

CHAPTER FIVE

“the title to real estate”

5.010. INTRODUCTION

The category of exclusive supreme court jurisdiction “involving . . . title to real estate”¹ denotes two basic elements: (1) the subject matter of the controversy must, in substantive law, constitute *title to real estate*, (2) which must not only be at issue, but must be *involved* according to criteria developed by the courts. These elements must be present in a case to vest jurisdiction in the supreme court.

The object of the constitutional provision was to channel the significant real property cases to the supreme court for final settlement in order “to secure uniformity of decision on that important branch of jurisprudence.”² The tests evolved to determine the existence of the jurisdictional prerequisites function ideally to eliminate from supreme court jurisdiction those cases in which questions of real property law are merely collateral to the main issues presented. This chapter will outline the criteria used by the courts to decide the question of appellate jurisdiction and will analyze the consistency with which these tests have been applied. The cases will be classified according to the substantive types of actions. The purpose of this format is twofold: to point up the unique jurisdictional problems of each and to make as accessible as possible the relevant jurisdictional authority.

1. The constitutional provision for appellate jurisdiction is not to be confused with the venue limitation for commencement of actions in circuit court which provides that “suits for the possession of real estate, or whereby the title thereto may be affected . . . shall be brought in the county where such real estate, or some part thereof, is situated.” Mo. REV. STAT. § 508.030 (1959). Title to real estate may be “affected” in a case for trial venue and yet not be “involved” for supreme court appellate jurisdiction. An example is *State ex rel. Shiek v. McElhinney*, 190 Mo. App. 618, 176 S.W. 292 (1915), in which it was sought to prohibit defendant trial court judge from taking venue of an action to enjoin the violation of building restrictive covenants. The court of appeals had jurisdiction, because the injunction action did not *involve* the title for supreme court jurisdiction (§ 5.121) even though it did *affect* title for trial court venue within the situs county—the enforcement of the easement so encumbered the title as to restrict its free use and enjoyment. The case was expressly followed in *Wearen v. Woodson*, 268 S.W. 648 (Mo. Ct. App. 1924). To the same effect are *State ex rel. City of Kirkwood v. Reynolds*, 265 Mo. 88, 175 S.W. 575 (1915) (en banc) (enforcement of lien of special tax bill); *State ex rel. Haeussler v. Court of Appeals*, 67 Mo. 199 (1877) (seeking to enjoin sale under execution). For a discussion of “effect” on title to real estate within the constitutional language of “involvement” see § 5.171(b).

2. *Fischer v. Johnson*, 139 Mo. 433, 439, 41 S.W. 203, 205 (1897) (dissenting opinion), *trans'd from* court of appeals, *retrans'd*, 74 Mo. App. 64 (1898).

5.011. *Examination of the Record in Determining Jurisdiction*

The general rule is that appellate jurisdiction is determined from the trial court record—the petition, relief sought, subsequent pleading, and the judgment rendered³—“at the time the appeal is granted, and . . . nothing subsequently occurring will defeat or confer jurisdiction.”⁴ Nevertheless, the supreme court has been divested of jurisdiction in “real estate” cases when, because of the death of a party, title to real estate is no longer disputed on appeal⁵ or no judgment on the merits can be entered.⁶ Though such cases of “divestment” of jurisdiction are inconsistent with the general rule, they occur only in rare instances and cause little practical difficulty.

3. *Nettleton Bank v. Estate of McGauhey*, 318 Mo. 948, 2 S.W.2d 771 (en banc), *trans'd*, 222 Mo. App. 1084, 11 S.W.2d 1093 (1928); *Curators of Cent. College v. Shields*, 182 S.W.2d 792 (Ct. App. 1944), *trans'd*, 188 S.W.2d. 835 (Mo. 1945); see *Kennedy v. Duncan*, 224 Mo. 661, 123 S.W. 856 (1909), *trans'd*, 157 Mo. App. 212, 137 S.W. 299 (1911).

4. *E.g.*, *Hunter v. Hunter*, 355 Mo. 599, 601, 197 S.W.2d 299, 300 (1946), *trans'd*, 202 S.W.2d 101 (Ct. App. 1947); *accord*, *Tant v. Gee*, 348 Mo. 633, 154 S.W.2d 745 (1941), *trans'd from* 236 Mo. App. 133, 146 S.W.2d 61 (1940), *retrans'd*, 167 S.W.2d 67 (Ct. App. 1943). This is also the general rule stated for jurisdiction based upon “monetary amount” (§ 9.021 (b)) and “constitutional question” (§ 1.024).

5. *Hunter v. Hunter*, *supra* note 4. On one count to determine title, the trial court adjudged that plaintiff held a life estate and that defendant held the reversion, and on the second count in ejectment granted plaintiff possession and damages. While defendant's appeal was pending, plaintiff died. Though acknowledging the general rule that subsequent events have no jurisdictional effect, the supreme court transferred the appeal to the court of appeals because plaintiff's death made defendant the undisputed owner of the fee—the quiet title count was no longer a “live” issue—leaving only the ejectment count in which title was only incidentally involved. *But cf.* *Wade v. Rogala*, 270 F.2d 280 (3d Cir. 1959).

6. *DeHatre v. Ruenpohl*, 341 Mo. 749, 108 S.W.2d 357 (1937), *trans'd*, 123 S.W.2d 243 (Ct. App. 1939). Plaintiff appealed a dismissal of his bill to impose a constructive trust on defendant's land but died pending the hearing of his appeal. The supreme court transferred because the appellate judgment could not affect any real estate interest claimed by the decedent since the heirs had not been made parties to the action. As support for its holding, the court stated that there were “cases holding that issues can be abandoned resulting in the loss of appellate jurisdiction, as where an issue involving the title to real estate is abandoned” (*Id.* at 754, 108 S.W.2d 360), citing *Nettleton Bank v. Estate of McGauhey*, 318 Mo. 948, 2 S.W.2d 771 (en banc), *trans'd*, 222 Mo. App. 1084, 11 S.W.2d 1093 (1928). But two of the cases cited in *Nettleton* and apparently referred to by *DeHatre* involved title issues which were not asserted as error on appeal. See § 5.012, notes 15-16. They were not cases in which the court was divested of jurisdiction by the occurrence of a subsequent event. *Jones v. Hogan*, 211 Mo. 45, 109 S.W. 641 (1908), *trans'd*, 135 Mo. App. 347, 116 S.W. 21 (1909) (defendant's prayer for title relief “not insisted on appeal”); *Whitecotton v. Wilson*, 197 S.W. 168 (Mo. Ct. App. 1917). The third case cited in *Nettleton*, *Loewenstein v. Queen Ins. Co.*, 227 Mo. 100, 130, 127 S.W. 72, 84 (1909), cited the *Jones* case, *supra*, in overruling a motion to transfer. It distinguished those cases in which title to real estate was an issue in the pleadings, but in which the judgment appealed from did not involve title. The court in

5.012. *Judgment Sought or Rendered as the Basis for Jurisdiction*

The basic standard for supreme court jurisdiction over real estate cases is an affirmative appearance from the record' that "the judgment sought or rendered" directly affects or operates upon title to real estate so as to determine it adversely to one litigant in favor of another.⁸ When the party seeking affirmative relief is the appellant, the court determines what judgment was *sought* by reference to the petition, not the prayer,⁹ of that party.¹⁰ Therefore if the prayer seeks title relief not authorized by the facts pleaded in the petition, jurisdiction is in the court of appeals.¹¹ On the other hand, when the defendant (or the plaintiff when counter-relief is sought by defendant) appeals, the judgment *rendered* granting the re-

DeHatre also referred to cases in which the supreme court lost jurisdiction of "constitutional question" cases because that question was abandoned on appeal. See § 1.024. The *DeHatre* case and the *Hunter* case, *supra* note 4, are difficult to reconcile with those in which the court has held that it has jurisdiction of an appeal when it clearly will be required to hold the trial court judgment invalid because not authorized by the pleadings—which is a decision on the merits of the case. § 5.012, notes 13-14. That is, it would seem that the appellate court in *DeHatre* and *Hunter* had to determine whether the relief granted was still authorized in view of the change in parties, arguably a decision on the merits, and that this decision should be made only after jurisdiction is accepted.

7. *E.g.*, *Hanna v. Sheetz*, 355 Mo. 1215, 200 S.W.2d 338, *trans'd*, 240 Mo. App. 385, 205 S.W.2d 955 (1947); *Hilton v. City of St. Louis*, 129 Mo. 389, 31 S.W. 771, *trans'd*, 63 Mo. App. 179 (1895). The requirement of affirmative appearance in the record is based upon the limitations on the jurisdiction of the appellate courts imposed by the constitution. The courts must determine their jurisdiction before deciding the appeal, and the parties may not stipulate jurisdiction in one court or the other. *E.g.*, *Dubowsky v. Binggeli*, 258 Mo. 197, 167 S.W. 999, *trans'd*, 184 Mo. App. 361, 171 S.W. 12 (1914).

8. *Nettleton Bank v. Estate of McGauhey*, 318 Mo. 948, 2 S.W.2d 771 (en banc), *trans'd*, 222 Mo. App. 1084, 11 S.W.2d 1093 (1928), and cases cited therein. The "direct effect" principle appears in varying forms throughout the title to real estate cases.

9. See Mo. REV. STAT. § 509.050 (1959). The prayer for relief is not part of a pleading and may be disregarded in determining the relief authorized. *Caldwell v. Eubanks*, 326 Mo. 185, 30 S.W.2d 976 (1930). The court, in determining its appellate jurisdiction, will not consider whether the pleadings state a good cause of action, but will only "ascertain the class in which the case falls with respect to relief sought." *Nettleton Bank v. Estate of McGauhey*, 318 Mo. 948, 954, 2 S.W.2d 771, 775 (en banc), *trans'd*, 222 Mo. App. 1084, 11 S.W.2d 1093 (1928).

10. *E.g.*, *Munday v. Austin*, 240 Mo. App. 41, 210 S.W.2d 714 (1948), *trans'd*, 358 Mo. 959, 218 S.W.2d 624 (1949) (en banc); *Leach v. Armstrong*, 149 S.W.2d 865 (Mo. 1941), *trans'd*.

11. *Wood v. Gregory*, 155 S.W.2d 168 (Mo. 1941), *trans'd*, 163 S.W.2d 355 (Mo. Ct. App. 1942); *Brutcher v. Fitzsimmons*, 343 Mo. 547, 122 S.W.2d 881 (1938), *trans'd from court of appeals, retrans'd*, 130 S.W.2d 206 (Ct. App. 1939); *General Theatrical Enterprises, Inc. v. Lyriss*, 121 S.W.2d 139 (Mo. 1938), *trans'd*, 131 S.W.2d 874 (Ct. App. 1939); *State ex rel. South Mo. Pine Lumber Co. v. Dearing*, 180 Mo. 53, 79 S.W. 454 (1904); *Briscoe v. Longmire*, 148 Mo. App. 594, 128 S.W. 521 (1910), *trans'd from supreme court*.

relief and sought to be overturned is referred to by the appellate court.¹² The judgment granting affirmative relief controls even if beyond the pleadings and petition and thereby void on its face.¹³ (Determination of the validity of the trial court's judgment would be a decision on the merits which the court could not properly render without appellate jurisdiction.¹⁴)

Because appellate review is limited to those "allegations of error" which the party "aggrieved" by the trial court judgment has preserved on appeal, issues and claims which are not disputed on appeal are no longer in the case.¹⁵ Therefore, the court must separate the claims decided at the trial since only those actually appealed may serve as a basis for appellate jurisdiction; each claim for appellate relief is then examined to determine whether it is one "involving . . . title to real estate" (an approach which is suggested by the organization of this chapter). If the supreme court has

12. *E.g.*, *Pursley v. Pursley*, 213 S.W.2d 291 (Mo.), *trans'd*, 215 S.W.2d 302 (Ct. App. 1948) (judgment rendered did not grant title relief sought by plaintiff); *Kennedy v. Duncan*, 224 Mo. 661, 123 S.W. 856 (1909), *trans'd*, 157 Mo. App. 212, 137 S.W. 299 (1911) (defendant administrator appealed judgment granting defendant widow pecuniary equivalent of dower). "[T]he appeal is not from the petition, but from the judgment; therefore it is only where title to real estate is involved in the judgment that this court has jurisdiction." *Id.* at 666, 123 S.W. at 857.

13. *Albi v. Reed*, 281 S.W.2d 882 (Mo. 1955); *State ex rel. Brown v. Hughes*, 345 Mo. 958, 137 S.W.2d 544 (1940) (en banc); *Riley v. La Font*, 174 S.W.2d 857 (Mo. 1943); *Watts v. Watts*, 304 Mo. 361, 263 S.W. 421 (1924); *Domyan v. Dornin*, 348 S.W.2d 360 (Mo. Ct. App. 1961), *trans'd*, 356 S.W.2d 70 (Mo. 1962); see *State ex rel. Place v. Bland*, 353 Mo. 639, 183 S.W.2d 878 (en banc), *trans'd from* 180 S.W.2d 538 (Ct. App. 1944); *Herriman v. Creason*, 352 Mo. 1176, 181 S.W.2d 502 (1944) (en banc); *Brewster v. Terry*, 172 S.W.2d 5 (Mo. Ct. App. 1943), *trans'd*, 352 Mo. 967, 180 S.W.2d 600 (1944).

14. See cases cited *supra* note 13.

In considering . . . our appellate jurisdiction, we will disregard the fact that the land described in the option is located in Texas. If we were to hold that we did not have jurisdiction because the land . . . is not located in Missouri, such would be an adjudication on the merits. *Fisher v. Lavelock*, 282 S.W.2d 557, 560 (Mo. 1955), *trans'd*, 290 S.W.2d 655 (Ct. App. 1956).

Accord, *Tant v. Gee*, 348 Mo. 633, 154 S.W.2d 745 (1941), discussed *supra* note 4; see *Kansas City Power & Light Co. v. Riss*, 312 S.W.2d 846 (Mo.), *trans'd*, 319 S.W.2d 262 (Ct. App. 1958).

15. Mo. REV. STAT. §§ 512.020, .160(1) (1959). *City of St. Charles v. De Sherlia*, 303 S.W.2d 32 (Mo.), *trans'd*, 308 S.W.2d 456 (Ct. App. 1957) (adverse judgment on defendant's counterclaim for title relief not appealed), discussed in Garnett, *Appellate Practice in Missouri—1957*, 23 Mo. L. REV. 401, 402-03 (1958); *Reece v. Van Gilder*, 272 S.W.2d 177 (Mo.), *trans'd from* 264 S.W.2d 893 (Ct. App. 1954), *retrans'd* (part of judgment giving plaintiff life estate conceded by defendant); *Stephens v. Anth*, 142 S.W.2d 1008 (Mo. 1940), *trans'd*, 147 S.W.2d 165 (Ct. App. 1941) (failure of trial court to decree specific performance not complained of on appeal); *Hayes v. Dunstan*, 98 S.W.2d 539 (Mo. 1936), *trans'd*, 104 S.W.2d 1025 (Ct. App. 1937) (claim allegedly involving title to real estate not appealed). See generally Bennick, *Missouri Appellate Practice and Procedure in Civil Cases*, 1951 WASH. U.L.Q. 486.

jurisdiction of one of the claims, all issues appealed in the case will be heard in that court.¹⁶

5.020. CLAIMS FOR MONEY DAMAGES

A claim for money damages for alleged injury to plaintiff's real estate interest will not vest the supreme court with jurisdiction. Title to real estate is not *involved* because a money judgment will not directly *affect* title—*i.e.*, determine *res judicata* which disputant has title¹⁷—without the aid of subsequent proceedings.¹⁸ Although title may be disputed at trial, this title issue will be only “incidental and collateral” to the object to the suit¹⁹—adjudication of plaintiff's right to recover damages.²⁰

16. *E.g.*, *Howell v. Reynolds*, 249 S.W.2d 381 (Mo. 1952); *Missouri City Coal Co. v. Walker*, 183 S.W.2d 350 (Mo. Ct. App. 1944), *trans'd*, 188 S.W.2d 39 (Mo. 1945); *Hyer v. Baker*, 128 S.W.2d 1067 (Mo. Ct. App.), *trans'd*, 130 S.W.2d 516 (Mo. 1939); see § 9.024, “Ancillary Jurisdiction.”

17. *Norman v. Summerfield-Jones Constr. Co.*, 319 Mo. 599, 4 S.W.2d 1064 (1928), *trans'd*, 18 S.W.2d 559 (Ct. App. 1929) (damages for removal of sand and gravel from plaintiff's land); *Eighme v. Indiana, B. & W. Ry.*, 238 S.W. 479 (Mo. 1921), *trans'd*, 213 Mo. App. 342, 249 S.W. 717 (1923); *Simmons v. Kansas City, C. & S. Ry.*, 201 Mo. App. 477, 213 S.W. 149 (1919) (damages to barn by fire set by passing locomotive); *Schroer v. Brooks*, 200 S.W. 1068 (Mo. 1918), *trans'd*, 204 Mo. App. 567, 224 S.W. 53 (1920) (trespass action); *Coleman v. Lucksinger*, 224 Mo. 1, 123 S.W. 441 (1909) (damages for breach of covenants in warranty deed); *McKinney v. T. L. Wright Lumber Co.*, 192 Mo. 32, 90 S.W. 726 (1905), *trans'd*, 131 Mo. App. 425, 109 S.W. 103 (1908) (damages for cutting and hauling away lumber); *Ozark Land & Lumber Co. v. Robertson*, 158 Mo. 322, 59 S.W. 69 (1900), *trans'd*, 89 Mo. App. 480 (1901) (cutting and carrying away timber); *Cox v. Barker*, 150 Mo. 424, 51 S.W. 1051 (1899), *trans'd from* 71 Mo. App. 568 (1897), *retrans'd*, 81 Mo. App. 181 (1899) (trespass for tearing down and carrying away fence); *Rothrock v. Cordz-Fisher Lumber Co.*, 146 Mo. 57, 47 S.W. 907 (1898), *trans'd*, 80 Mo. App. 510 (1899) (trespass for cutting and removing trees); *Heman v. Wade*, 141 Mo. 598, 43 S.W. 162 (1897), *trans'd from* 63 Mo. App. 363 (1895), *retrans'd*, 74 Mo. App. 339 (1898) (injunction against waste involved “personal or pecuniary right”).

18. *Heman v. Wade*, *supra* note 17 (injunction against waste “merely in aid of the pending ejectment suit”); *accord*, *Weil v. Richardson*, 320 Mo. 310, 7 S.W.2d 348 (1928), *trans'd from* court of appeals, *retrans'd*, 224 Mo. App. 990, 24 S.W.2d 175 (1930). In *Weil*, the sheriff was enjoined from executing a prior judgment for services rendered a corporation upon the trial court's finding that the corporation charter was invalid, making the prior judgment void. The supreme court held that the judgment of the trial court did not determine title as between the corporation and the plaintiffs (who claimed the property had been conveyed to them by the corporation) but only the validity of the former judgment. The court further noted that had the trial court denied the injunction, title could only be “affected” by a “subsequent proceeding,” *i.e.*, an actual sale under the execution. See *Snodgrass v. Copple*, 203 Mo. 408, 101 S.W. 1090 (1907), *trans'd*, 131 Mo. App. 346, 111 S.W. 845 (1908) (right to homestead exemption from execution); *McGregor v. Pollard*, 130 Mo. 332, 32 S.W. 640 (1895), *trans'd*, 66 Mo. App. 324 (1896) (partition suit to declare charge on lands).

