4).

50. In the opinion of the members of the judiciary committee of the constitutional convention, the scope of review afforded the supreme court by the old constitution was

This provides a means similar to the discretionary certiorari power of the United States Supreme Court by which uniformity in the case law can be assured.⁵¹ In this respect the drafters of the present constitution simplified Missouri appellate practice.⁵² Generally, the provision gives the supreme court the potential power to control the decisional law in any area by selectively ordering transfers, without having to hear all of the insignificant cases falling within that area.⁵³ However, it is unfortunate that this improved "pyramid" appellate system, similar to the federal structure, is superimposed upon the outmoded system by which the original appellate work load is allocated. Consequently, the supreme court must still waste hours either hearing insignificant cases that clearly fall within one of its categories of original jurisdiction, or in deciding the complex jurisdictional questions involved in close cases conceptually falling on the fringe of one or more of these categories. It is probable, therefore, that insufficient judge-hours are available to fully exploit the potential of article V, section ten.⁵⁴

Another matter of Missouri appellate practice of which the reader should be aware is that by virtue of article V, section seven of the 1945 constitution "the supreme court may sit en banc or in divisions, and courts of appeals may sit in divisions, as the courts may from time to time determine. Each

too narrow, because it depended upon action taken by judges of the courts of appeals. 1943-1944 DEBATES 2602-08. The new provision was hotly debated, with some delegates presenting the view that it would lead to a flood of motions for transfer, increasing the supreme court's work load. *Id.* at 2604-05. However, others felt that just as the United States Supreme Court had been able to limit the number of cases heard on certiorari by establishing an identifiable test of public interest, so could the Missouri Supreme Court. *Id.* at 2610-12. One effect of the new provision is to allow the court to restrict its original jurisdiction by use of the arbitrary distinctions discussed in the chapters of this treatise. That is, the supreme court can exclude certain classes of cases from its jurisdiction and still exercise control over the development of the law in those classes so long as it has power to review selected opinions rendered by the courts of appeals.

51. See 1943-1944 DEBATES 2609-13; Righter, *The Judicial Section of the Proposed New Mo. Constitution*, 13 U. KAN. CITY L. REV. 1, 4-5 (1944).

52. It is beyond the scope of this symposium to attempt to catalogue the cases in which this power of review has been exercised. It is noteworthy, however, that a glance at the cases digested under "courts," key number 231(4) indicates that almost all were decided under the old procedure of certification and certiorari. Also, sample readings of the cases drawn together in Shepard's MISSOURI CITATOR under article V, section ten, indicate that the supreme court rarely has to do more than refer to the procedure by which it has acquired jurisdiction for a final disposition under article V, section ten.

53. Fitzpatrick, *The Reviewing Courts of Ill.*, 1952 U. ILL. L.F. 5, 22-23, recognizes that a general class of cases may be of great importance and yet certain cases within those classes may be of trifling importance; the high court of a state should be relieved of the obligation of hearing the "trifling" cases.

54. This problem is discussed in "Conclusion."

division shall be composed of not less than three judges, at least one of whom shall be a regular judge of the court.”⁵⁵ Article V, section nine provides for transfer of divisional opinions in the supreme court to the court en banc “when the members of a division are equally divided in opinion, or when the division shall so order, or on application of the losing party when a member of the division dissents from the opinion therein, or a federal question is involved, or pursuant to supreme court rule.”⁵⁶ Although the divisional system is designed to dispose more effectively of the appellate work load, it has occasionally led to complication in jurisdictional cases.⁵⁷

III. INTRODUCTION TO THE JURISDICTIONAL CASE LAW

Not all opinions in original appeals contain a statement of the basis for jurisdiction. It is likely that this partially results from the court's consideration of the jurisdictional issue in private and its conclusion that the issue is so clear that it does not merit discussion.⁵⁸ If this is true, the opinion would arguably have value as jurisdictional precedent. However, if the jurisdictional issue in a given case is clear, that clarity will have resulted from a previous resolution of the issue. Thus, citation of the cases specifically resolving the jurisdictional question would be more appropriate. If in fact the supreme court has broken new ground in privately deciding a jurisdictional problem, citation of the case as jurisdictional authority would require inferences from the holding on the merits in order to determine the court's jurisdictional predicate. A further possibility is that the court neglected to

55. For a history of the divisional system see Hyde, *Historical Review of the Judicial System of Missouri*, 27 V.A.M.S. 1, 16 (1952); Hyde, *The Work of the Missouri Supreme Court for the Year 1938*, 4 Mo. L. REV. 345 (1939); notes 18 & 24 *supra* and accompanying text.