19. *E.g.*, *Heath v. Beck*, 225 S.W. 993 (Mo. 1920), *trans'd from* 204 S.W. 43 (Ct. App. 1918), *retrans'd*, 231 S.W. 657 (Ct. App. 1921) (damages for breach of agreement in deed to furnish outlet); *Price v. Blankenship*, 144 Mo. 203, 45 S.W. 1123 (1898)

5.030. SUITS CONTESTING LEASEHOLDS

Actions contesting leasehold interests are not appealable to the supreme court because in Missouri a lease, no matter how long, is personal property,

(action for difference between selling price and amount due on mortgage); cases cited note 17 *supra*. See *Hunter v. Hunter*, 355 Mo. 599, 197 S.W.2d 299 (1946), *trans'd*, 202 S.W.2d 101 (Ct. App. 1947); *In re Ellis' Estate*, 127 S.W.2d 441 (Mo. 1939), *trans'd from* 110 S.W.2d 864 (Ct. App. 1937), *retrans'd*; *Williams v. Mackey*, 331 Mo. 68, 52 S.W.2d 831 (1932), *trans'd from* 40 S.W.2d 1098 (Ct. App. 1931), *retrans'd*, 227 Mo. App. 1016, 61 S.W.2d 968 (1933); *Salia v. Pillman*, 328 Mo. 1212, 43 S.W.2d 1038 (1931), *trans'd*, 49 S.W.2d 215 (Ct. App. 1932); *Lewellen v. Lewellen*, 319 Mo. 854, 5 S.W.2d 4 (1928), *trans'd*, 223 Mo. App. 262, 13 S.W.2d 565 (1929); *Wuertenbaecher v. Feik*, 36 S.W.2d 913 (Mo.), *trans'd*, 43 S.W.2d 848 (Ct. App. 1931); *State ex rel. Miller v. Board of Educ.*, 18 S.W.2d 26 (Mo.), *trans'd*, 224 Mo. App. 120, 21 S.W.2d 645 (1929); *Nettleton Bank v. Estate of McGauhey*, 318 Mo. 948, 2 S.W.2d 771 (en banc), *trans'd*, 222 Mo. App. 1084, 11 S.W.2d 1093 (1928); *Hydraulic Press Brick Co. v. Lane*, 205 S.W. 801 (Mo. 1918), *trans'd from* 198 Mo. App. 438, 200 S.W. 306 (1918), *retrans'd*, 211 S.W. 93 (1919).

In *Hannibal & St. J. R.R. v. Mahoney*, 42 Mo. 467, 472 (1868), quoted in *Rothrock v. Cordz-Fisher Lumber Co.*, 146 Mo. 57, 59, 47 S.W. 907 (1898), discussed *supra* note 17, it was stated:

The primary object in trespass is to recover damages, *not to try title to real estate*; and it matters not which side is successful, *the title remains unaffected*. The plaintiff cannot obtain judgment without showing title, where his ownership is denied; *but his proof of title is collateral, and a mere incident of the real issue*, his right to damages. (Emphasis added.)

The *res judicata* effect of a judgment which "directly affects" title is described in *Cantrell v. City of Caruthersville*, 267 S.W.2d 646 (Mo. 1954); see § 5.070, notes 65-68.

20. In the usual damage action, plaintiff seeks only an adjudication of his right to recover money damages. In these cases, the courts hold that since title is not sought to be adjudicated, it is not *affected* by the judgment. In several classes of cases, however, the decision that title to real estate is not involved is based upon another ground. In some cases involving damages for wrongful appropriation of plaintiff's property by railroads, the courts have held that title to real estate is not involved because "when plaintiffs elected to sue for compensation, they surrendered whatever title and right of possession they had to the land described in the petition; they acquiesce in the taking and appropriation and seek to recover compensation and nothing more." *Eighme v. Indiana, B. & W. Ry.*, 238 S.W. 479, 480 (Mo. 1921), discussed *supra* note 17; *accord*, *Griffin v. Missouri, K. & E. Ry.*, 148 Mo. 516, 50 S.W. 1117 (memorandum decision), *trans'd*, 82 Mo. App. 93 (1899), relying upon *Edwards v. Missouri, K. & E. Ry.*, 148 Mo. 513, 50 S.W. 89 (1899), *trans'd*, 97 Mo. App. 103, 71 S.W. 366 (1902) (suit "not to get land back, but the money value of it"). Thus these opinions seemingly turned on a lack of *dispute* of title. However, a reading of the description of the pleadings in these cases indicates that it is doubtful that the plaintiff conceded title in the defendant, and it is arguable that the court reached these decisions on the merits when it concluded that the mere seeking of damages conceded title in the defendant.

The judgment sought in a replevin action is recovery of a "personal chattel," *e.g.*, crops severed from realty; title to the land may be inquired into but is not one of the issues adjudicated. *Fischer v. Johnson*, 139 Mo. 433, 41 S.W. 203 (1897) (en banc), *trans'd from* court of appeals, *retrans'd*, 74 Mo. App. 64 (1898). The judgment rendered in a replevin action operates only "indirectly" and "collaterally" on title, *Phipps v. Redman*, 238 Mo. App. 571, 185 S.W.2d 848 (1945), and may be satisfied by the payment of

not an interest in real estate.²¹ As a result, title to *real estate* will not be involved.²²

5.040. CLAIMS FOR DOWER AND CURTESY

"Effective January 1, 1956, dower . . . [and curtesy were] abolished. . . . But, 'any such estate . . . [then] vested' was not affected by the abolition of dower [and curtesy]."²³ Since claims may be brought only for dower estates vested prior to January 1, 1956, the interest has only limited practical significance. Nevertheless, an examination of dower cases illustrates fact patterns that have caused difficulties in the analysis of the jurisdictional prerequisites of *title to real estate*, and *involvement*. Dower and curtesy are virtually identical;²⁴ because the interest of dower is more common, it is more fully discussed.

money, *Turner v. Morris*, 222 Mo. 21, 121 S.W. 9 (1909), *trans'd*, 142 Mo. App. 60, 125 S.W. 238 (1910).

Title to real estate is not involved in suits to enjoin a future alleged trespass by defendant. *E.g.*, *Sikes v. Turner*, 242 S.W. 940 (Mo. 1922), *trans'd*, 212 Mo. App. 419, 247 S.W. 803 (1923); *Hill v. Hopson*, 221 Mo. 103, 120 S.W. 29 (1909), *trans'd*, 150 Mo. App. 611, 131 S.W. 357 (1910); *Ozark Land & Lumber Co. v. Robertson*, 158 Mo. 322, 59 S.W. 69 (1900), *trans'd*, 89 Mo. App. 480 (1901). See § 5.150.

21. *Thacker v. Flottmann*, 244 S.W.2d 1020 (Mo.), *trans'd*, 250 S.W.2d 810 (Ct. App. 1952); *Blake v. Shower*, 356 Mo. 618, 202 S.W.2d 895 (1947), *trans'd*, 207 S.W.2d 775 (Ct. App. 1948) (suit for specific performance of lease agreement); *Bussen v. Del Commune*, 195 S.W.2d 666 (Mo. 1946), *trans'd*, 239 Mo. App. 859, 199 S.W.2d 13 (1947); *Thompson v. Thompson*, 149 S.W.2d 867 (Mo.), *trans'd*, 156 S.W.2d 937 (Ct. App. 1941) (action to set aside a lease); *General Theatrical Enterprises v. Lyris*, 121 S.W.2d 139 (Mo. 1938), *trans'd*, 131 S.W.2d 874 (Ct. App. 1939) (parties sought adjudication of existence of lease); *McCaskey v. Duffley*, 335 Mo. 383, 73 S.W.2d 188, *trans'd*, 229 Mo. App. 289, 78 S.W.2d 141 (1934) (action to determine right to collect rentals); *Springfield S.W. Ry. v. Schweitzer*, 246 Mo. 122, 151 S.W. 128 (1912), *trans'd*, 173 Mo. App. 650, 158 S.W. 1058 (1913) (condemnation of leasehold interest); *Smith v. McNew*, 381 S.W.2d 369 (Mo. Ct. App. 1964) (oral agreement to cultivate crops).

22. Cases cited *supra* note 21. In *Thacker v. Flottmann*, *supra* note 21, a judgment was rendered for plaintiff declaring valid a mining lease and option for removal of mineral deposits from land owned by defendant and declaring that defendant had no right or title to the minerals. The supreme court transferred the case to the court of appeals on the ground that the right conveyed by the instrument to mine clay was a *chattel real*—not a real estate interest. *Contra*, *Elliot v. Winn*, 305 Mo. 105, 264 S.W. 391 (1924) (en banc). In *Elliot* a lessee sought to enjoin lessor's forfeiture of a ninety-nine year lease, as a cloud on lessee's title to the lease; the appeal was held properly transferred to the supreme court. This decision has not been overruled, but it was made without a jurisdictional discussion; it is inconsistent with later cases because a lease is not real estate, and also because the purely injunctive relief sought does not fulfill the "involvement" requirements. See § 5.150.

23. *Sando v. Phillips*, 319 S.W.2d 648, 650 (Mo. 1959) (action for assignment of dower which allegedly vested prior to abolition).

24. Mo. Laws 1921, § 1, at 119.

5.041. *Dower as an Interest in Real Estate*

Inchoate dower, a contingent future right, does not constitute an interest in *real estate* for jurisdictional purposes.²⁵ *Dower consummate*, however, is an interest in real estate, the *title* to which may be *involved* within the meaning of article V, section three.²⁶

5.042. *Dower as "Involving" Title*

Title to real estate will not be *involved* unless there are disputed title claims;²⁷ therefore, when parties to a claim based on dower concede that interest, it cannot provide a basis for jurisdiction in the supreme court.²⁸ The *dispute* requirement raises a time problem. Since dower consummate vests, if at all, upon the death of the husband,²⁹ a controversy over dower will focus upon a point in time *prior to the institution* of the suit. Thus, the judgment in a suit to assign dower will *declare* and *determine* that title to dower has previously vested in one party adversely to the contentions of the other. The supreme court exercises jurisdiction over appeals from such judgments.³⁰

In addition to the *dispute* requirement, title must be *directly affected* to be *involved*.³¹ The often-quoted standard for deciding "direct effect" is

25. During the lifetime of the husband the inchoate right of dower is not a vested estate. *Murawski v. Murawski*, 203 S.W.2d 714 (Mo. 1947), *trans'd*, 240 Mo. App. 533, 209 S.W.2d 262 (1948), citing *Brannock v. Magoon*, 216 Mo. 722, 116 S.W. 500 (1909), *trans'd* from court of appeals, *retrans'd*, 141 Mo. App. 316, 125 S.W. 535 (1910); *Chouteau v. Missouri Pac. Ry.*, 122 Mo. 375, 22 S.W. 458 (1893), *aff'd*, 122 Mo. 375, 30 S.W. 299 (1894) (en banc); see GILL, MISSOURI TITLES 45 (3d ed. 1931); 2 PATTON, TITLES § 593 (1957).

26. See *Sando v. Phillips*, 319 S.W.2d 648 (Mo. 1959); *Gebbeken v. Growney*, 205 S.W. 721 (Mo. 1918) (curtesy consummate).

27. *E.g.*, *Goforth v. Ellis*, 300 S.W.2d 379 (Mo. 1957); *Stewart v. Stewart*, 269 S.W.2d 49 (Mo. 1954), *trans'd*, 277 S.W.2d 322 (Ct. App. 1955); *Bussen v. Del Commune*, 195 S.W.2d 666 (Mo. 1946), *trans'd*, 239 Mo. App. 859, 199 S.W.2d 13 (1947); *Nettleton Bank v. Estate of McGauhey*, 318 Mo. 948, 2 S.W.2d 771 (en banc), *trans'd* from court of appeals, *retrans'd*, 22 Mo. App. 1084, 11 S.W.2d 1093 (1928); *Platt v. Parker-Washington Co.*, 235 Mo. 467, 139 S.W. 124 (1911), *trans'd*, 161 Mo. App. 663, 144 S.W. 143 (1912); *Krepp v. St. Louis & S.F.R.R.*, 99 Mo. App. 94, 72 S.W. 479 (1903).

28. *Carlin v. Mullery*, 149 Mo. 255, 50 S.W. 813, *trans'd*, 83 Mo. App. 30 (1899) (contested value of conceded dower interest); see *Lewellen v. Lewellen*, 319 Mo. 854, 5 S.W.2d 4 (1928), *trans'd*, 223 Mo. App. 262, 13 S.W.2d 565 (1929) (distribution of proceeds of sale of homestead by consent).

29. See note 25 *supra*.

30. *E.g.*, *Sando v. Phillips*, 319 S.W.2d 648 (Mo. 1959).

31. *E.g.*, *Proffer v. Proffer*, 342 Mo. 184, 114 S.W.2d 1035 (1938), *trans'd* from 106 S.W.2d 51 (Ct. App. 1937); *Toothaker v. Pleasant*, 315 Mo. 1239, 288 S.W. 38 (1926); *Corbett v. Brown*, 263 S.W. 233 (Mo.), *trans'd*, 266 S.W. 996 (Ct. App. 1924); *Jenkins*

set forth in *Nettleton Bank v. Estate of McGauhey*:³² "The judgment sought or rendered must be such as will directly *determine* title in some measure or degree adversely to one litigant and in favor of another; or, as some of the cases say, must *take title from one litigant and give it to another*."³³ The dower cases reveal a difficulty if the second half of this statement is an independent jurisdictional prerequisite: the judgment assigning dower is only *declaratory* of a prior vesting of title and *cannot* "take title from one litigant and give it to another." The supreme court, nevertheless, has accepted jurisdiction of dower cases without acknowledging the significance of the second disjunctive in the *Nettleton Bank* statement, indicating that inconsistency exists without causing jurisdictional difficulty.

A judgment which *determines* title binds the parties *res judicata* on the title issue and thereafter serves as evidence of title (much like a deed).³⁴ Because these are the effects of judgments in suits for assignment³⁵ or admeasurement³⁶ of dower, appeals from these judgments lie in the supreme court. But when a widow does not affirmatively seek a judgment establishing her title to dower, but seeks only the money value of the interest in lieu of dower, the court's inquiry into title is only collateral or incidental to the object of the suit;³⁷ such cases vest jurisdiction in the court of appeals.

v. Jenkins, 231 S.W. 581 (Mo.), *trans'd*, 234 S.W. 365 (Ct. App. 1921); *Schroer v. Brooks*, 200 S.W. 1068 (Mo. 1918), *trans'd*, 204 Mo. App. 567, 224 S.W. 53 (1920). See also note 17 *supra* and accompanying text.

32. 318 Mo. 948, 2 S.W.2d 771 (en banc), *trans'd from court of appeals, retrans'd*, 222 Mo. App. 1084, 11 S.W.2d 1093 (1928).

33. *Id.* at 953, 2 S.W.2d at 774 (Emphasis added.); *accord*, *Pearson Drainage Dist. v. Erhardt*, 196 S.W.2d 855 (Mo. 1946), *trans'd*, 239 Mo. App. 845, 201 S.W.2d 484 (1947); *Devoto v. Devoto*, 326 Mo. 511, 31 S.W.2d 805 (1930), *trans'd*, 39 S.W.2d 1083 (Ct. App. 1931); *Stock v. Schloman*, 322 Mo. 1209, 18 S.W.2d 428 (1929), *trans'd*, 226 Mo. App. 234, 42 S.W.2d 61 (1930).

34. See *Gibbany v. Walker*, 342 Mo. 156, 113 S.W.2d 792, *trans'd*, 233 Mo. App. 489, 121 S.W.2d 317 (1938); *Ballenger v. Windes*, 338 Mo. 1039, 93 S.W.2d 882, *trans'd*, 99 S.W.2d 158 (Ct. App. 1936), ejectment cases in which title was held not "determined" because the parties were not bound on the title issue by the judgment rendered; see section 5.070. A judgment binding the parties becomes a link in the chain of title. 2 PATTON, TITLES § 522 (1957). In *Cantrell v. City of Caruthersville*, 359 Mo. 282, 221 S.W.2d 471 (1949), title was affected *because* the judgment in an action to quiet title would bind the parties on the title issue decided. In *Cantrell v. City of Caruthersville*, 267 S.W.2d 646 (Mo. 1954), *trans'd from court of appeals* (a case related to *Cantrell, supra*), a conclusive judgment was termed a "muniment" of title.

35. *Sando v. Phillips*, 319 S.W.2d 648 (Mo. 1959); *Pierce v. Georger*, 30 Mo. App. 650 (1888), *trans'd*, 103 Mo. 540, 15 S.W. 848 (1891).

36. *Lindell Glass Co. v. Hanneman*, 46 Mo. App. 614 (1891), *trans'd*; *Null v. Howell*, 40 Mo. App. 329 (1890), *trans'd*, 111 Mo. 273, 20 S.W. 24 (1892).

37. *Jenkins v. Jenkins*, 231 S.W. 581 (Mo.), *trans'd*, 234 S.W. 365 (Ct. App. 1921) (widow died before judgment); *Kennedy v. Duncan*, 224 Mo. 661, 123 S.W. 856 (1909), *trans'd*, 157 Mo. App. 212, 137 S.W. 299 (1911); *Carlin v. Mullery*, 149 Mo. 255, 50 S.W. 813, *trans'd*, 83 Mo. App. 30 (1899).

5.050. SUITS TO PARTITION REAL ESTATE

In a statutory proceeding for partition "the court shall . . . declare the rights, titles and interests of the parties to such proceedings . . . and *determine* such rights. . . ."³⁸ The judgment will *determine* the real estate interests of parties, but title to real estate is not *involved* unless the parties *dispute* these interests.³⁹

In *Devoto v. Devoto*,⁴⁰ the interests of the parties in the land were admitted, and after interlocutory judgment of partition, the plaintiff's motion to set it aside for lack of a proper accounting was denied. The supreme court lacked jurisdiction because the only *dispute* on appeal concerned pecuniary claims.⁴¹ *Dispute* over title of the parties is necessary for *involvement* even though title may be *affected* by the judgment without a dispute.⁴² Similarly, if the parties dispute only the right to partition, or the susceptibility of the land to partition in kind, jurisdiction is in the court of appeals.⁴³

38. Mo. REV. STAT. § 528.160 (1959). (Emphasis added.)

39. *E.g.*, Goforth v. Ellis, 300 S.W.2d 379 (Mo. 1957).

40. 326 Mo. 511, 31 S.W.2d 805 (1930), *trans'd*, 39 S.W.2d 1083 (Ct. App. 1931).

41. See Stewart v. Stewart, 269 S.W.2d 49 (Mo. 1954), *trans'd*, 277 S.W.2d 322 (Ct. App. 1955) (title to real estate not involved when only the method of partition in kind disputed). In Utz v. Dormann, 31 S.W.2d 991 (Mo. 1930), *trans'd*, 43 S.W.2d 883 (Ct. App. 1931), all the parties admitted their interests and agreed to partition. The only issue was whether a deed of trust on the land, barred by the statute of limitations, had been revived by later payments and was a lien on real estate. Title to real estate was held not involved. See § 5.080.

42. Cunningham v. Cunningham, 325 Mo. 1161, 30 S.W.2d 63 (1930), *trans'd*, 34 S.W.2d 994 (Ct. App. 1931).

43. In cases in which only the right to partition or the susceptibility of the land to partition in kind is disputed the courts have undergone an evolution to the present position. In Cunningham v. Cunningham, *supra* note 42, the supreme court said:

In partition actions, the title to real estate has been held (by some of the courts of appeals of this State) to be involved, so as to confer appellate jurisdiction upon this court, . . . where the question whether the real estate is incapable of partition in kind is a controverted issue, or where the right of a party to partition of real estate is denied by some pleading filed in the action. *Id.* at 1166, 30 S.W.2d at 66.