56. The divisional system was first established by the 1890 amendment.

57. See, e.g., *State ex rel. Kersey v. Sims*, 309 Mo. 18, 274 S.W. 359 (1925), *trans'd*, 286 S.W. 832 (Ct. App. 1926); *Lawson v. Hammond*, 191 Mo. 522, 90 S.W. 431 (1905), *trans'd from* 102 Mo. App. 44, 81 S.W. 656 (1903). In the *Sims* case, Division Two, on motion for rehearing, withdrew the opinion on the merits it had previously handed down, and transferred the case stating that “we were not aware that Division No. 1 had promulgated [the] above [jurisdictional] opinion, and . . . assumed that this court had jurisdiction We see no reason for departing from the . . . [case decided by Division One] and hence must hold that this court was without jurisdiction to pass upon the merits of the case.” In *Lawson v. Hammond*, *supra*, Division One announced a jurisdictional principle contrary to two previous cases, one of which had been decided by one division and followed by the other. The court expressed concern over keeping separate the lines of authorities promulgated by each division; in fact, it was intimated that one division should not overrule the other. See also *Benner v. Terminal R.R. Ass'n*, 340 Mo. 928, 156 S.W.2d 657 (1942).

58. Interviews with appellate judges indicate that much consideration and discussion of jurisdiction occur among members of the courts that does not appear in the opinions.

consider jurisdiction.⁵⁹ Indeed, there are cases in which a court in its jurisdictional statement has explained older cases which contained no jurisdictional statement as examples of inadvertent acceptance of jurisdiction.⁶⁰ For these reasons, and for the further reason that cases without statements of jurisdiction are not digested under jurisdictional classifications, cases not considering jurisdiction as an issue are usually disregarded in this symposium.⁶¹

Much of the discussion in these chapters, however, centers about cases which contain only a brief conclusionary statement of jurisdiction (*e.g.*, "we take jurisdiction because the case involves a construction of the revenue laws," or "we transfer the case because the amount in dispute does not affirmatively appear on the record"). Such a statement commits the court to the stated basis of jurisdiction (or the lack of it) and thus joins the body of authoritative case law, whether or not it announces correct principles. Such brief conclusionary statements are often confusing because they force the reader to infer the basis for the court's jurisdictional decision from its dis-

59. *State ex rel. Kersey v. Sims*, 309 Mo. 18, 274 S.W. 359 (1925), discussed *supra* note 57, verifies that this has occurred. Other examples of delayed consideration of jurisdiction are: *Emerson Elec. Mfg. Co. v. City of Ferguson*, 359 S.W.2d 225, 226 (Mo. 1962), discussed § 9.012, note 15; *State v. Pullam*, 293 S.W. 484 (Mo. Ct. App. 1927) (court quashed writ of error previously issued upon finding that it had no jurisdiction, as discussed § 7.020, text accompanying note 21).

60. *E.g.*, *Wuertenbaecher v. Feik*, 36 S.W.2d 913 (Mo.), *trans'd*, 43 S.W.2d 848 (Ct. App. 1931); *Parker v. Zeisler*, 139 Mo. 298, 40 S.W. 881 (1897), *trans'd*, 73 Mo. App. 537 (1898).