The supreme court failed to note, however, that the court of appeals cases which it cited for this proposition do not authoritatively support the proposition that title is involved. In Hiles v. Rule, 49 Mo. App. 628 (1892), *trans'd*, 121 Mo. 248, 25 S.W. 959 (1894), the court of appeals had transferred to the supreme court because real estate interests of the parties were in dispute and would be adjudicated. Groes v. Brockman, 246 S.W. 608 (Mo. Ct. App. 1923), *trans'd*, 307 Mo. 644, 271 S.W. 752 (1925), did support the proposition, but cited as authority cases which are inapplicable. Hull v. McCracken, 1 S.W.2d 205 (Mo. Ct. App. 1928), *trans'd*, 327 Mo. 957, 39 S.W.2d 351 (1931), *retrans'd*, 53 S.W.2d 405 (1932), had been ultimately retransferred to the court of appeals for lack of jurisdiction. The supreme court in *Cunningham* failed to disapprove these court of appeals cases and implied that title would have been involved if either the susceptibility to partition in kind or the right to partition had been disputed. However, since neither was disputed, the case was transferred.

The present rule is that without more than these two issues, the supreme court lacks jurisdiction. In Gebauer v. Gebauer, 163 S.W.2d 944 (Mo.), *trans'd*, 165 S.W.2d 333

If a valid sale has previously been made to one not a party to the instant partition action, title cannot be involved even though the previous real estate interests of the parties to the action are in dispute. This is true because the judgment could not affect the title held by the disinterested purchaser.⁴⁴ The only recovery in such case would be in the nature of a money judgment.⁴⁵

When there are disputed title claims, the court is directed by the statute to *determine* which parties had what title and interest at some point of time prior to the institution of the suit for partition. The judgment therefore has the requisite effect on title and jurisdiction is in the supreme court.⁴⁶

5.060. SUITS TO DECLARE CONSTRUCTIVE OR RESULTING TRUSTS

On appeal from an action seeking to declare a constructive or a resulting trust, in which the judgment sought would declare the defendant to be

(Ct. App. 1942), the only issue on appeal was the susceptibility of the land to partition in kind, which it was held did not constitute a title controversy. See *Burch v. Horn*, 152 S.W.2d 88 (Mo.), *trans'd*, 236 Mo. App. 388, 156 S.W.2d 929 (1941); *Leach v. Armstrong*, 149 S.W.2d 865 (Mo.), *trans'd*, 236 Mo. App. 382, 156 S.W.2d 959 (1941). In *Brockman v. St. Louis Union Trust Co.*, 38 S.W.2d 1010 (Mo. 1931), *trans'd*, 44 S.W.2d 877 (Ct. App. 1932), the defendants conceded the allegations of interests, but contended that the plaintiffs had no right to maintain the partition suit. The case was transferred to the court of appeals. *Accord*, *Farmer v. Littlefield*, 355 Mo. 243, 195 S.W.2d 657 (1946), *trans'd*; *Kaufmann v. Kaufmann*, 40 S.W.2d 555 (Mo.), *trans'd*, 226 Mo. App. 172, 43 S.W.2d 879 (1931); see *Mack v. Mack*, 281 S.W.2d 872 (Mo. 1955), *trans'd*, 286 S.W.2d 385 (Ct. App. 1956).

44. *Mitchell v. McClelland*, 306 S.W.2d 75 (Mo. Ct. App. 1957). The court held title not involved, since title was in a stranger, and the validity of the sale was not attacked. It noted that the dispute concerned only the proceeds of the sale, although the trial court had to ascertain the interests of the parties prior to the sale. *Accord*, *Funk v. Funk*, 205 App. 178, 223 S.W. 780 (1920).

45. *Lewellen v. Lewellen*, 319 Mo. 854, 5 S.W.2d 4 (1928), *trans'd*, 223 Mo. App. 262, 13 S.W.2d 565 (1929) (only question on appeal was distribution of proceeds).

46. See *Richards v. Stewart*, 185 Mo. 533, 84 S.W. 1181 (1904). This was a memorandum decision holding that partition of land among the devisees of a will *confers* no title, but only designates the boundaries, and the title of one to her allotted shares related back to the time of the vesting under the devise. (Court accepted jurisdiction.)

If the action seeks only to set aside the partition sale jurisdiction is generally not in the supreme court. In *Tucker v. Burford*, 337 Mo. 1073, 88 S.W.2d 144 (1935), *trans'd*, 95 S.W.2d 866 (Ct. App. 1936), the defendant appealed the overruling of his motion to set aside the sale. The moving party had earlier defaulted to the plaintiff's petition. The court held that since the moving party did not dispute title, the judgment could not determine title adversely to one party and in favor of another, so title was not involved. The motion was apparently made before the sheriff had executed the deed to the purchasers, since after the deed was executed to a disinterested purchaser, his title could not be affected. See *Hiles v. Rule*, 49 Mo. App. 628, 631 (1892), *trans'd*, 121 Mo. 248, 25 S.W. 959 (1894), stating that the title of a disinterested purchaser could not be adjudged in a proceeding to which he was not a party.

the holder of the title in trust for the plaintiff, jurisdiction belongs in the supreme court.⁴⁷ The effect of the judgment is that at least equitable title⁴⁸ is declared to be in the plaintiff as of the moment when the trust arose.⁴⁹

47. *Davis v. Roberts*, 365 Mo. 1195, 295 S.W.2d 152 (1956) (purchase money resulting trust); *Park v. Park*, 259 S.W. 417 (Mo. 1924) (trust arising *ex maleficio*, although misnamed a resulting trust). No jurisdictional decisions were found relating to express trusts.

That the Missouri courts often fail to distinguish between resulting trusts and constructive trusts, arising *ex maleficio*, is admitted in *Jankowski v. Delfert*, 356 Mo. 184, 187, 201 S.W.2d 331, 332 (1947). See *James v. James*, 248 S.W.2d 623 (Mo. 1952) ("resulting trust" based upon fraud); *Kuhn v. Zepp*, 355 Mo. 295, 196 S.W.2d 249 (1946). For a definition of constructive trusts, see *RESTATEMENT, RESTITUTION* § 160 (1937); for a definition of resulting trusts, see *RESTATEMENT (SECOND), TRUSTS* § 404 (1959). Constructive trusts are distinguished from resulting trusts in 4 *SCOTT, TRUSTS* § 462.1 (2d ed. 1956). This failure, however, has not led to incorrect jurisdictional decisions because the "dispute" and "effect" on title are identical in both cases. The Missouri statute on resulting trusts applies also to constructive trusts. *Mo. REV. STAT.* § 456.030 (1959), *Swon v. Huddleston*, 282 S.W.2d 18, 26 (Mo. 1955).

48. Missouri law apparently fails to specify whether the trust is executed by the Statute of Uses, thus placing full legal title in the plaintiff when a resulting trust arises. The Missouri statute on resulting trusts applies also to constructive trusts, *supra* note 47. Resulting trusts are passive, *Shelton v. Harrison*, 182 Mo. App. 404, 167 S.W. 634 (1914), and thus would, without more, be executed by the Statute of Uses, *Mo. REV. STAT.* § 456.020 (1959). However, the order of appearance of the statutes referring to trusts causes confusion whether this occurs. The order is: *Mo. REV. STAT.* § 456.010 (Statute of Frauds); § 456.020 (Statute of Uses); § 456.030 (provides that "the act" shall not apply to resulting trusts). It is unclear whether by "the act" it is meant that only the Statute of Frauds does not apply to resulting trusts, or that the Statute of Uses also does not apply. Some writers assume that the Missouri Statute of Uses does not execute resulting trusts. *GILL, MISSOURI TITLES* § 856, at 428 (3d ed. 1931); 1 *SCOTT, TRUSTS* § 73, at 610 (2d ed. 1956). In *Scholle v. Laumann*, 139 S.W.2d 1067 (Mo. App. 1940), it was held that the word "act" referred to the Statute of Frauds, but nothing was said to indicate whether it applies also to the Statute of Uses.

Missouri law also apparently fails to specify whether the judgment necessarily accomplishes the further step of passing legal title. Probably, if the Statute of Uses does not have this effect, a trial court, cognizant of this fact, would take this step to avoid perpetuating a purposeless division of equitable and legal title, although the division is arguably justifiable in some situations. See 1 *SCOTT, TRUSTS* § 73, at 611 (2d ed. 1956). The form of relief sought may also dictate the passage of legal title by the judgment. See *Baier v. Berberich*, 77 Mo. 413 (1883), holding that a constructive trust imposes upon the trustee the duty to reconvey title to the plaintiff. A decree establishing the trust and enforcing the duty to reconvey title acts itself as a reconveyance of title. *Mo. REV. STAT.* § 511.300 (1959).

49. The trust arises when operative facts creating a right to trust relief come into existence, not when the court grants relief. Professor Scott states that "the beneficial interest in the property is from the beginning in the person who has been wronged It arises when the duty to make restitution arises, not when that duty is subsequently enforced." 4 *SCOTT, TRUSTS* § 462.4, at 3110 (2d ed. 1956). See *McConnell v. Deal*, 296 Mo. 275, 246 S.W. 594 (1922) (en banc) (express trust): "A court of equity may declare, construe, and administer trusts, but it cannot create one." *Id.* at 297, 246 S.W. at 598.

The judgment stands as a muniment of the equitable title, which constitutes "title to real estate."⁵⁰

The fact that the petition on its face seeks or concerns a "trust" is not necessarily sufficient to confer supreme court jurisdiction. In *Brannock v. Magoon*⁵¹ the petition sought to impress a resulting trust on land held by defendant, asked that the "trust" be charged "as a first lien on said property, and that said property be sold to satisfy and discharge said trust."⁵² When defendant's appeal reached the supreme court, the court acknowledged that "in the ordinary action to declare a resulting trust," in which "the petition asks that by reason of a resulting trust *the title to real estate* be decreed out of one person and decreed to be in another," title to real estate is involved.⁵³ In holding that it did not have jurisdiction, the court noted that the judgment appealed only decreed a lien—the precise relief sought by plaintiff—even though ostensibly the suit was for a declaration of a "trust."⁵⁴

5.070. ACTIONS IN EJECTMENT

The jurisdictional decisions in ejectment cases illustrate the development of the requirement that title be directly involved, and not merely incidentally examined. The traditional action of simple ejectment sought only a judgment for possession; the right to possession was determined upon the strength of the title claimed by each party. If neither party sought affirmative adjudication of title, the action remained one at law and the judgment rendered could not be *res judicata* on the title issue.⁵⁵ Nevertheless, prior to 1936 it was "beyond dispute that an action at law in ejectment was a case . . . involving title to real estate,"⁵⁶ unless title was conceded,⁵⁷ because

50. *Morris v. Clare*, 132 Mo. 232, 33 S.W. 1123 (1896).

51. 216 Mo. 722, 116 S.W. 500 (1909), *trans'd* from court of appeals, *retrans'd*, 141 Mo. App. 316, 125 S.W. 535 (1910).

52. *Id.* at 726, 116 S.W. at 502.

53. *Ibid.* (Emphasis added.) *But see* *Hewitt v. Price*, 74 S.W. 884 (Mo. Ct. App. 1903), *trans'd*, in which the plaintiff appealed a decree declaring that plaintiff had bought the land at reduced value and that he pay the defendant the loss suffered. The court of appeals transferred to the supreme court, because "while the decree does not divest plaintiff of the title to the land in question, it confirms his title thereto, and charges it within his hands with a resulting trust for the benefit of defendants." *Id.* at 885-86. This decision is questionable, because the judgment would seem to be in the nature of a lien, and could have been satisfied by the payment of money.

54. *Cf.* *Mack v. Mack*, 281 S.W.2d 872 (Mo. 1955), *trans'd*, 286 S.W.2d 385 (Ct. App. 1956).

55. *E.g.*, *Sutton v. Dameron*, 100 Mo. 141, 13 S.W. 497, 499-500 (1890); *Kimmel v. Benna*, 70 Mo. 52 (1879), discussed in *SEDGWICK & WAIT, TRIAL OF TITLE TO LAND* § 511, at 325-26 (1882).

56. *Dunn v. Miller*, 96 Mo. 324, 334, 9 S.W. 640, 643 (1888), *trans'd* from 18 Mo. App. 136 (1885).

57. Even prior to 1936, title was not involved in ejectment when title was not dis-

it was "necessary for the court to determine which party had legal title to the real estate in order to determine which was entitled to possession."⁵⁸ The reasoning of the early ejectment cases was inconsistent with that which had previously lodged trespass appeals in the courts of appeals because the title examination was only "incidental and collateral."⁵⁹ The supreme court

puted, as for example, when the dispute concerned only a lease or a license. *Wood v. Gregory*, 155 S.W.2d 168 (Mo. 1941), *trans'd*, 163 S.W.2d 355 (Ct. App. 1942) (license); *Sasse v. Sparkman*, 53 S.W.2d 261 (Mo.), *trans'd from* 45 S.W.2d 1112 (Ct. App. 1932), *retrans'd*, 65 S.W.2d 1067 (Ct. App. 1933) (lease); *G. M. Mining Co. v. Hodge*, 185 Mo. App. 138, 170 S.W. 689 (1914) (license to mine for term of years).

58. *Williams v. Maxwell*, 82 S.W.2d 270, 272-73 (Mo. 1935). The view that the concepts of "title" and "possession" were not separable had considerable support in the earlier cases. For citation of this authority, see *Ballenger v. Windes*, 338 Mo. 1039, 1044, 93 S.W.2d 882, 884 (dissenting opinion), *trans'd*, 99 S.W.2d 158 (Ct. App. 1936), in which it is stated that "ejectment is a possessory action. Title to real estate is involved in ejectment only as an incident to the possession upon which the action is based. The title is presumed to be with the possession." *Id.* at 1047, 93 S.W.2d at 886. See *Tice v. Hamilton*, 188 Mo. 298, 87 S.W. 497 (1905), *trans'd from* 94 Mo. App. 198, 67 S.W. 957 (1903). The court's restrictive definition of the "effect" requirement has led to other objections by dissenting judges that cases "necessarily" involving "title" were being transferred. *E.g.*, *Weil v. Richardson*, 320 Mo. 310, 316, 7 S.W.2d 348, 351 (1928) (dissenting opinion), discussed *supra* note 18; *Snodgrass v. Coople*, 203 Mo. 480, 490, 101 S.W. 1090, 1093 (1907) (dissenting opinion), discussed *supra* note 17.

59. Section 5.020.

The acceptance by the supreme court of ejectment actions regardless of their inconclusive effect on title is undoubtedly due to the extreme importance historically accorded ejectment by the Missouri courts, rather than to technical considerations of "involvement" of title to real estate. Until 1855, a party claiming title could in no way obtain a judgment certain to conclude title. By Mo. REV. STAT. ch. 128, § 62 (1855), a party in possession of land could force anyone claiming title adverse to his own to show cause why that person should not bring an action to try the alleged title under a penalty of being forever barred from claiming any interest. However, if the suitor's opponent did show cause or did bring an action to try title, the statute then did not act to make the judgment in the opponent's forced action conclusive, so it is reasonable to assume the action forced would be an inconclusive ejectment action. See *Meriwether v. Love*, 167 Mo. 514, 519, 67 S.W. 250, 251 (1902). Not until 1897 did the general assembly decide that a party might institute an action certain to conclude the parties on the title issue, when it provided that any person claiming title may cause it to be determined against any adverse claimants. Mo. LAWS 1897, at 74 (now Mo. REV. STAT. § 527.150 (1950), repealing Mo. REV. STAT. ch. 128, § 162 (1855)). *Hudson v. Wright*, 204 Mo. 412, 103 S.W. 8 (1907); *Meriwether v. Love*, *supra*. Thus, until 1897, ejectment was the only action the purpose of which was to try title. (While title might have been decided in a trespass action, the central purpose of trespass was to recover damages.) This was true even though the *ostensible* purpose of ejectment was the recovery of possession. The theory of ejectment was unique because the central position of the title was clouded by fictional issues and also because "the issues and proof may be broader than as indicated by the pleadings, unique, also, in that . . . the plaintiff *must* go beyond the issues so tendered, in the petition." *Ballenger v. Windes*, *supra* note 58, at 1045, 93 S.W.2d at 885 (dissenting opinion). After 1897, ejectment no longer had this importance as the only action for the trial of title. But the decisions lodging appeals in the supreme court indi-

erased the inconsistency in 1936 by overruling the early cases. In *Ballenger v. Windes*,⁶⁰ the court held that examining and deciding title only for the purpose of adjudicating the right to possession, did not *involve* title. Two years later in *Gibbany v. Walker*,⁶¹ the supreme court upheld *Ballenger*, stating that a judgment in ejectment was no bar to a second action on the title issue, "which could not be true if ejectment *determined* title in the modern sense."⁶² Of course, if an equitable plea or defense seeking conclusive determination of title is raised, the action becomes a suit in equity and the claim for affirmative title relief may be a basis for supreme court jurisdiction.⁶³

cate a lingering influence of the historical import of ejectment actions. It would seem that even as early as 1895, the general assembly recognized that the judgment in ejectment did not fulfill the "direct effect" criterion, but that the importance of the action, notwithstanding this defect, justified lodging ejectment appeals in the supreme court. In 1895 the general assembly proposed a constitutional amendment, later rejected, which contained the provision: "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." Mo. Laws 1895, at 287. (Emphasis added.) See "Introduction," notes 35, 37 and accompanying text.

60. 338 Mo. 1039, 93 S.W.2d 882, *trans'd*, 99 S.W.2d 158 (Ct. App. 1936). Defendant appealed judgment for plaintiffs granting possession and damages. Although the facts pleaded might have authorized title relief had it been sought, the court held that the decisive jurisdictional criterion was the relief the parties *did* seek and which in fact was granted. See also *supra* notes 9-12 and accompanying text.

61. 342 Mo. 156, 113 S.W.2d 792, *trans'd*, 233 Mo. App. 489, 121 S.W.2d 317 (1938).

62. *Id.* at 160, 113 S.W.2d at 794. (Emphasis added.) The court noted that even though in Missouri title to real estate had been held to be involved in ejectment actions, the judgment in such actions had never been conclusive on title, that ejectment was a "purely possessory" action, and that to the extent a judgment in ejectment purported to vest title in either party it was *coram non iudice* and void. *Id.* at 160, 113 S.W.2d at 794. Of course, a judgment which erroneously grants title relief when not sought by the parties will nevertheless provide supreme court jurisdiction. This is because a decision that the trial judgment was in error cannot be made until the appellate court has determined its jurisdiction. *State ex rel. Brown v. Hughes*, 345 Mo. 958, 137 S.W.2d 544 (1940); *Domyan v. Dornin*, 348 S.W.2d 360 (Mo. Ct. App. 1961), *trans'd*, 356 S.W.2d 70 (Mo. 1962); see § 5.012, notes 13-14. Because a judgment in ejectment does not adjudicate the title of the parties, ejectment actions may be brought on the same facts *ad infinitum*. *Auldridge v. Spraggin*, 349 Mo. 858, 163 S.W.2d 1042 (1942).

63. *E.g.*, *Auldridge v. Spraggin*, *supra* note 62:

In order to prevent the harassment of successive actions in ejectment, a bill of peace to quiet title was resorted to. . . . An exception was recognized when the ejectment action was converted into an equitable action and an issue as to title was injected and affirmative relief prayed for. Under such cases an adjudication became binding.

Accord, *Davidson v. Eubanks*, 354 Mo. 301, 189 S.W.2d 295, *trans'd from* 185 S.W.2d 73 (Ct. App. 1945); *Murphy v. Milby*, 344 Mo. 1080, 130 S.W.2d 518 (1939); *Gibbany v. Walker*, 342 Mo. 156, 113 S.W.2d 792 (1938), discussed in text accompanying note 61 *supra*; *Welsh v. Brown*, 339 Mo. 235, 96 S.W.2d 345 (1936) (defendant sought title determination).

The recent cases, following *Ballenger* and *Gibbany*, have denied supreme court jurisdiction over simple ejectment actions.⁶⁴ Since 1949, however, the premise that judgment in simple ejectment is inconclusive has been theoretically undermined. In that year the supreme court decided *Cantrell v. City of Caruthersville*, in which, during the course of a non-jurisdictional discussion of civil procedure, the court reasoned that in ejectment “the judgment rendered should . . . be binding [as to all claims of title and possession] upon the parties and their privies.”⁶⁵ In this case plaintiff was appealing a judgment dismissing his suit to quiet title. The supreme court stated that the dismissal had been correct because the plaintiff’s action concerned the same “subject matter” as a pending suit of simple ejectment which had been previously filed by the city (the defendant in the instant action) against the plaintiff. The supreme court’s conclusion was derived from its examination of the 1943 Code of Civil Procedure, which required defendants to plead in actions filed against them all matters constituting affirmative defenses⁶⁶ or counterclaims⁶⁷ arising out of the same transactions that gave rise to the claims against them. (The penalty for failure was a bar to raising them in subsequent litigation.) The court reasoned that *title* is the “subject matter” in actions of simple ejectment as well as in suits to quiet title and that the instant action therefore, fell within the intent of the general assembly to avoid relitigation of issues.⁶⁸

64. *E.g.*, *Luttrell v. Highway Comm’n*, 367 S.W.2d 615 (Mo. 1963), *trans’d*, 379 S.W.2d 137 (Ct. App. 1964); *Corbin v. Galloway*, 382 S.W.2d 827 (Mo. Ct. App. 1964); *Moore v. Rone*, 355 S.W.2d 398 (Mo. Ct. App. 1962).

65. 359 Mo. 282, 295, 221 S.W.2d 471, 479 (1949).

66. Mo. CODE CIV. P. § 40 (1943) (now Mo. REV. STAT. § 509.090 (1959)).

67. Mo. CODE CIV. P. § 73 (1943) (now Mo. REV. STAT. § 509.420 (1959)).

68. The court failed to articulate clearly why the two statutes required that the judgment in ejectment be conclusive upon the title issue raised. The following reasons for this conclusiveness may be inferred from the opinion: (1) The *intention* of the legislature, as reflected by these two statutes, was to avoid relitigation of issues, and this intention, applied to ejectment actions, requires a judgment conclusive on the title issues raised. This application is only impliedly rather than expressly condoned by the terms of the statutes. (2) If the defendant fails to assert all affirmative title counterclaims and defenses, he will be *deemed* to have raised them, and they will be deemed to have been conclusively adjudicated. If the second possibility was intended by the court, it would seem that since the statutes discussed pertain only to defendants, the conclusiveness which the court derives should apply not to the action of ejectment itself, but only to the defendants in such actions. That is, neither of the statutes precludes the *plaintiff* in ejectment from relitigating the title issues in future actions.

The reasoning of *Cantrell*, if extended somewhat and accepted as valid authority, could have a sweeping effect not only in ejectment actions, but on the general law of appellate jurisdiction based upon title to real estate. If “subject matter” was interpreted to mean the “primary issue” or the “basis of the cause of action” (as in *Cantrell*, *e.g.*, title was the basis of the non-title action for possession), the reasoning of *Cantrell* would require that judgments be *res judicata* in all actions in which the pivotal issue of fact is the title

Expressing doubts that its view of the matter would accord with the current sentiments of the Missouri Bar, the *Cantrell* opinion ascribed to its reasoning a "prospective" effect only, and "in justice to appellants" reversed the judgment. The "prospective" reasoning has never been adverted to by the court for the purpose of questioning the jurisdictional premise of *Ballenger* and *Gibbany*, but it is a potential threat to that premise.

5.080. ACTIONS TO IMPRESS OR SET ASIDE LIENS ON REAL ESTATE

Title to real estate is not *involved* and the supreme court has no jurisdiction in an action to establish a lien on real estate, whether a lien for a personal debt,⁶⁹ mechanic's lien,⁷⁰ tax bill,⁷¹ vendee's lien,⁷² judgment lien⁷³ or

of the litigants upon which non-title relief is sought. At the present time these actions for non-title relief fail to merit supreme court jurisdiction because the judgments do not "affect" the title. The *res judicata* effect of *Cantrell* would cure that jurisdictional defect.

The potential effect of the *Cantrell* reasoning is particularly great in actions for trespass and injunctions in which the primary factual issue at trial may be the title of the parties, but in which the supreme court denies jurisdiction because the title is not conclusively affected. §§ 5.150 and 5.020, notes 17 & 19. Similar compulsory counterclaim statutes have been applied in federal decisions in cases of injunction against trespass, *Carter Oil Co. v. Wood*, 30 F. Supp. 875 (E.D. Ill. 1940), and in trespass, *Arizona Lead Mines, Inc. v. Sullivan Mining Co.*, 3 F.R.D. 135 (N.D. Idaho 1943). See Blackmar, *Some Problems Regarding Compulsory Counterclaims Under the Federal Rules and the Missouri Code*, 19 U. KAN. CTRY L. REV. 38, 49 (1951). It has been argued that the *Cantrell* rationale and "the 1943 Missouri Code of Civil Procedure should make a judgment in trespass conclusive under the same sections that make a judgment in ejectment conclusive." Eckhardt, *Work of the Missouri Supreme Court for 1949—Property*, 15 Mo. L. REV. 376, 382 (1950). (Emphasis added.) (This same author questions whether supreme court jurisdiction will still be denied in ejectment under the *Cantrell* decision. *Id.* at 383.)

69. *Schell v. Schell*, 381 S.W.2d 864 (Mo. 1964), *trans'd from* 370 S.W.2d 816 (Ct. App. 1963), *retrans'd*; *Jine v. Jine*, 217 S.W. 93 (Mo. 1919), *trans'd*, 226 S.W. 51 (Ct. App. 1920); *Chapman v. Chapman*, 194 Mo. App. 483, 185 S.W. 221 (1916), *rev'd on other grounds*, 269 Mo. 663, 192 S.W. 448 (1917).

70. *Rust Sash & Door Co. v. Gates City Bldg. Corp.*, 342 Mo. 206, 114 S.W.2d 1023 (1937), *trans'd*, 124 S.W.2d 544 (Ct. App. 1939); *Hydraulic Press Brick Co. v. Lane*, 205 S.W. 801 (Mo. 1918), *trans'd sub nom.* *Hydraulic Press Brick Co. v. Bambrick Bros. Constr. Co.*, 211 S.W. 93 (Ct. App. 1919); *P. M. Bruner Granitoid Co. v. Klein*, 170 Mo. 225, 70 S.W. 687 (1902), *trans'd*, 100 Mo. App. 289, 73 S.W. 313 (1903).

71. *St. Ferdinand Sewer Dist. v. Turner*, 356 Mo. 804, 203 S.W.2d 731 (1947), *trans'd*, 208 S.W.2d 85 (Ct. App. 1948) (action to recover delinquent taxes, plaintiff sought lien); *Pearson Drainage Dist. v. Ehrhardt*, 196 S.W.2d 855 (Mo. 1946), *trans'd*, 239 Mo. App. 845, 201 S.W.2d 484 (1947) (action to recover drainage taxes); *Stumpe v. City of Washington*, 328 Mo. 1081, 43 S.W.2d 414 (1931) (en banc), *trans'd*, 54 S.W.2d 731 (Ct. App. 1932); *City of St. Louis v. Dietering*, 19 S.W.2d 882 (Mo. 1929), *trans'd*, 27 S.W.2d 711 (1930); *City of Laclede v. Libby*, 278 S.W. 372 (Mo. 1925), *trans'd*, 221 Mo. App. 703, 285 S.W. 178 (1926); *Barber Asphalt Paving Co. v. Hezel*, 138 Mo. 228, 39 S.W. 781 (1897), *trans'd*, 76 Mo. App. 135 (1898); *Bobb v. Wolf*, 105

deed of trust (or mortgage).⁷⁴ The courts of appeals also have jurisdiction of appeals from actions to set aside liens other than deeds of trust (or mortgages),⁷⁵ to establish priority of liens,⁷⁶ or seeking decrees of subrogation to the rights of mortgagees.⁷⁷ The supreme court's view that it has no jurisdiction of "lien" cases is based upon two conclusions: (1) a lien is not *title* to the fee, nor is it *real estate*, and (2) the judgment itself will not affect title, even though enforcement of the lien in *subsequent* proceedings might divest title.

A lien is only a charge on the land—a security interest not constituting an interest in real estate.⁷⁸ A lien may be a cloud on title but does not deprive the principal owner of the land or of any segment of fee simple title.⁷⁹

The enforcement of the lien by execution and sale will divest the title from the present holder. A possible future divestiture, however, will not

Mo. 52, 16 S.W. 835 (1891), *trans'd*, 54 Mo. App. 515 (1893) (seeking apportionment of tax assessments among life tenants and remaindermen); *Skrainka v. Allen*, 2 Mo. App. 387 (1876).

72. *McHolland v. Treadway*, 328 Mo. 721, 41 S.W.2d 375 (1931), *trans'd*, 226 Mo. App. 212, 45 S.W.2d 903 (1932).

73. *Miller v. Heisler*, 180 S.W.2d 54 (Mo. 1944), *trans'd*, 187 S.W.2d 485 (Ct. App. 1945); *King v. Hayes*, 319 Mo. 569, 4 S.W.2d 1062 (1928), discussed *infra* note 76.

74. *E.g.*, *Corbett v. Brown*, 263 S.W. 233 (Mo. 1924), discussed *infra* note 124; § 5.102(b). The term "mortgage" includes deed of trust, vendor's lien, and chattel mortgage." Mo. REV. STAT. § 472.010(23) (1959).

75. *City of Marshfield ex rel. Hasten v. Brown*, 337 Mo. 1136, 88 S.W.2d 339 (1936), *trans'd from* 79 S.W.2d 519 (Ct. App. 1935), *retrans'd*, 99 S.W.2d 485 (1936) (cross-bill sought to cancel tax bill); *Gratz v. City of Kirkwood*, 165 Mo. App. 196, 145 S.W. 870 (1912). Even though the supreme court does not have jurisdiction of appeals from suits to *establish* mortgages, it does have jurisdiction of appeals involving suits to *cancel*. For a full discussion and critique of this distinction, see §§ 5.102(a), (b) and 5.103.

76. *Truesdale v. Brennan*, 72 Mo. App. 547 (1897), transferred to the supreme court a suit to establish a prior lien which was accepted without discussion, 153 Mo. 600, 55 S.W. 147 (1900). This decision was overruled in *King v. Hayes*, 319 Mo. 569, 4 S.W.2d 1062, *trans'd*, 223 Mo. App. 138, 9 S.W.2d 538 (1928), which held that a suit to establish priority was equivalent to a suit to establish a lien, and did not involve title to real estate.

77. *Lemmon v. Lincoln*, 130 Mo. 335, 32 S.W. 662 (1895), *trans'd*, 68 Mo. App. 76 (1896). Plaintiff appealed a judgment denying his petition to have reinstated in his favor certain liens alleged to have been discharged by plaintiff's funds. Jurisdiction was not in the supreme court because the judgment would only have established liens on the land.

78. *Miller v. Heisler*, 180 S.W.2d 54 (Mo. 1944), *trans'd*, 187 S.W.2d 485 (Ct. App. 1945); *State ex rel. Reed v. Elliot*, 180 Mo. 658, 79 S.W. 696 (1904); *Chapman v. Chapman*, 194 Mo. App. 483, 185 S.W. 221 (1916), *rev'd on other grounds*, 269 Mo. 663, 192 S.W. 448 (1917).

79. *City of Marshfield ex rel. Hasten v. Brown*, 337 Mo. 1136, 88 S.W.2d 339 (1936), discussed *supra* note 75; see *Smith v. City of Westport*, 174 Mo. 394, 74 S.W. 610 (1903), *trans'd*, 105 Mo. App. 221, 79 S.W. 725 (1904); *Barber Asphalt Paving Co. v. Hezel*, 138 Mo. 228, 39 S.W. 781 (1897), *trans'd*, 76 Mo. App. 135 (1898) ("cloud" on title does not constitute a segment of title).

involve title because the *judgment* does not directly affect title, but only grants or denies the lien sought.⁸⁰ Also, many cases have noted that title to real estate is not *disputed*, and hence not *involved*, because the party seeking the lien must concede title in the other party if the lien is to attach.⁸¹

5.090. ACTIONS RELATING TO FORECLOSURE, EXECUTION AND SALE

The problems considered in actions relating to foreclosure, execution and sale focus primarily upon the meaning of the *involvement* requirement. The real estate interest under consideration is generally the fee simple, the title to which is likely to be divested as a result of the proceedings.⁸² Whether there is an *involvement* of title to real estate is determined by considering the mechanics of foreclosure actions and sales and the position of the title at each step.

80. The divestiture is contingent because the lien may be discharged by the payment of money. *Hydraulic Press Brick Co. v. Lane*, 205 S.W. 801 (Mo. 1918), discussed *supra* note 70; *Lemmon v. Lincoln*, 130 Mo. 335, 32 S.W. 662 (1895), discussed *supra* note 77. If the judgment is not satisfied, a subsequent foreclosure, judicial or execution sale will be necessary for divestiture of title, which is accomplished by delivery of the deed resulting from the sale. *State ex rel. Reed v. Elliot*, 180 Mo. 658, 79 S.W. 696 (1904), *trans'd*, 114 Mo. App. 562, 90 S.W. 122 (1905); 1 PATTON, *TITLES* § 481 (2d ed. 1957).

81. *Stumpe v. City of Washington*, 328 Mo. 1081, 43 S.W.2d 414 (1931), *trans'd*, 54 S.W.2d 731 (Ct. App. 1932); *Jones v. Hogan*, 211 Mo. 45, 109 S.W. 641 (1908), *trans'd*, 135 Mo. App. 347, 116 S.W. 21 (1909); *Stark v. Martin*, 204 Mo. 433, 102 S.W. 1089, *trans'd*, 126 Mo. App. 575, 105 S.W. 33 (1907); *Balz v. Nelson*, 171 Mo. 682 (1903), *trans'd from* 86 Mo. App. 374 (1900). This reasoning presupposes that a lien is not a segment of title to real estate, because the lien interest is *disputed*. See notes 78-79 *supra*.

82. It is important that the concepts of title and real estate be distinguished from involvement in these cases, even though the main focus is upon the last. *Snodgrass v. Cople*, 203 Mo. 480, 101 S.W. 1090 (1907), *trans'd*, 131 Mo. App. 346, 111 S.W. 845 (1908), was an appeal from an order sustaining a motion to quash an execution on the ground that the property came within the homestead exemption. The court first held that the owner's title *to the land* would not be affected by the judgment. It then noted, however, that the decision would determine defendant's right to a homestead and raised the question whether this right constituted real estate as a question distinct from that of involvement. The court answered in the negative. Judge Graves, in dissent, asserted that a homestead right, while a mere exemption, is an interest in real estate, and that title to that interest, as distinguished from title to the fee, was involved.

The title requirement should also be individually examined. Even when the title to the fee is conceded in the defendant in an action to foreclose a deed of trust, if the owner of the land attacks the validity of the deed of trust and seeks to set it aside, title to real estate is involved, because the deed of trust is termed a "muniment" of title, and to cancel it would determine that aspect of title. *City of Marshfield ex rel. Hasten v. Brown*, 337 Mo. 1136, 88 S.W.2d 339 (1936), discussed *supra* note 75; *accord*, *Little v. Reid*, 141 Mo. 242, 42 S.W. 674 (1897), *trans'd*, 75 Mo. App. 266 (1898), which noted that in that foreclosure action the defendant did not dispute the validity of the deed of trust, implying that title would have been involved had there been such a dispute. See § 5.100 for discussion of muniments of title.

5.091. *Proceeding of Foreclosure and Execution*

Title to real estate is not *involved* in suits to foreclose upon a mortgage (deed of trust)⁸³ or to execute a lien⁸⁴ since title to the fee simple is not *disputed*, but is conceded at the time suit is filed to be in the defendant.⁸⁵ Furthermore, title is not *affected* by the judgment; only the later enforcement by foreclosure or execution sale will divest title.

[T]itle to real estate is involved only in cases where the judgment directly affects the title, and [the constitution of Missouri] does not confer jurisdiction [on the supreme court] simply because real estate is attempted to be sold under a judgment which does not directly affect the title. In other words, *it is the judgment which must affect the title, and not the enforcement of the judgment by a sale under execution* to satisfy a claim against one who concededly has the title⁸⁶

5.092. *Actions to Enjoin Foreclosure and Sale*

Since title will not be divested until the sale and delivery of the deed, judgment in an action to enjoin a foreclosure or execution upon land will

83. *Rust v. Geneva Inv. Co.*, 124 S.W.2d 1135 (Mo. 1939), *trans'd*, 235 Mo. App. 505, 136 S.W.2d 355 (1940); *Nettleton Bank v. Estate of McGauhey*, 318 Mo. 948, 2 S.W.2d 771, *trans'd*, 222 Mo. App. 1084, 11 S.W.2d 1093 (1928) (en banc) (dictum); *DuBowsky v. Binggelli*, 258 Mo. 197, 167 S.W. 999, *trans'd*, 184 Mo. App. 361, 171 S.W. 12 (1914); *Finch v. Edwards*, 239 Mo. App. 788, 198 S.W.2d 665 (1947). The procedure for filing a petition to foreclose a mortgage is recited in Mo. REV. STAT. § 443.190 (1959) which provides that the mortgagee set forth the substance of the mortgage and pray that judgment be rendered for the debt secured by the mortgage, that the equity of redemption be foreclosed and that the mortgaged property be sold. In addition to foreclosures by suit, a mortgage may be foreclosed by a trustee's sale (Mo. REV. STAT. § 443.410 (1959)) or, in the case of a mortgage with a power of sale, by the mortgagee himself (Mo. REV. STAT. § 443.290 (1959)); Note, 1950 WASH. U.L.Q. 423).

84. *Nettleton Bank v. Estate of McGauhey*, *supra* note 83; *P. M. Bruner Granitoid v. Klein*, 170 Mo. 225, 70 S.W. 687 (1902), *trans'd*, 100 Mo. App. 289, 73 S.W. 313 (1903) (mechanic's lien); see *Snodgrass v. Copple*, 203 Mo. 480, 101 S.W. 1090 (1907), discussed *supra* note 82; *Lawson v. Hammond*, 191 Mo. 522, 90 S.W. 431 (1905), *trans'd from* 102 Mo. App. 44, 81 S.W. 656 (1903), *retrans'd*, 119 Mo. App. 480, 94 S.W. 313 (1906) (suit to quash execution). An execution may be issued by the clerk on "any judgment, order or decree" within ten years after its rendition. Mo. REV. STAT. §§ 513.015, .020 (1959). After issuance of the execution, the property of the defendant is subject to levy, *i.e.*, "seizure . . . by the officer charged with the execution of the writ" (Mo. REV. STAT. § 513.010 (1959)), and sale (Mo. REV. STAT. §§ 513.085, .100 (1959)).