61. The dissenting opinion of Sherwood, J., in *State v. Thayer*, 158 Mo. 36, 58 S.W. 12 (1900), incorporated the brief of the attorney general which presented the fruits of exhaustive research indicating that recurrent acceptance of jurisdiction *sub silentio* is not necessarily authority for a jurisdictional proposition. In *Rourke v. Holmes St. Ry.*, 257 Mo. 555, 166 S.W. 272 (1914) (en banc) (for the full history of this case see note 36 *supra*), the supreme court held that it had no jurisdiction and struck down a statute which purported to vest it with jurisdiction. It was suggested by the parties in this case that the jurisdictional issue had been settled by a previous supreme court case which had considered this same statute and failed to take the action that was taken in *Rourke*. The court disposed of this contention by stating:

That case . . . is *not even persuasive* authority, since it gives no expression whatever on the question which now has arisen for judgment, but which was neither in judgment nor touched upon there. There is no exception to the doctrine established in this State and elsewhere, that where a prior decision does not rule upon or refer to a ground of attack made upon an act of the Legislature in a subsequent case, the former decision is without any authority whatever in the decision of the later case. *Id.* at 572, 166 S.W. at 278.

See *State ex rel. Baker v. Goodman*, 364 Mo. 1202, 274 S.W.2d 293 (1954) (en banc); *State v. Carr*, 142 Mo. 607, 44 S.W. 776 (1898).

In *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952), the Court held that it was not bound by previous decisions which did not deal with the point

discussion of the merits.⁶² In addition, they may indicate that the court has not carefully considered and thus has reached the wrong result on the jurisdictional issue.⁶³ The other side is that a more exhaustive discussion of jurisdiction would probably be complicated. The cases cited in Chapter Three ("Construction of Revenue Laws") serve as models to illustrate how an accumulation of complexities has been avoided by this very failure to articulate fully the basis for jurisdiction.⁶⁴

The writers have read and catalogued every appellate jurisdiction case decided since 1875 which could be found in West Publishing Company's digest and Shepard's citator systems; most cases are cited and all problem areas are discussed in the respective chapters. Because the courts since 1875 have been attempting to define the boundaries of the eight basic categories, which have, with a few wording changes, been retained to the present day, pre-1945 case law is valid authority for jurisdictional propositions under the 1945 constitution.⁶⁵

The purpose of the exhaustive discussion in each chapter is twofold: (1) the detailed treatment of every problem encountered tends to reflect the complexity and unworkability of the case law and thereby indicates the need for fundamental changes; and (2) the detailed treatment should serve as an aid to judges and lawyers who are researching the case law to decide jurisdictional questions.

in contention in the instant case. In dictum, the Court stated: "Even as to our own . . . jurisdiction, this Court has . . . held that this Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silentio*." (Footnote omitted.)

In *United States v. Sanges*, 144 U.S. 310, 321 (1891), the Court, in denying that it had appellate jurisdiction disposed of certain similar cases in which jurisdiction had been exercised: "[N]o objection was taken to the jurisdiction of this court. The exercise of jurisdiction over those cases . . . is therefore entitled to no more weight by way of precedent than the exercise of appellate jurisdiction *sub silentio* . . ."

62. See §§ 7.030, 9.012, 9.030.

63. *Fleischaker v. Fleischaker*, 338 Mo. 797, 801, 92 S.W.2d 169, 171 (1936). See *State ex rel. Reed v. Elliott*, 180 Mo. 658, 79 S.W. 696 (1904), *trans'd from court of appeals*, *retrans'd*, 114 Mo. App. 562, 90 S.W. 122 (1905), *overruling McAnaw v. Matthis*, 129 Mo. 142, 31 S.W. 344 (1895), *trans'd from court of appeals*.

In *Elliott* it was pointed out that the court in *McAnaw* had accepted jurisdiction with only a brief conclusionary statement that title to real estate was involved; apparently, the *Elliott* court felt that this fact helped to justify the overruling of *McAnaw*.

In *City of Poplar Bluff v. Poplar Bluff Loan & Bldg. Ass'n*, 369 S.W.2d 764 (Mo. Ct. App. 1963), discussed at § 3.030, note 19, the court gave only a passing reference to the jurisdictional issue, and probably erred in accepting jurisdiction.

64. See §§ 3.040-.050.

65. *Trokey v. United States Cartridge Co.*, 214 S.W.2d 526, 528 (Mo. 1948), *trans'd*, 222 S.W.2d 496 (Ct. App. 1949); *Hydesburg Common School Dist. v. Rensselaer Common School Dist.*, 214 S.W.2d 4 (Mo. 1948), *trans'd*, 218 S.W.2d 833 (Ct. App. 1949).