85. *Stark v. Martin*, 204 Mo. 433, 102 S.W. 1089, *trans'd*, 126 Mo. App. 575, 105 S.W. 33 (1907); *Finch v. Edwards*, 239 Mo. App. 788, 198 S.W.2d 665, 672 (1947).

86. *Lawson v. Hammond*, 191 Mo. 522, 90 S.W. 431, 433-34 (1905), *trans'd from* 102 Mo. App. 44, 81 S.W. 656 (1903), *retrans'd*, 119 Mo. App. 480, 94 S.W. 313 (1906) (Emphasis added.); *accord*, *Snodgrass v. Copple*, 203 Mo. 480, 101 S.W. 1090 (1907), discussed *supra* note 82.

In foreclosure actions, the parties do not seek title "determination," which means a final, binding effect upon the title issue. *Harrel v. Surface*, 349 Mo. 370, 160 S.W.2d 756, *trans'd*, 237 Mo. App. 155, 165 S.W.2d 322 (1942); see § 5.070.

not directly affect title;⁸⁷ the decree granting the injunction would be *in personam* only and would not run with the land.⁸⁸ Similarly, in suits to enjoin a threatened sale of realty, title to real estate is not involved; title remains in the debtor, at least for the time being, whether the decree is granted or denied.⁸⁹

5.093. *Proceedings to Set Aside Sales*

In Missouri, title is passed not by the sale of land but only by delivery of the deed, which may or may not occur concomitantly.⁹⁰ Therefore, if the

87. *Blodgett v. Perry*, 97 Mo. 263, 10 S.W. 891 (1888); *Leach v. Koenig*, 55 Mo. 451 (1874); *Patten v. Springfield Fire & Marine Ins. Co.*, 223 Mo. App. 1070, 25 S.W.2d 1075 (1930).

88. *State ex rel. South Mo. Pine Lumber Co. v. Dearing*, 180 Mo. 53, 79 S.W. 454 (1904).

89. *Oehler v. Philpott*, 253 S.W.2d 179 (Mo. 1952), *trans'd*, 225 S.W.2d 90 (Ct. App. 1953) (sale under power of sale in deed of trust); *Farrell v. Seelig*, 19 S.W.2d 648 (Mo. 1929) (trustee's sale); *Weil v. Richardson*, 320 Mo. 310, 7 S.W.2d 348 (1928), discussed *supra* note 18; *State ex rel. Haussler v. Court of Appeals*, 67 Mo. 199 (1877); *Maender v. Breck*, 159 S.W.2d 310 (Mo. Ct. App. 1942) (sheriff's sale under execution); *Madden v. Fitzsimmons*, 235 Mo. App. 1074, 150 S.W.2d 761 (1941) (sheriff's sale under execution); *Swan v. Thompson*, 36 Mo. App. 155 (1889) (sale by public administrator pursuant to order of probate court). If additional affirmative title relief is sought, an appeal from a judgment denying it will involve title to real estate. *Gardner v. Terry*, 99 Mo. 523, 12 S.W. 888 (1890).

In *Weil v. Richardson*, *supra*, the plaintiffs sought to enjoin execution (on land) upon a judgment for services rendered a corporation, claiming in the alternative that (1) they held title by deed from the corporation (judgment debtor) and (2) the judgment for services rendered was void because the corporate charter had been forfeited (contentions which the dissenting opinion noted were inconsistent). The defendant creditor sought to cancel the deed to the plaintiffs as fraudulent upon creditors. The trial court made no finding on the validity of the conveyance, holding the original judgment void because of the invalidity of the corporate charter, and enjoined the sale. On appeal the majority opinion failed to make clear whether the defendant preserved his claim to cancel the deed in addition to appealing the injunction based upon the invalidity of the charter, but the dissent indicates that this affirmative title relief claim had been preserved. The majority opinion did not advert to the fact that such relief sought by defendant would involve title, and retransferred the cause to the court of appeals, viewing it as "at most nothing more than an action to prevent the lien of the judgment being enforced against the real estate in question." *Id.* at 315, 7 S.W.2d at 351. See § 5.012. For a criticism of *Weil* see Comment, *Courts—Appellate Jurisdiction in Missouri in Cases Involving Title to Real Estate*, 41 U. MO. BULL. L. SER. 30, 39 (1930). For an extended discussion of claims for injunctive relief, see § 5.150.

90. *Blodgett v. Perry*, 97 Mo. 263, 10 S.W. 891 (1888); *Leach v. Koenig*, 55 Mo. 451 (1874); *Patten v. Springfield Fire & Marine Ins. Co.*, 223 Mo. App. 1070, 25 S.W.2d 1075 (1930).

While Missouri courts have not so held, it is possible that the sale would pass to the purchaser an "equitable title," including the right to have the legal title conveyed to him upon performance of any unfulfilled conditions of the sale. 2 PARRON, *TITLES* § 481 (1957). If this "equitable title" were construed as title for jurisdictional purposes, the judgment setting aside a sale would divest this.

deed had not been delivered, a suit to set aside a sale would not have the effect of reconveying title. However, the location of title and the possible effect of judgment upon title in a proceeding to set aside the sale are not clearly analyzed by the courts.

By the present rule, as expressed in *State ex rel. Reed v. Elliott*,⁹¹ the supreme court has no jurisdiction of appeals from orders of the circuit court sustaining or overruling motions to set aside sales.⁹² Rather than discussing whether title has passed previous to the motion, the courts appear to test jurisdiction according to whether the judgment sought upon institution of the *original* action, out of which the instant proceeding emerged, could have directly affected title. In *Elliott* the court reasoned that title was not involved because the original action in circuit court was only *in personam* to recover a debt. Although only a lien was imposed by the original judgment in favor of the creditor, a new element may have been injected into the proceeding by the motion to set aside the post-judgment sale. If a deed had been delivered and title had passed previous to the filing of the motion, it appears that a matter of title would have been injected into the proceedings. The court, however, apparently disregarded this possibility.

In cases in which the original proceedings were in a court inferior to the circuit court—to order a sale in probate court or to impress and foreclose a lien in a magistrate (justice of the peace) court—primary significance is

91. 180 Mo. 658, 79 S.W. 696 (1904), *trans'd*, 114 Mo. App. 562, 90 S.W. 122 (1905).

92. *State ex rel. Ross v. Martin*, 338 Mo. 1067, 93 S.W.2d 911, *trans'd*, 99 S.W.2d 875 (Ct. App. 1936) (appeal from order of circuit court setting aside sale under special execution); *Bank of Forest City v. Pettijohn*, 338 Mo. 506, 92 S.W.2d 189, *trans'd*, 231 Mo. App. 139, 99 S.W.2d 154 (1936) (appeal from circuit court decree disapproving administrator's private sale of realty to pay debts).

The early cases caused considerable difficulty. In *McAnaw v. Matthis*, 129 Mo. 142, 31 S.W. 344 (1895), *trans'd from* court of appeals, the trial court set aside the sale. Plaintiff's appeal to the Kansas City Court of Appeals was transferred to the supreme court, Division One, which accepted jurisdiction summarily. In *Stinson v. Call*, 163 Mo. 323, 63 S.W. 729 (1901), Division Two followed *McAnaw* just as summarily, upon plaintiff's appeal from an order sustaining the defendant's motion to set aside a sale of defendant's land on execution. Then the supreme court, Division One, in *State ex rel. Reed v. Elliott*, discussed text accompanying note 91 *supra*, overruled *McAnaw*. On appeal from an order to set aside a sheriff's sale of real estate for delinquent taxes, the court reviewed the reasoning in actions to establish liens and suits to set aside foreclosures and writs of execution, concluding that "*McAnaw v. Matthis* was not even a suit to fasten a lien on real estate. It was a plain action, *in personam*, to recover a debt, and did not involve title to real estate . . ." *Id.* at 660, 79 S.W. at 697. In *Lawson v. Hammond*, 191 Mo. 522, 90 S.W. 431 (1905), *trans'd from* 102 Mo. App. 44, 81 S.W. 656 (1903), *retrans'd*, 119 Mo. App. 480, 94 S.W. 313 (1906), the court expressly overruled *Stinson v. Call*, *supra*.

attached to the fact that the inferior court lacked jurisdiction to try title.⁹³ Even though it is possible that in the appeal from the minor court to the circuit court a title issue is introduced, these cases have not described the *effect* of the instant judgment upon, and the parties' *dispute* of, title. Thus the jurisdictional reasoning is incomplete, as is suggested by the court of appeals in *Bank of Forest City v. Pettijohn*:

The defendant argues that . . . the circuit court had no jurisdiction save "over matters fought out and litigated in the probate court." The circuit court proceeded as though it had original jurisdiction . . . and was not influenced by the finding and order of the probate court. This was the proper procedure.⁹⁴

Thus the jurisdiction of the probate or magistrate court does not control that of the circuit and appellate courts, and should not be the controlling criterion of *involvement* of title in appeals from motions to set aside sales in circuit courts.

A possible explanation of the courts' reasoning is a belief that the dispute

93. In *State ex rel. Reed v. Elliott*, 180 Mo. 658, 79 S.W. 696 (1904), *trans'd*, 114 Mo. App. 562, 90 S.W. 122 (1905), the judgment and execution occurred at the circuit court level, which did have title jurisdiction. But in its overruling of *McAnaw v. Matthis*, *supra* note 92, the court gave operative significance to the fact that in *McAnaw* an execution levied upon a personal judgment in a justice of the peace court for a debt had been appealed to the circuit court and there dismissed. Since no deed had been executed in *Elliott*, and thus the judgment setting aside the sale could not possibly do anything but leave the title in the debtor, the jurisdictional result seems correct. It is suggested, however, that the result should have been based expressly on this lack of effect on title, rather than on a discussion of the jurisdiction of inferior tribunals.

In *Bank of Forest City v. Pettijohn*, 338 Mo. 506, 92 S.W.2d 189, *trans'd*, 231 Mo. App. 139, 99 S.W.2d 154 (1936), the appeal was from an order of the circuit court, on a creditor's appeal from the probate court, setting aside an administrator's sale which had been approved by the probate court, at which sale a deed had been delivered to the purchaser. The purchaser appealed to the supreme court. Since the purchaser was a party to the instant action, it is possible that the respondent creditor sought to destroy his record title. The court did not account for this possibility. The court noted "this case originated in the probate court of Holt county," and then denied jurisdiction, apparently on the ground that since the probate court order and approval of the sale could not have affected title, this second appeal therefrom also could not affect title. It is suggested that the court's reasoning is incomplete, because of failure to consider whether a title issue was injected into the case at the circuit court level. The court also said that since the probate court action did not dispute the title, this subsequent proceeding did not. This reasoning is also incomplete: it does not account for the position of title at the time of the action to set aside the sale.

94. 231 Mo. App. 139, 142-43, 99 S.W.2d 154, 157, *trans'd from* 338 Mo. 506, 92 S.W.2d 189 (1936). The supreme court had transferred to the court of appeals using the reasoning that appellate and circuit court jurisdiction was circumscribed by that of the probate court.

It is reasonable to assume, of course, that if a deed had passed and was attacked, the courts would advert to those facts, so the jurisdictional decisions are probably correct.

on appeal from an action to set aside a sale concerns not the title but only the validity of the sale. As was circuitously stated in *Williams v. Luecke*:

Conceding that title to real estate would have been incidentally affected if the court had sustained the motion [to set aside a sale], such question was nevertheless not directly involved in the case as it is required to be in order to invest appellate jurisdiction in the Supreme Court. . . . The issue involved on the merits of the motion was the validity of the sale, and not the title acquired by plaintiff [the purchaser at the sale], about which there was no controversy if the sale itself was valid. . . .⁹⁵

Since a deed had been executed to the plaintiff purchaser, and the motion by the defendant to set aside the sale was directed against the purchaser, it would appear from the very reasoning of the court that an attack on the sale concomitantly assailed the validity of the title; this point was not clarified by the court.

5.094. *Actions Seeking Redemption*

If the grantor of a deed of trust gives written notice and a surety bond at the sale or within specified periods thereafter, he has the right to satisfy the obligation secured by the deed of trust at any time within a period of one year after the sale.⁹⁶ Although earlier cases reached a contrary result,⁹⁷ it is now settled that a judgment of redemption will not affect title because it merely declares the redemption and prevents a *future* divestment by delivery of the deed to the purchaser.⁹⁸ However, in any action for redemp-

95. 152 S.W.2d 991, 993 (Mo. Ct. App. 1941).

96. MO. REV. STAT. §§ 443.410-440 (1959). For a discussion of the rights acquired by redemption, see 2 PATTON, TITLES § 483 (1957).

97. *Keith v. Browning*, 139 Mo. 190, 40 S.W. 764 (1897); *Sturgeon v. Mudd*, 190 Mo. 200, 88 S.W. 630 (1905), were suits to redeem real estate sold under power of sale in a mortgage which were decided by the supreme court without discussion of jurisdiction. Two later cases seeking redemption were summarily accepted. *Casebolt v. Courtney*, 177 Mo. App. 414, 162 S.W. 1045 (1914), *trans'd*, 195 S.W. 746 (Mo. 1917) (court of appeals stated that judgment could divest title and supreme court accepted jurisdiction without comment); *House v. Clarke*, 171 Mo. App. 242, 156 S.W. 495 (1913), *trans'd*, 187 S.W. 57 (Mo. 1916) (court of appeals followed *Casebolt* without discussion).

98. *Casner v. Schwartz*, 276 S.W. 58 (Mo. 1925), *trans'd*, 286 S.W. 401 (Ct. App. 1926), is a transitional decision. Comment, 41 U. MO. BULL. L. SER. 30, 36 (1930). The court held that a redemption is effected by the payment of money within a specified time, not by the judgment of the court. *White v. Huffman*, 301 S.W.2d 824 (Mo. 1957), clearly held that a judgment of redemption does not affect title but only determines plaintiff's right to redeem. The court in the *White* case distinguished the *Casebolt* and *House* cases, *supra* note 97, as suits to redeem "by setting aside the foreclosure sale." 301 S.W. at 826. By this it is implied that title was considered "involved" if cancellation of the sale was sought. However, in view of the decisions holding that suits to cancel sales do not "involve title to real estate" (§ 5.093), the *Casebolt* and *House* cases are no longer valid authority.

tion in which cancellation of a sheriff's deed or a trustee's deed is sought, title to real estate would be involved.⁹⁹

5.100. ACTIONS CONCERNING MUNIMENTS OF TITLE

The failure of the courts to analyze the concepts of *title*, *real estate*, and *involvement* has led to inconsistencies in the cases concerning muniments of title.

5.101. *The Muniment as Title to Real Estate*

A muniment is an instrument evidencing the title or ownership of real estate.¹⁰⁰ If the validity of a muniment is attacked, the *title to real estate* purportedly evidenced thereby is necessarily disputed.¹⁰¹ Hence the supreme court has been held to have jurisdiction when a party assails a warranty deed,¹⁰² a quitclaim deed,¹⁰³ a sheriff's deed,¹⁰⁴ a trustee's deed,¹⁰⁵ or a decree purporting to vest title in one of the parties.¹⁰⁶

99. See § 5.091, notes 84-85. A case of this nature was *Leone v. Bear*, 362 Mo. 464, 241 S.W.2d 1008 (1951) (to cancel trustee's deed), but the court made no express jurisdictional finding. The supreme court's acceptance of the case leads to the conclusion that when a deed has passed, title is involved in a redemption action seeking to set aside the record title of the purchaser.

100. BLACK, LAW DICTIONARY 1170 (4th ed. 1951).

101. *Hanna v. South St. Joseph Land Co.*, 126 Mo. 1, 10, 28 S.W. 652, 654 (1894) (action to set aside deed of trust): "From these rulings it would seem to follow that, where a muniment of title to real estate is directly assailed and sought to be canceled, this court has jurisdiction . . ." *Accord*, *Pelz v. Bollenger*, 87 Mo. App. 540 (1901), *trans'd*, 180 Mo. 252, 79 S.W. 146 (1904). This was an action to vacate a judgment purporting to vest title in the defendant, alleging it was procured by fraud. The court stated: "The decree sought to be vacated for fraud in its concoction is a muniment of title. Necessarily, therefore, a determination of the issues herein joined directly involves the title to real estate." *Id.* at 541.

102. *E.g.*, *Jones v. Davis*, 306 S.W.2d 479 (Mo.), *trans'd from* 301 S.W.2d 881 (Ct. App. 1957); *Green v. Wilks*, 109 S.W.2d 859 (Mo. 1937) (defendant attacked warranty deed, discussed as muniment of title); *Nordquist v. Nordquist*, 278 S.W. 810 (Mo. Ct. App. 1926), *trans'd*, 321 Mo. 1244, 14 S.W.2d 583 (1929); *McKinney v. Hawkins*, 192 S.W. 466 (Mo. Ct. App. 1917), *trans'd*, 215 S.W. 250 (Mo. 1919).

103. *E.g.*, *Thomas v. Scott*, 214 Mo. 430, 113 S.W. 1093 (1908) (en banc) (suit to establish a quitclaim deed, discussed as a muniment of title); *Curators of Cent. College v. Shields*, 182 S.W.2d 792 (Mo. Ct. App. 1944), *trans'd*, 354 Mo. 132, 188 S.W.2d 835 (1945).

104. *E.g.*, *Shearer v. Shearer*, 363 Mo. 1127, 257 S.W.2d 636 (1953) (action to set aside sheriff's deed, appeal accepted without analysis); *Massey v. Fitzpatrick*, 175 S.W.2d 780 (Mo. 1943).

105. *Starr v. Mitchell*, 231 S.W.2d 299 (Mo. Ct. App. 1950), *trans'd*, 361 Mo. 908, 237 S.W.2d 123 (1951); *Cordia v. Matthes*, 122 S.W.2d 32 (Mo. Ct. App. 1938), *trans'd*, 344 Mo. 1059, 130 S.W.2d 597 (1939) (court stated that trustee's deed is muniment of title).

106. *Pelz v. Bollenger*, 87 Mo. App. 540 (1901), discussed *supra* note 101.

When the instrument ceases to be evidence of title, as when the interest in real estate described in the deed has been sold to a bona fide purchaser who cannot be reached by the judgment, a suit to attack the instrument's prior validity in order to establish a prior interest in the land will not affect title; the instrument is no longer a muniment of *title*.¹⁰⁷

Inconsistency arises in the cases in which the challenged instrument evidences an interest which does not constitute *real estate*. Although mortgages or deeds of trust evidence only lien interests,¹⁰⁸ in most jurisdictional determinations they are loosely treated as representing a segment of *title* to real estate.¹⁰⁹ For the purpose of discussing the "involvement" requirement, it must be granted arguendo that a mortgage or deed of trust is a muniment of title for some purposes.

5.102. "Involvement" of a Muniment

Actions to set aside, to establish and to reform muniments are examined separately to facilitate discussion of the differentiations made by the courts between the types of action involving muniments, and to illustrate inconsistencies in the jurisdictional results. The courts make these differentiations only when mortgages or deeds of trust are at issue, not when absolute deeds (such as warranty deeds and quitclaim deeds¹¹⁰) are at issue. Absolute

107. In *Mitchell v. McClelland*, 306 S.W.2d 75 (Mo. Ct. App. 1957), the petitioner sought to cancel two warranty deeds as fraudulent upon creditors. Title was in a third party buyer from a prior judicial sale, and it could not be reached. Therefore, the plaintiff sought the cancellation only in order to recover a portion of the proceeds from the sale. Jurisdiction was in the court of appeals. *Accord*, *Nevins v. Coleman*, 198 Mo. App. 252, 200 S.W. 445 (1918) (action to reform deed of trust upon land previously sold at foreclosure sale, title held not involved).

108. *Park Nat'l Bank v. Travelers Indem. Co.*, 90 F. Supp. 275 (W.D. Mo.), *appeal dismissed*, 184 F.2d 672 (1950) (mortgage discussed); *Eurengy v. Equitable Realty Corp.*, 341 Mo. 341, 107 S.W.2d 68 (1937) (mortgage discussed); *In re Title Guar. Trust Co.*, 113 S.W.2d 1053 (Mo. App. 1938) (mortgage and deed of trust discussed); *Pence v. Gabbert's Adm'r*, 70 Mo. App. 201 (1897) (discussion of evolution of mortgage from common law "title" theory to present day treatment as lien only); see note 74 *supra*.

109. *E.g.*, *Munday v. Austin*, 358 Mo. 959, 218 S.W.2d 624 (1949) (en banc): "From these decisions it will be seen that where the essential validity of the mortgage itself is in dispute, title is involved. In other words, the mortgage is regarded as a part of segment of the title, constituting a cloud on title if it is invalid." *Id.* at 963, 218 S.W.2d at 626.

110. An "absolute deed" is here considered as one which conveys an actual interest in land, as opposed to the lien granted by a mortgage or a deed of trust. See BLACK, LAW DICTIONARY 22-23 (4th ed. 1951). As will be later discussed, the term "deed of trust" is perhaps a misnomer because no interest in real estate other than a security interest is passed thereby. Note 108 *supra* and accompanying text.

deeds, however, cannot be omitted from the discussion because much of the *effect* analysis is applicable to both absolute deeds and mortgages, and because absolute deeds are necessary for comparison of reasoning.

5.102(a). *Actions to Set Aside Muniments*

When a party seeks to cancel a muniment, there are two lines of decision. If either party contends that *any* muniment is void *ab initio*, title to real estate is generally held to be "involved."¹¹¹ If, however, the original validity of a *mortgage* or a *deed of trust* is not in question, jurisdiction on appeal is in the court of appeals.¹¹² Thus, when a party seeks to set aside an absolute deed, mortgage or deed of trust because of the lack of consideration¹¹³ or delivery,¹¹⁴ because it was procured or executed by fraud,¹¹⁵ or on the

111. *E.g.*, Cobble v. Garrison, 219 S.W.2d 393 (Mo. 1949) (trust deed); Kleber v. Carlos, 202 S.W.2d 865 (1947); Woodbury v. Connecticut Mut. Life Ins. Co., 350 Mo. 527, 166 S.W.2d 552 (1942) (deed of trust); Phillips v. Phoenix Trust Co., 332 Mo. 327, 58 S.W.2d 318 (1933) (deeds of trust); Koewing v. Greene County Bldg. & Loan Ass'n, 327 Mo. 680, 38 S.W.2d 40 (1931); Caneer v. Kent, 108 S.W.2d 457 (Mo. Ct. App. 1937), *trans'd*, 342 Mo. 878, 119 S.W.2d 214 (1938).

112. Boesel v. Perry, 262 S.W.2d 636 (Mo. 1953), *trans'd* to court of appeals (jurisdiction in court of appeals when original validity of deed of trust not attacked); Peters v. Kirkwood Fed. Sav. & Loan Ass'n, 344 Mo. 1067, 130 S.W.2d 507 (1939), *trans'd*, 136 S.W.2d 369 (Ct. App. 1940); Farrell v. Seelig, 19 S.W.2d 648 (Mo. 1929), *trans'd*, 27 S.W.2d 489 (Ct. App. 1930); Puthoff v. Walker, 239 S.W. 108 (Mo. 1922), *trans'd*, 213 Mo. App. 228, 248 S.W. 619 (1923). It is important to note here that the distinction according to the time when the deed is alleged to have been invalid is only meaningful when deeds of trust and mortgages are being examined, and has no application to absolute deeds. That is, the means by which a deed becomes invalid, *i.e.*, satisfaction of the debt or merger of the mortgage with the fee, have no application to absolute deeds. (Although it is conceivable that an absolute deed, once valid, could lose its validity by adverse possession of another party, no such cases were found. It is thus possible that the court would apply the jurisdictional distinction to such cases, but no opinion can be given on this possibility.)

113. Cobble v. Garrison, 219 S.W.2d 393 (Mo. 1949); Munday v. Austin, 358 Mo. 959, 218 S.W.2d 624 (1948) (en banc) (deed of trust).

114. Koewing v. Greene County Bldg. & Loan Ass'n, 327 Mo. 680, 38 S.W.2d 40 (1931) (deed of trust).

115. Bitzenburg v. Bitzenburg, 360 Mo. 70, 226 S.W.2d 1017 (1950) (deeds of trust); Green v. Wilks, 109 S.W.2d 859 (Mo. 1937) (warranty deeds); Overton v. Overton, 131 Mo. 559, 33 S.W. 1 (1895) (deeds of trust); Tressler v. Whitsett, 280 S.W. 438 (Mo. Ct. App. 1926), *trans'd*, 321 Mo. 849, 12 S.W.2d 723 (1928) (deed of trust); Soehngen v. Jantzen, 218 S.W. 423 (Mo. Ct. App.), *trans'd*, 222 S.W. 401 (Mo. 1920) (deed of trust); Schroeder v. Turpin, 138 Mo. App. 320, 122 S.W. 1 (1909); *trans'd*, 253 Mo. 258, 161 S.W. 716 (1913); Reed v. Colp, 74 S.W. 422 (Mo. Ct. App. 1903), *trans'd*, 213 Mo. 577, 112 S.W. 255 (1908) (deed of trust); Lappin v. Crawford, 92 Mo. App. 453 (1902), *trans'd*, 186 Mo. 462, 85 S.W. 535 (1905) (deed of trust); Turner v. Overall, 83 Mo. App. 378 (1900), *trans'd* to supreme court (deed of trust). For jurisdictional purposes, the courts do not distinguish between a deed fraudulently *executed* and a deed fraudulently *induced* or procured. They are treated as void *ab initio* in either case.

ground of forgery or the grantor's mental incapacity,¹¹⁶ jurisdiction belongs in the supreme court. The supreme court has jurisdiction, even though it is claimed the conveyance is void only as to creditors.¹¹⁷ If, however, the original validity of a mortgage or deed of trust is not attacked, and a party prays cancellation on the ground that the secured debt has been satisfied,¹¹⁸ or that rights under the deed of trust have been extinguished by a merger,¹¹⁹ jurisdiction belongs in the court of appeals.

In view of the common *effect* of the judgment sought in both cases, it is difficult to distinguish suits to declare invalidity *ab initio* from actions to cancel because of events subsequent to execution of the instrument. Any valid distinction between questions of original and subsequent validity must lie in the courts' interpretation of the *dispute* requirement. In *Christopher v. People's Home & Sav. Ass'n*,¹²⁰ plaintiffs, concededly the owners of the land in question, sought to cancel a deed of trust held by the defendant, claiming that the debt had been satisfied. The supreme court denied jurisdiction of plaintiffs' appeal because the original validity of the deed of trust was not attacked. In distinguishing this case from one attacking the deed of trust *ab initio*, the court noted that the title was not disputed, because

116. Gruetzmacher v. Hainey, 373 S.W.2d 45 (Mo. 1963); Walker v. Thompson, 338 S.W.2d 114 (Mo. 1960).

117. Jones v. Davis, 306 S.W.2d 479 (Mo. 1957), discussed *supra* note 102 (warranty deed); Garrison v. Schmicke, 354 Mo. 1185, 193 S.W.2d 614 (Mo. 1946) (warranty deed); Belleville Casket Co. v. Brueggeman, 353 Mo. 357, 182 S.W.2d 555 (1944); Herriman v. Creason, 352 Mo. 1176, 181 S.W.2d 502 (1944); Brennecke v. Riemann, 102 S.W.2d 874 (Mo. 1937); Hendrix v. Goldman, 92 S.W.2d 733 (Mo. 1936) (deed of trust). In all these actions it was claimed the conveyances were fraudulent as to creditors, and should be set aside. *But cf.* Klingelhoef v. Smith, 171 Mo. 455, 71 S.W. 1008 (1903) (en banc), *trans'd*.

118. Peters v. Kirkwood Fed. Sav. & Loan Ass'n, 344 Mo. 1067, 130 S.W.2d 507 (1939), discussed *supra* note 112; Farrell v. Seelig, 19 S.W.2d 648 (Mo. 1929), discussed *supra* note 112; Steffen v. Stahl, 266 S.W. 474 (Mo. 1924), *trans'd*, 273 S.W. 118 (Ct. App. 1925); Puthoff v. Walker, 239 S.W. 108 (Mo. 1922), discussed *supra* note 112; Vandeventer v. Florida Sav. Bank, 232 Mo. 618, 135 S.W. 23, *trans'd*, 162 Mo. App. 34, 141 S.W. 900 (1911); Bonner v. Lisenby, 157 Mo. 165, 57 S.W. 735 (1900), *trans'd from* 73 Mo. App. 562 (1898), *retrans'd*, 86 Mo. App. 666 (1901); Vandergrif v. Brock, 158 Mo. 681, 59 S.W. 979 (1900), *trans'd from* 73 Mo. App. 646 (1898), *retrans'd*, 89 Mo. App. 411 (1901).

119. Morgan v. York, 337 Mo. 1076, 88 S.W.2d 146 (Mo. 1935), *trans'd from* 61 S.W.2d 972 (Ct. App. 1933), *retrans'd*, 91 S.W.2d 244 (Ct. App. 1936) (plaintiff claimed deed of trust extinguished by merger when holder of notes held equitable title to land); *accord*, Boesel v. Perry, 262 S.W.2d 636 (Mo. 1953), *trans'd to* court of appeals (plaintiff claimed rights under deed of trust extinguished when its holder executed quitclaim deed to him); Hardwicke v. Barnes, 253 Mo. 6, 161 S.W. 744 (1913), *trans'd*, 179 Mo. App. 386, 166 S.W. 826 (1914), in which the plaintiff, who executed a deed of trust as surety for the debt of another, claimed the interests under the deed of trust were extinguished when the payment was extended without notice to him.

120. 180 Mo. 568, 79 S.W. 899 (1904).

the plaintiffs concededly owned the land. The court, however, expressed a distinction without a difference: ownership of the land will not be disputed whether the deed of trust is challenged as void *ab initio* or because it has been extinguished by satisfaction of the debt.

If a valid claim is made that the secured debt has been satisfied, the interest under the deed has been extinguished *by the satisfaction*, and the decree cancelling the deed of trust will only declare the fact of prior extinction.¹²¹ When the *original* validity of the muniment is attacked, however, the claim is made that the holder of the muniment never received an interest; cancellation of the instrument is only declaratory of the fact that its execution was of no effect. This declaration is substantially identical to a declaration of subsequent extinction. It is submitted that this distinction—the difference in point of time before the action at which the validity of the instrument is disputed and adjudicated—should not provide a basis for differing jurisdictional results.¹²²

121. The existence, or non-existence, the payment or the non-payment of the original debt secured, was the issue around which the controversy centered, and if upon this issue the court's final conclusion is that plaintiffs' obligation has been paid, the deed of trust represents nothing to defendant, and the final decree ordering its cancellation becomes a matter to it [the defendant] of no concern, and affects not an iota its interest in the land therein named; and if upon the other hand the court's final determination is that plaintiffs' debt to defendant has not been fully paid, the proceeding herein is simply dismissed. *Id.* at 572-73, 79 S.W. at 900.

Also by this language the court stated as another ground for its holding that the *original* validity of the deed of trust was conceded by the parties throughout the controversy, and that the sole issue was the payment of the note which if established would render ineffective the deed of trust. This reasoning is questionable because the two issues are concomitant, not separable. Since validity of the deed of trust depends on its not being satisfied, that validity is assailed when it is claimed the debt was satisfied.

122. This distinction is inconsistent with the normal requirement that title only be disputed as of the time of filing the action. See § 5.130. When an easement is sought by prescriptive user, the parties also concede the full validity of defendant's original title and it is asserted that at some time after the defendant acquired his title, but before the action was instituted, the defendant's title was reduced by the occurrence of certain operative facts. But in easement cases, title is properly disputed for supreme court jurisdiction. § 5.120.

In *Boesel v. Perry*, 262 S.W.2d 636 (Mo. 1953), discussed *supra* note 112, the plaintiff sought to set aside a deed of trust, alleging that all rights under the instrument, concededly valid originally, had been extinguished. The court noted the absence of a claim that the deed of trust was void *ab initio*, and held that title was not involved because plaintiff's prayer was but an effort to terminate the originally valid *lien* of the deed of trust. It would seem, however, that the deed of trust conveyed only a *lien*, whether it is attacked as void originally or only subsequently; the distinction is therefore invalid. The same reasoning was used also in *Morgan v. York*, 337 Mo. 1076, 88 S.W.2d 146 (1935), discussed *supra* note 119; *Milby v. Murphy*, 121 S.W.2d 169 (Mo. Ct. App. 1938).

5.102(b). *Actions to Establish a Muniment of Title*

Title is "involved" for jurisdictional purposes when a party seeks to establish an absolute deed.¹²³ Jurisdictional problems exist only in actions to establish mortgages or deeds of trust; by denying supreme court jurisdiction in such actions, the courts appear to reach a result inconsistent with actions to set aside these instruments. In *Corbett v. Brown*,¹²⁴ the plaintiff sought to set aside a prior cancellation of—and thus to re-establish—a deed of trust. The plaintiff alleged undue influence in procuring the cancellation. The supreme court refused jurisdiction, comparing the case to those in which parties seek to set aside deeds of trust alleged to have been satisfied. The court noted, as it has in "satisfaction" cases, that neither of the parties contested the original validity of the deed of trust, nor was the present validity of the deed disputed.¹²⁵ This latter assertion seems erroneous. The plaintiff claimed the deed of trust was still valid due to the wrongful cancellation, and both aspects of this assertion were denied by the defendant.

The court bolstered its holding by stating that the plaintiff sought only the re-establishment of the *lien* of the deed of trust. But the court could apply the same reasoning to actions to *set aside* as well as to establish a deed of trust so that *neither* would involve title to real estate.¹²⁶

Of parallel significance are cases in which a party seeks to set aside a release of a deed of trust. In *Dubowsky v. Binggelli*,¹²⁷ the court denied that *title to real estate* was involved, stating: "Plaintiff merely sued to es-

123. In *Thomas v. Scott*, 214 Mo. 430, 113 S.W. 1093 (1908) (en banc), the plaintiff sought to establish a quitclaim deed alleged to have been executed to him by the defendant, which the plaintiff asserted had been lost or destroyed. The court reasoned that if the title is involved in striking down a muniment of title, it should be involved when the muniment is sought to be established: "How can it be said that the establishment of a deed conveying the whole title to a tract of land by the decree of a court of competent jurisdiction, a decree which the statute provides shall be conclusive of such fact, does not affect the title to such real estate? We think it obvious that it does." *Id.* at 437, 113 S.W. at 1096. The statute referred to was Mo. Laws 1873, § 2 at 48. It is noteworthy that a decree in favor of the plaintiff in this case would not take title from one litigant and give it to another, as is often stated to be necessary for "involvement," but will only establish a deed which had passed the title prior to the action.

124. 263 S.W. 233 (Mo.), *trans'd*, 266 S.W. 996 (Ct. App. 1924).

125. *Id.* at 234.

126. See note 133 *infra*. See also *Steffen v. Stahl*, 266 S.W. 474 (Mo. 1924), *trans'd*, 273 S.W. 118 (Ct. App. 1925), holding that title to real estate was not involved in a suit to set aside a fraudulent satisfaction of a deed of trust because the only issue was whether the note was discharged through a valid gift or surrender, and as a *result*, the *lien* of the deed of trust extinguished. *But see* note 109 *supra*, to the effect that a deed of trust is a segment of the title.

127. 258 Mo. 197, 167 S.W. 999, *trans'd*, 184 Mo. App. 361, 171 S. W. 12 (1914); *accord*, *Simmon v. Marion*, 358 Mo. 888, 217 S.W.2d 537 (1949) (en banc), *trans'd*, 227 S.W.2d 127 (Ct. App. 1950).

establish a *lien* against the real estate of the defendants."¹²⁸ Therefore, the courts express differing views according to the form of the action: in an action for *establishment* of a deed of trust, the interest is viewed as a mere *lien*, but in an action for *cancellation* of a deed of trust, it is treated as *title* to real estate.¹²⁹

5.102(c). *Actions to Reform a Muniment*

Generally title to real estate is "involved" in a suit to reform a deed if the judgment appealed concerns a disputed interest in real estate.¹³⁰ However, even though title may be *disputed*, it is not *affected* by the judgment in an action seeking reformation in order to obtain only a lien on real estate,¹³¹ or to obtain damages;¹³² jurisdiction belongs in the court of appeals.

5.103. *Mortgages and Deeds of Trust as "Title to Real Estate"*

The decisions that the supreme court has jurisdiction of appeals from suits to cancel but not to establish deeds of trust and mortgages are based upon an inconsistent view of the interest conveyed by such an instrument. Although it is established that a deed of trust or mortgage is "simply a lien or security, and does not pass title to realty,"¹³³ in cancellation actions the cases have held that a mortgage or deed of trust is a "segment" of the title.¹³⁴ No compelling reason for retention of such a distinction exists.

128. 258 Mo. at 200, 167 S.W. at 1000. See also *Simmon v. Marion*, 358 Mo. 888, 217 S.W.2d 537 (1949). *But cf.* *Munday v. Austin*, 358 Mo. 959, 218 S.W.2d 624 (1949).

129. See notes 111-17 *supra* and accompanying text.

130. *Phillips v. Cope*, 104 S.W.2d 276 (Mo. Ct. App.), *trans'd*, 111 S.W.2d 81 (Mo. 1937).

131. See *McBee v. Twin City Fire Ins. Co.*, 235 S.W.2d 283 (Mo.), *trans'd*, 241 Mo. App. 404, 238 S.W.2d 685 (1951) (to reform deed in order to declare lien on insurance proceeds).

132. *Heath v. Beck*, 225 S.W. 993 (Mo. 1920), *trans'd from* 204 S.W. 43 (Ct. App. 1918), *retrans'd*, 231 S.W. 657 (Ct. App. 1921) (action for reformation of warranty deed to incorporate agreement to afford outlet and damages for breach); *Nevins v. Coleman*, 198 Mo. App. 252, 200 S.W. 445 (1918) (suit seeking to reform deed of trust and obtain damages for alleged wrongful negotiation of note secured thereby).

133. In *In re Thomasson's Estate*, 350 Mo. 1157, 171 S.W.2d 553 (1943), the court said that "a suit to cancel a mortgage does not make a title controversy (*unless on the ground of fraud* and if affirmative title relief is prayed)." *Id.* at 1176, 171 S.W.2d at 563. It is submitted, however, that the jurisdictional defect is intrinsic to the instrument—it does not evidence an estate in land—and is not dependent upon the ground on which the instrument is attacked.

134. In *Munday v. Austin*, 358 Mo. 959, 963, 218 S.W.2d 624, 626 (1949) (*en banc*), discussed *supra* note 109, an action to set aside a deed of trust, it was said: "In other words, the mortgage is regarded as a part or segment of the title, constituting a cloud on the title if it is invalid." The second half of this statement is relied upon to establish the first half. But a cloud or incumbrance on title does not necessarily consti-

5.104. *The In Rem Statutes and the Effect Requirement*

In order for title to real estate to be *involved*, the judgment must directly *affect* the title. In an action to cancel a muniment of title, this *effect* is the cancellation.

On the strictest equitable principles such a suit might be considered solely one to destroy the particular deed, which is but evidence of legal title. However, the chancery courts frequently required a reconveyance by the defendant in such cases to do equity between the parties, rather than a mere cancellation. This seems to have been the theory of the Missouri courts as to the proper decree, for it has been held that under the *in rem* statute . . . a decree in such a suit operates to vest title directly in the complaining party.¹³⁵

The current Missouri *in rem* statutes¹³⁶ provide that in a judgment of specific performance, conveyance or release, the *judgment itself* shall operate as a conveyance of the record title if the party required to convey should fail to do so.

In *Thomas v. Scott*,¹³⁷ the plaintiff sued to establish a destroyed deed. The action was brought under an *in rem* statute which provided that in an action to prove a lost deed, the court should “determine” the interests of the parties.¹³⁸ The court held that under such a statute the *effect* of the judgment in the action would be binding on the parties in all subsequent proceedings, judicial or otherwise, and that title was *therefore affected*.¹³⁹

In order that title be *determined*, the party contending invalidity of the

tute a segment of title itself. See *Tobin v. Insurance Agency Co.*, 80 F.2d 241 (8th Cir. 1935); BLACK, LAW DICTIONARY 322 (4th ed. 1951).

In *May v. Jarvis-Conklin Mortgage Trust Co.*, 138 Mo. 275, 282, 39 S.W. 782, 784 (1897), the court stated: “But a mortgage or deed of trust is a conveyance of land upon condition.” (Case later overruled for lack of “involvement” of the deed of trust, not because deed of trust was not “title.”) *Accord*, *Vandergrif v. Brock*, 158 Mo. 681, 59 S.W. 979 (1900), *trans'd from* 73 Mo. App. 646 (1898), *retrans'd*, 89 Mo. App. 411 (1901).

135. Comment, 41 U. Mo. BULL. L. SER. 30, 35 (1930), citing *Balz v. Nelson*, 171 Mo. 682, 72 S.W. 527 (1903), *trans'd from* 86 Mo. App. 374 (1900).

136. MO. REV. STAT. §§ 511.280, .300 (1959).

137. 214 Mo. 430, 113 S.W. 1093 (1908) (en banc).

138. MO. REV. STAT. § 527.190 (1959).

139. *Thomas v. Scott*, 214 Mo. 430, 113 S.W. 1093 (1908) (en banc):

[W]hat is the effect of such a proceeding? In a subsequent suit or action to try the full title, is the judgment of the court finding its execution, delivery and loss, a mere *brutum fulmen*, of no judicial force, and the parties to such proceeding in no way estopped by it, but at liberty to retry the whole matter anew? Or was it not the purpose to give all parties interested a day in court of competent jurisdiction on this particular question of the execution and delivery of the particular deed and its legal effect, and to make the finding of the court a *finality* as to the execution of the deed and its loss between such parties? *Id.* at 435, 113 S.W. at 1095. (Court's emphasis in part.)

Compare the ejectment cases (§ 5.070) which hold that title is not determined because the parties are not bound on the title issue by the judgment rendered.

muniment of title must seek this determination as affirmative relief. The supreme court denied jurisdiction in *Williams v. Mackey*,¹⁴⁰ a suit to foreclose a trust deed. Plaintiff claimed that a previous foreclosure was invalid because the prior deed of trust was void. Neither party sought affirmative relief—cancellation of a muniment; defendant claimed invalidity of plaintiff's title only as a *defense*, and the plaintiff asserted invalidity of defendant's deed of trust only as an *aid* to her action. Thus the judgment could only grant or refuse the foreclosure sought by the plaintiff, which would not *involve* title.¹⁴¹

5.110. ACTIONS CONCERNING WILLS AND HEIRSHIP

A will devising real estate is a conveyance of realty, much the same as a deed.¹⁴² An action in which such a will is *involved* is properly appealed to the supreme court.¹⁴³

In Missouri, title to the land of the decedent vests in either the heirs or the devisees at the moment of death.¹⁴⁴ In actions seeking to contest,¹⁴⁵

140. 331 Mo. 68, 52 S.W.2d 831 (1932), *trans'd*, 227 Mo. App. 1016, 61 S.W.2d 968 (1933).

141. See § 5.090, "Actions Relating to Foreclosure, Execution and Sale." The defendant may involve title by an appropriate claim for title relief. In *Green v. Wilks*, 109 S.W.2d 859 (Mo. 1937), the plaintiff sought only to enjoin advertisement of a sheriff's sale, but the court held title was involved by the defendant's cross-bill seeking cancellation of warranty deeds to the plaintiff as fraudulent conveyances. *Conrey v. Pratt*, 248 Mo. 576, 154 S.W. 749 (1913) (defendant sought to cancel plaintiff's deed of trust as fraudulent).

142. *Proffer v. Proffer*, 342 Mo. 184, 114 S.W.2d 1035 (1938), *trans'd from* 106 S.W.2d 51 (Ct. App. 1937): "[W]e can perceive no difference in reason and principle, so far as concerns the question of title, in a suit to set aside a deed that conveys real estate and a suit to set aside a will that devises real estate." *Id.* at 190, 114 S.W.2d at 1037.

143. *Proffer v. Proffer*, *supra* note 142. However, it must affirmatively appear from the record that the will purports to devise real estate. *Hanna v. Sheetz*, 355 Mo. 1215, 200 S.W.2d 338, *trans'd*, 240 Mo. App. 385, 205 S.W.2d 955 (1947) (record failed to show will devised realty); *Klaus v. Zimmerman*, 174 S.W.2d 365 (Mo. Ct. App. 1943) (will did not devise realty).

144. *Jones v. Nichols*, 280 Mo. 653, 216 S.W. 962 (1919): "It is true . . . that title to land does not pass by will until the will is probated. . . . But it is equally true that title does pass upon the probating of the will, and relates back and takes effect as of the time of the testator's death." *Id.* at 665, 216 S.W. at 965. The court did not state where title was posited between death and probate. It would seem more reasonable to say that title vested at death, and was *declared* by probate. In *Stolle v. Stolle*, 66 S.W.2d 912, 914 (Mo. 1934), the court stated, in connection with a non-jurisdictional issue, that "a will takes effect and transfers title only at and because of the death of the testator." In *Dickerson v. Dickerson*, 211 Mo. 483, 110 S.W. 700, 704 (1908), it was held that the will becomes effective from and after the death of the testator. See also Mo. REV. STAT. § 473.260 (1959): "*When a person dies*, his real and personal property

probate,¹⁴⁶ establish¹⁴⁷ or construe¹⁴⁸ a will, title is *affected*: the judgment sought *determines* title in the heir or devisee and finally binds the parties on the title issue.¹⁴⁹ If title under the will is not also *disputed*, however, and the controversy concerns, for example, the right to partition the real estate,¹⁵⁰ or the establishment of a legacy as a lien upon the land devised,¹⁵¹ title is not *involved* and jurisdiction belongs in the court of appeals. If the will has provided that the land be sold, and construction of the will would

. . . passes to the persons to whom it is devised by his last will, or, in absence of such disposition, to the persons who succeed to his estate as his heirs. . . ." (Emphasis added.)

In actions to probate, establish, contest or construe the will, or for declaratory judgment, the judgment will simply declare to which of the parties the title passed at death. See MO. REV. STAT. § 473.087 (1959): "No will is effectual for the purpose of *proving* title to . . . any real or personal property, disposed of by the will, until it has been admitted to probate." (Emphasis added.) Thus the effect of administration of a will is not to *vest* title, but to prove it. Of course, probate of the will cannot effectively declare title in one or the other party, if within the time allowed, the probate is successfully contested. MO. REV. STAT. § 473.083 (1959). Hence, if the implication, sometimes appearing in will actions, that "title must be taken from one litigant and given to another" were correct, jurisdiction on appeal would be in the court of appeals. *But see* Ray v. Nethery, 255 S.W.2d 817 (Mo. 1953). It is suggested that this is an erroneous interpretation of the rule that title must be determined in favor of one litigant and adversely to another, which rule does not require title divestiture from one party. See § 5.042, notes 32-33 and accompanying text.

145. MO. REV. STAT. § 473.083 (1959). *Proffer v. Proffer*, 342 Mo. 184, 114 S.W. 1035 (1938), discussed *supra* note 142: "The devisee's sole claim is under the will and an adjudication as to the will's validity [in this will contest] would seem a direct adjudication as to the title between heir and devisee." *Id.* at 190, 114 S.W. at 1037.

146. *Smith v. Dardenne Presbyterian Church*, 378 S.W.2d 465 (Mo. 1964) (appeal from order of distribution of realty under will by probate court); *Morton v. Simm*, 263 S.W.2d 435 (Mo. 1953).

147. *Norwood v. Norwood*, 353 Mo. 548, 183 S.W.2d 118 (1944).

148. Judgment in a suit to construe a will *determines* the parties' respective interests. *Taylor v. Hughes*, 363 Mo. 392, 251 S.W.2d 94 (1952); *Harwell v. Magill*, 147 S.W.2d 684 (Mo. Ct. App.), *trans'd*, 348 Mo. 365, 153 S.W.2d 362 (1941) (suit in equity to determine meaning of phrase in a will); see *Burrier v. Jones*, 338 Mo. 679, 92 S.W.2d 885 (1936), in which the supreme court expressly accepted jurisdiction of an action to construe a will.

149. The entire proceeding of administration of the estate is *in rem*. MO. REV. STAT. § 473.013 (1959). The probate judgment becomes final after nine months. MO. REV. STAT. § 473.077 (1959). A contest judgment is final unless a motion for new trial is filed or an appeal taken. MO. REV. STAT. § 473.083 (1959).

150. In *Johnson v. Woodard*, 352 S.W.2d 9 (Mo. 1961), *trans'd from* 343 S.W.2d 646 (Ct. App. 1961), *retrans'd*, 356 S.W.2d 526 (Ct. App. 1962), the plaintiff contended that the will devised a tenancy in common and sought partition. The defendants claimed that a joint tenancy with the right of survivorship passed; therefore, defendants argued, the testator's intention precluded partition. The court held that there was no dispute concerning title, such that title could be determined adversely to one party and in favor of another. The only issue was the right to partition.

151. *Hourigan v. McBee*, 119 S.W.2d 404 (Mo. 1938), *trans'd*, 130 S.W.2d 661 (Ct. App. 1939).

be made only to determine interests in the proceeds, title is not affected—thus not *involved*—because the judgment cannot determine title to be in one of the parties.¹⁵²

The supreme court has jurisdiction of appeals from suits to establish heirship. "Establishing by court decree that one person is the child or heir of another is in effect *establishing a deed of adoption* . . . and that is a muniment of title from a decedent in the absence of a will as effectual as is a will one dying testate or of a grant inter vivos."¹⁵³

Proceedings by the guardian of a widow seeking the court's direction whether the will should be renounced do not *involve* title to real estate. The interests of the parties may be *disputed* and the decision may eventually cause title to be held by one party rather than another, but the judgment *itself* does not *affect* these interests. The title will not be finally determined until the option to elect is exercised.¹⁵⁴

5.120. ACTIONS CONCERNING EASEMENTS

5.121. *Easements in General*

An easement is an "interest . . . carved out" of the principal owner's fee simple; the land in which it exists constitutes a servient tenement.¹⁵⁵ Thus, judgments which finally adjudicate the disputed existence of an easement in suits to set aside or establish are appealable to the supreme court.¹⁵⁶

152. *Matthews v. Hughes*, 232 S.W. 99 (Mo. 1921), *trans'd*, 237 S.W. 808 (Ct. App. 1922). The court held the will worked an equitable conversion of land, and the will was treated as disposing of personal property only.

153. *McCary v. McCary*, 217 S.W. 547, 549 (Mo. Ct. App. 1920), *trans'd*, 239 S.W. 848 (Mo. 1922); *accord*, *Love v. White*, 150 S.W.2d 494 (Mo. Ct. App.), *trans'd*, 348 Mo. 640, 154 S.W.2d 759 (1941) (action to establish pretermitted heirship); see *Hogane v. Ottersbach*, 269 S.W.2d 9 (Mo. 1954) (action seeking decree of equitable adoption).

154. *First Nat'l Bank v. Schaake*, 355 Mo. 1196, 200 S.W.2d 326, *trans'd*, 240 Mo. App. 217, 203 S.W.2d 611 (1947); *In re Ellis' Estate*, 110 S.W.2d 864 (Mo. Ct. App. 1937), *trans'd*, 127 S.W.2d 441 (Mo. 1939).

155. *Pendleton v. Gundaker*, 370 S.W.2d 720, 723 (Mo. Ct. App. 1963), *trans'd*, 381 S.W.2d 849 (Mo. 1964). The factor of actual subtraction from the fee simple distinguishes easements from such interests as liens which only "incumber" or "entangle" the fee title. An easement is an "interest" in the land. *Missouri State Oil Co. v. Fusc*, 360 Mo. 1022, 232 S.W.2d 501 (1950); *Baker v. Squire*, 143 Mo. 92, 44 S.W. 792 (1898); *Dalton v. Johnson*, 319 S.W.2d 66 (Mo. Ct. App. 1958), *trans'd*, 320 S.W.2d 569 (Mo. 1959); RESTATEMENT, PROPERTY § 450 (1944); GILL, MISSOURI TITLES 55 (1931). *But see* *Smith v. Santarelli*, 355 Mo. 1047, 199 S.W.2d 411 (1947), *trans'd*, 207 S.W.2d 543 (Ct. App. 1948) (action to *enjoin* violation of easement, not to adjudicate title): "[A]n easement, strictly speaking, does not carry any title to the land over which it is exercised; it is rather a right to use the land for particular purposes." *Id.* at 1049, 199 S.W.2d at 412.

156. *Rosenbloom v. Grossman*, 351 S.W.2d 735 (Mo. 1961); *Peters v. Platte Pipe Line Co.*, 305 S.W.2d 413 (Mo. 1957) (dismissal of petition to set aside easements be-

A more difficult problem exists in cases in which the principal ownership cannot be further affected because the existence of the easement is admitted and the controversy concerns only the adverse interests of the litigants in the easement. The supreme court has held that it has jurisdiction of cases disputing ownership of a concededly existent easement.¹⁵⁷ The court also exercised jurisdiction of a case in which the existence of some sort of easement was apparently conceded, and the parties contested only the extent and nature of the easement. In *White v. Bevier Coal Co.*,¹⁵⁸ the grantees of the fee title of a certain tract of land brought suit to determine the title, rights and interests in that tract as between themselves and the defendants. Defendants held an easement under the deed executed by the grantor of the deed to the plaintiff grantees. Plaintiff conceded that the defendants could transport coal taken from the mines on the tract concerned, but contended

cause of fraud in procurement); *Robb v. N. W. Elec. Power Coop.*, 297 S.W.2d 385 (Mo. 1957) (judgment refusing to set aside instrument conveying easement); *Mills v. Taylor*, 270 S.W.2d 724 (Mo. 1954); *Jacobs v. Brewster*, 354 Mo. 729, 190 S.W.2d 894 (1954) (reciprocal easements in driveway declared); *Larkin v. Kieselmann*, 259 S.W.2d 785 (Mo. 1953) (defendants appealed denial of claim for affirmative relief to establish easement); *Missouri State Oil Co. v. Fuse*, *supra* note 155 (denial of claim for establishment of easement); *Chapman v. Schearf*, 229 S.W.2d 522 (Mo. 1950) (en banc), *trans'd from* 220 S.W.2d 757 (Ct. App. 1949); *Davis v. Lea*, 293 Mo. 660, 239 S.W. 823 (1922) (judgment established easement even though only injunction prayed); *Pendleton v. Gundaker*, *supra* note 155 (denial of count for declaration that driveway was easement); *Mueller v. Larison*, 347 S.W.2d 446 (Mo. Ct. App. 1961), *trans'd*; *Dalton v. Johnson*, *supra* note 155 (appeal from judgment denying easement for passage of livestock). Actions to establish or set aside meet the "effect" requirement of supreme court jurisdiction because a decree establishing an easement would "interfere with the absolute owners', defendants', right of exclusive and unrestricted possession and user, and which decree would amount to an adjudication of such interest in defendants' real estate as would encumber the land and cloud the clarity of defendants' otherwise perfect fee simple title." *Missouri State Oil Co. v. Fuse*, *supra* at 503. A potential difficulty is raised by the use of "encumbrance" language in this case and others (e.g., *Smith v. Santarelli*, 355 Mo. 1047, 199 S.W.2d 411 (1947), discussed *supra* note 155). Such language is unnecessary in view of the fact that an easement constitutes an "interest" in real estate.

157. *Ginter v. City of Webster Groves*, 349 S.W.2d 895 (Mo. 1961), *trans'd from* 338 S.W.2d 371 (Ct. App. 1960) (appeal from judgment declaring title to a street easement in city adverse to plaintiff); *Billings v. Paine*, 319 S.W.2d 653 (Mo. 1959) (suit to try title to cemetery lot); see *Kansas City Power & Light Co. v. Riss*, 312 S.W.2d 846 (Mo.), *trans'd*, 319 S.W.2d 262 (Ct. App. 1958). In a case of this kind in which the existence of the easement is admitted, the dispute focuses only upon the fractional interest and not the reversioner principal landowner's fee. Since the courts hold that the minor quantum of the fee simple—an easement—is a sufficient real estate "interest," when its existence is admitted the action becomes a suit to determine title. See § 5.160. If there is no controversy involving title to the easement but only as to its location, jurisdiction is in the court of appeals. *Allen v. Smith*, 375 S.W.2d 874 (Mo. Ct. App. 1964).

158. 261 S.W.2d 81 (Mo.), *trans'd from* 254 S.W.2d 42 (Ct. App. 1953).

that the reservation in the deed did not grant them freedom to transport coal across that tract taken from mines surrounding the tract. If the supreme court had viewed the interest actually disputed by the parties as the right to transport coal from adjoining lands across the tract, jurisdiction would have been in the court of appeals.¹⁵⁹ But since "the question of whether the Coal Company owns an easement over the plaintiffs' land is directly in issue," the supreme court accepted appellate jurisdiction.¹⁶⁰

The principal problem in actions to enjoin obstruction of an easement relates to the requirement that title be directly *affected* and not merely collaterally examined. Despite some confusion in the earlier cases based upon the belief that the judgment of the equity court in granting the injunction would *establish* the easement,¹⁶¹ the courts now hold that actions to enjoin obstruction of an easement are not properly appealed to the supreme court.¹⁶² The judgment granting injunctive relief is viewed as operating

159. Compare *Fischer v. Johnson*, 139 Mo. 433, 41 S.W. 203 (1897), discussed *supra* note 20, in which the court held, in effect, that the right to reap crops from lands (the title to which was conceded) did not constitute an interest in real estate.

If the contested right were viewed as similar to a leasehold interest, the jurisdictional result in *Bevier* would be subject to question. Section 5.030.

160. *White v. Bevier Coal Co.*, 261 S.W.2d 81, 82 (Mo. 1953). A reading of the facts, however, indicates that both parties conceded that the Coal Company had an easement.

161. In *Peters v. Worth*, 164 Mo. 431, 64 S.W. 490 (1901), a suit to restrain obstruction of a stairway, the issue involved was whether the deed to the plaintiff passed an easement for use of the stairway. The supreme court accepted jurisdiction of defendant's appeal from a judgment for complainant, stating that "it is apparent on the face of the bill that the easement claimed is a right in the land . . . and the trial of the claim involved the title to real estate." *Id.* at 437, 64 S.W. at 491. The court cited the case of *Baker v. Squire*, 143 Mo. 92, 44 S.W. 792 (1898), which had reached the supreme court on a writ of certiorari after an unsuccessful attempt to transfer from the court of appeals. The supreme court had jurisdiction in *Summers v. Cordell*, 171 Mo. App. 184, 156 S.W. 486 (1913), *trans'd*, 187 S.W. 5 (Mo. 1916), an action to enjoin the opening of a new public road, because "the order of the county court [ordering the road] . . . if permitted to stand, would charge appellants' real estate with an easement . . . and the order would divest that much of the title and interest in and to said land out of appellants and invest the same in [respondent]." *Id.* at 186, 156 S.W. at 486-87; see *JONES, EASEMENTS* § 889 (1898). See also Comment, 41 U. Mo. BULL. L. SER. 30 (1930). One early case, however, reasoned that the investigation of the easement was made only for the purpose of granting or denying the injunctive relief sought, and transferred the appeal. *Porter v. Kansas City & No. Connecting Ry.*, 175 Mo. 96, 74 S.W. 992, *trans'd* from court of appeals, *retrans'd*, 103 Mo. App. 422, 77 S.W. 582 (1903). Although the court used language which would normally indicate only incidental or collateral involvement (see § 5.150, "Suits Seeking Injunctive Relief"), it cannot be stated unequivocally that this was the reason for its determination of lack of involvement. The court appeared to give weight to the fact that defendant had conceded the plaintiff's easement; if so, the holding possibly turned on the lack of *dispute* of title, rather than lack of effect.

162. *Kansas City Power & Light Co. v. Riss*, 312 S.W.2d 846 (Mo. 1958), discussed *supra* note 157; *Judge v. Durham*, 274 S.W.2d 247 (Mo. 1955), *trans'd* from 265 S.W.2d

in personam only, not running with the land, and the inquiry “into the validity of plaintiff’s claim of an easement over defendants’ land in order to determine whether to grant or withhold the relief prayed [is] . . . purely incidental or collateral.”¹⁶³ Although an arguably inconsistent result was reached in *Albrecht v. Highway Comm’n* in 1963,¹⁶⁴ the rule appears to be that for the supreme court to have jurisdiction, an affirmative adjudication of the existence of the easement must be sought in addition to injunctive relief.¹⁶⁵

437 (Ct. App. 1954), *retrans’d*, 281 S.W.2d 16 (Ct. App. 1955); *Gibson v. Sharp*, 364 Mo. 1007, 270 S.W.2d 721 (1954), *trans’d*, 277 S.W.2d 672 (Ct. App. 1955); *Smith v. Santarelli*, 355 Mo. 1047, 199 S.W.2d 411 (1947), discussed *supra* note 156; *Drainage Dist. No. 28 v. Drainage Dist. No. 23*, 144 S.W.2d 61 (Mo.), *trans’d*, 146 S.W.2d 858 (Ct. App. 1940); *St. Louis-San Francisco Ry. v. Silver King Oil & Gas Co.*, 117 S.W.2d 225 (Mo. 1938), *trans’d*, 234 Mo. App. 589, 127 S.W.2d 31 (1939); *Oliver v. Wilhite*, 329 Mo. 524, 45 S.W.2d 1083 (1932), *trans’d from* 41 S.W.2d 825 (Ct. App. 1931), *retrans’d*, 227 Mo. App. 538, 55 S.W.2d 491 (1932); *Wallach v. Stetina*, 20 S.W.2d 663 (Mo. 1929), *trans’d*, 28 S.W.2d 389 (Ct. App. 1930). *Gibson v. Sharp*, *supra*, overruled two cases which had exercised jurisdiction of appeals from injunction actions because an easement was at issue. *Zinser v. Lucks*, 361 Mo. 671, 235 S.W.2d 844 (1951) (defendant’s answer prayed injunction because of easement by prescription); *Dillen v. Edwards*, 263 S.W.2d 433 (Mo.), *trans’d from* 254 S.W.2d 44 (Ct. App. 1953) (defendants’ appeal from granting of plaintiff’s injunction).

163. *Oliver v. Wilhite*, *supra* note 162, at 527, 45 S.W.2d at 1084. This holding is analogous to those denying jurisdiction in actions to enjoin trespass (§ 5.150).

164. 363 S.W.2d 643 (Mo. 1962). The court stated that it took jurisdiction because the case involved “construction of the constitution” and “involved title to real estate,” saying nothing more and citing no cases. The plaintiffs claimed to own negative easements in certain land which had been acquired by the defendant commission, and sought to enjoin construction of a highway thereon, under the theory that the negative easements constituted property rights for which they were entitled to compensation.

165. *Billings v. Paine*, 319 S.W.2d 653 (Mo. 1959) (suit to try and determine title to a cemetery lot); *Kansas City Power & Light Co. v. Riss*, 312 S.W.2d 846 (Mo. 1958), discussed *supra* note 161 (dictum); *Missouri State Oil Co. v. Fuse*, 360 Mo. 1022, 232 S.W.2d 501 (1950) (dictum); *Pendleton v. Gundaker*, 370 S.W.2d 720 (Mo. Ct. App. 1963), discussed *supra* note 155. See *Winslow v. Sauerwein*, 365 Mo. 269, 282 S.W.2d 14 (1955), *trans’d from* 272 S.W.2d 836 (Ct. App. 1954), *retrans’d*, 285 S.W.2d 21 (Ct. App. 1955), in which the plaintiff sought to enjoin defendant’s alleged trespass on a claimed *private* street. The defendant counterclaimed for a declaration that the street had been dedicated to *public* use. Upon a judgment dismissing the plaintiffs’ bill and the defendants’ affirmative counterclaim, only the plaintiff appealed the overruling of his motion for a new trial. The supreme court noted that the defendants had not appealed, and that the “defendants’ counterclaim must be disregarded” in the jurisdictional determination, because by defendants’ failure to appeal or seek a new trial, the issues of the counterclaim were not “properly presented and preserved for review.” The court then held that the plaintiffs’ appeal sought only injunctive relief, and thus did not involve the title to real estate. It would seem by implication, therefore, that had the defendants’ affirmative counterclaim been presented for review, title would not have been only incidentally involved, but would have been involved for jurisdictional purposes.

5.122. *Restrictive Covenants*

It is questionable whether a restrictive covenant on land amounts to an easement, and thus is an interest in *real estate* for purposes of supreme court jurisdiction. It has been held that a combination of certain covenants, restrictions, stipulations and privileges concerning use of land and adjoining lakes constitutes an easement or easements, and that the appeal from a judgment terminating them lies in the supreme court.¹⁶⁶ The court, however, did not separate them and discuss each as constituting an easement. In *Toothaker v. Pleasant*,¹⁶⁷ the court held that covenants restricting sale, running with the land, so "complicated and entangled" the principal owners title that *title to real estate was involved*. In *Wuertenbaecher v. Feik*,¹⁶⁸ however, the court held that an action to enjoin violation of *building* restrictive covenants did not involve title, distinguishing *Toothaker* on the basis that the defendant in that case was enjoined "from selling, occupying, renting, leasing . . . to or by negroes or persons of African descent."¹⁶⁹ *Toothaker* was thus distinguished on the basis of the different types of covenants.¹⁷⁰

Because they were injunction actions, these two cases would now be heard by the court of appeals even if the restrictions concerned were easements. Presumably, however, in suits for affirmative adjudication of restrictive covenants, whether they constitute easements would be the pivotal jurisdictional question. No definitive answer is provided by the cases.

166. *Wilson v. Owen*, 261 S.W.2d 19 (Mo. 1953) (declaratory judgment action); see Comment, 41 U. Mo. BULL. L. SER. 30, 37 (1930), and cases cited therein for a discussion of restrictive covenants as equitable easements.

167. 315 Mo. 1239, 288 S.W. 38 (1926).

168. 36 S.W.2d 913 (Mo.), *trans'd*, 43 S.W.2d 838 (Ct. App. 1931).

169. *Id.* at 914.

170. For the purpose of discussion of different types of interests as possibly constituting easements (or failing to do so), *Wuertenbaecher* and *Toothaker* have been referred to as implying that a restriction on sale is an easement while a restriction on building rights is not. It is probable, however, that the primary object of the court in *Wuertenbaecher* was to follow the general rule that cases seeking injunctive relief do not properly involve title (§ 5.150). However, in order to do this the court was forced to either overrule *Toothaker*, or to distinguish it, since both were actions seeking to enjoin violations of restrictive covenants. In deciding to distinguish *Toothaker*, the court was forced to make the distinction upon the only basis available: the variant types of restrictions concerned. The court probably then, in its desire to follow other injunction cases, made a distinction without substantive difference between the building restriction in *Wuertenbaecher* and the sale restriction in *Toothaker*.

This conclusion that there was no intention to create a substantive distinction between building and sale restrictions is supported by dicta found in two cases in the courts of appeals to the effect that restrictions on building rights do constitute equitable easements. (The courts of appeals retained jurisdiction because the "involvement" requirement was not met.) *Wearen v. Woodson*, 268 S.W. 648 (Mo. Ct. App. 1924); *State ex rel. Shiek v. McElhinney*, 190 Mo. App. 618, 176 S.W. 292 (1915).

5.130. CONDEMNATION PROCEEDINGS

The entire fee of the landowner may be condemned for public purposes,¹⁷¹ but the condemnor usually is vested with only an easement.¹⁷² An easement constitutes title to real estate for appellate jurisdictional purposes,¹⁷³ so that if the easement is procedurally involved in the condemnation proceedings, jurisdiction belongs in the supreme court.

The courts have only limited functions in the proceedings by which title to land is appropriated. The “necessity” for the taking of land is left to the determination of the condemnor; it is termed a “political” or “legislative” question into which the courts will not inquire. The right of the condemnor to appropriate land to its use depends upon the statute by which the power of eminent domain, inherent in the sovereignty of the state, has been delegated to the condemnor. This right does not rest upon any judgment of the court.¹⁷⁴ Rather, when the condemnor pays the proper amount into court the title passes by operation of law, *independently of the court’s judgment*.¹⁷⁵

The condemnation judgment which exposes the title to appropriation by the condemnor is similar to a foreclosure judgment which orders the land sold. In the foreclosure action title is not *involved* because not directly *affected* by the judgment without the aid of subsequent proceedings.¹⁷⁶ Despite this reasoning, the supreme court until 1949 accepted jurisdiction in condemnation appeals. The courts did not speak of the *effect* of the judgment as such, but of the divestiture of title by the condemnation proceeding

171. State *ex rel.* Scott v. Trimble, 308 Mo. 123, 272 S.W. 66 (1925).

172. McDERMOTT, LAND TITLES AND LAND LAWS § 25.26 (1954); NICHOLS, EMINENT DOMAIN § 150 (1917).

173. See § 5.120.

174. State *ex rel.* Lane v. Pankey, 359 Mo. 118, 221 S.W.2d 195 (1949) (en banc); City of Kirkwood v. Venable, 351 Mo. 460, 173 S.W.2d 8 (1943); St. Louis Housing Authority v. Jower, 267 S.W.2d 344 (Mo. Ct. App. 1954); State *ex rel.* Highway Comm’n v. Schultz, 241 Mo. App. 570, 243 S.W.2d 808 (1951).

175. State *ex rel.* Highway Comm’n v. Day, 327 Mo. 122, 35 S.W.2d 37 (1930), (en banc), *trans’d*, 226 Mo. App. 884, 47 S.W.2d 147 (1932) (dictum):

The judgment itself is silent as to title, and we think properly so. The exercise of the power of eminent domain has been delegated by the Legislature to the state highway commission and to various municipal and public service corporations, but not to the courts When it [the condemnor] pays to the owner of the property so appropriated just compensation, the title passes by operation of law. The only function that the court performs in a condemnation proceeding is in the ascertainment of just compensation, unless the question of public use be drawn into the proceeding. It may in its judgment make pronouncement of condemnation, but, if so, its judgment in that respect is a mere empty form. Id. at 125, 35 S.W.2d at 38. (Emphasis added.)

Accord, State *ex rel.* City of St. Louis v. Oakley, 354 Mo. 124, 188 S.W.2d 820 (1945) (en banc). See also State *ex rel.* Stratton v. Maughmer, 240 Mo. App. 714, 214 S.W.2d 754 (1948).

176. See § 5.090.

as a whole, holding title *involved* because the condemnation *proceeding* affected title.¹⁷⁷ Furthermore, in the condemnation cases prior to 1949, the courts did not discuss the *dispute* requirement. Generally the title of the landowner is conceded, and the condemnor claims no interest in the land prior to the institution of the condemnation proceeding.

In 1949, the supreme court en banc overruled the decisions holding that the supreme court had jurisdiction when the right to condemn or the validity of the condemnation proceeding was assailed. In *City of St. Louis v. Butler Co.*,¹⁷⁸ the court denied jurisdiction of an appeal from a judgment of dismissal of a petition for condemnation. The court reasoned, perhaps loosely, that the title may be *affected* by a condemnation suit, but that it was not *involved* because it was not also *disputed* by the parties. The decision turned on the fact that the condemnor initially conceded the title in the landowner, and then sought to take all or part of it. It analogized the condemnation action to the enforcement of a lien, in which the plaintiff concedes the title of the defendant and seeks to encumber and foreclose it. The decision in *Butler* has been consistently followed.¹⁷⁹

The reasoning and result of *Butler* primarily touch actions brought by

177. See *City of Kirkwood v. Venable*, 351 Mo. 460, 173 S.W.2d 8 (1943), accepting jurisdiction because the issue concerned the authority of the city to condemn and the power of the court by condemnation "proceedings" to divest title. *City of St. Louis v. Butler Co.*, 358 Mo. 1221, 219 S.W.2d 372 (en banc), *trans'd*, 223 S.W.2d 831 (Ct. App. 1949), although holding title not involved in a condemnation suit because title was not in dispute, characterized title as being affected by the whole of the condemnation proceedings.

Even prior to 1949 not all condemnation appeals were properly brought to the supreme court. The supreme court had jurisdiction if the appellant attacked the legality or authority of the condemnation proceedings. *City of Kirkwood v. Venable*, *supra*; *Thomas v. Craghead*, 332 Mo. 211, 58 S.W.2d 281 (1933). The same result obtained if the right of plaintiff to condemn was assailed. *Consolidated School Dist. v. O'Malley*, 343 Mo. 1187, 125 S.W.2d 818, *trans'd from* 232 Mo. App. 1116, 115 S.W.2d 171 (1938); *State ex rel. Highway Comm'n v. Gordon*, 327 Mo. 160, 36 S.W.2d 105 (1931) (en banc). If the appeal involved only a challenge to the amount of the award, it was properly taken to the court of appeals. *State ex rel. Highway Comm'n v. Day*, 327 Mo. 122, 35 S.W.2d 37 (1930) (en banc), discussed *supra* note 175; *Missouri Power & Light Co. v. Creed*, 325 Mo. 1194, 30 S.W.2d 605 (en banc), *trans'd*, 32 S.W.2d 783 (Ct. App. 1930). The reasoning for the result when cases involve only the amount of the award seems to be that the judgment on appeal does not alter the fact of condemnation, but changes only the assessment.

178. 358 Mo. 1221, 219 S.W.2d 372 (en banc), *trans'd*, 223 S.W.2d 831 (Ct. App. 1949).

179. *E.g.*, *State ex rel. Highway Comm'n v. Barbeau*, 330 S.W.2d 832 (Mo. 1960); *State ex rel. Highway Comm'n v. Hudspeth*, 297 S.W.2d 510 (Mo.), *trans'd*, 303 S.W.2d 703 (Ct. App. 1957); *In re Off-Street Parking Facilities*, 287 S.W.2d 866 (Mo. 1956); *Phillips Pipe Line Co. v. Brandstetter*, 363 Mo. 904, 254 S.W.2d 636 (1953), *trans'd*, 241 Mo. App. 1138, 263 S.W.2d 880 (1954).

corporate bodies but apparently apply similarly to actions brought by private citizens seeking to create private or public roads. Before 1949 the cases held that jurisdiction of road cases belonged in the supreme court.¹⁸⁰ But in *Butler* these actions were treated as condemnation cases and specifically overruled.¹⁸¹ The cases overruled were actions brought pursuant to statutes¹⁸² seeking to *create* the interest necessary for the roads; the interests held by the parties were not disputed at the time of institution of the actions. *Butler*, however, does not apply to actions seeking to *declare* that the interests necessary for roads existed *before* the time action is brought. Such interests are created by certain operative facts resulting in ownership by prescription or estoppel in pais.¹⁸³ These cases present the requisite *dispute* of title to an interest in real estate at the time of institution of the action and are properly appealed to the supreme court.¹⁸⁴

The rule in *Butler* is restricted by its language to appeals that seek only the court's adjudication of the validity of the proceedings in the lower court, the right of the condemnor to appropriate, or the amount of compensation awarded.¹⁸⁵ But the injection of a question of *public use*, as distinguished from the *necessity* of the taking by the condemnor, calls for a judicial determination and imposes on the courts the additional duty of preventing the taking of private property for a private or non-public use.¹⁸⁶ Although the question of public use has not arisen as often as it did before 1945 (when

180. *Private roads*: Welch v. Shipman, 357 Mo. 838, 210 S.W.2d 1008 (1948); State *ex rel.* Palmer v. Elliff, 332 Mo. 229, 58 S.W.2d 283 (1933), *trans'd from* 43 S.W.2d 1059 (Ct. App. 1931); Richter v. Rodgers, 327 Mo. 543, 550, 37 S.W.2d 523, 526 (1931). *Public roads*: Mitchell v. Nichols, 330 Mo. 1233, 52 S.W.2d 885 (1932), *trans'd from* 20 S.W.2d 554 (Ct. App. 1929); Reeves v. Green, 282 Mo. 521, 222 S.W. 795 (1920), *trans'd from* 185 S.W. 218 (Ct. App. 1916); *In re* Critzer, 189 Mo. App. 61, 175 S.W. 104 (1915), *trans'd*, 275 Mo. 514, 205 S.W. 16 (1918).

181. City of St. Louis v. Butler Co., 358 Mo. 1221, 1224, 219 S.W.2d 372, 374 n.3 (1949) (en banc).

182. The current statutes are: *private roads*—MO. REV. STAT. §§ 228.340-480 (1959); *public roads*—MO. REV. STAT. §§ 228.010-190 (1959).

183. For a discussion of prescription and estoppel in pais see Borders v. Glenn, 232 S.W. 1062, 1064 (Mo. Ct. App. 1921), *trans'd from* 226 S.W. 915 (Mo. 1920).

184. Wann v. Gruner, 251 S.W.2d 57 (Mo. 1952) (plaintiffs, pursuant to Mo. Rev. STAT. § 228.190 (1959), sought declaration of public road on defendant's land on basis of seventy-five years prior use by public); Chapman v. Schearf, 360 Mo. 551, 229 S.W.2d 552 (1950) (en banc), *trans'd from* 220 S.W.2d 757 (Ct. App. 1949) (seeking to establish that title to easement had passed to public at the time of prior dedication of land). See generally § 5.120, "Actions Concerning Easements."

185. As to appeals in which only the compensation is attacked, *Butler* only served to affirm prior cases holding jurisdiction was properly in the courts of appeals. See note 177 *supra*.

186. State *ex rel.* Highway Comm'n v. Schultz, 241 Mo. App. 570, 243 S.W.2d 808 (1951).

new constitutional provisions expanded the scope of eminent domain¹⁸⁷), a number of decisions have cryptically implied that the existence of a question of "public use" would confer jurisdiction on the supreme court.¹⁸⁸ These unqualified implications do not advert to the fact that even if the trial court passes on the question of the public nature of the proposed use, its judgment will not necessarily affect title.¹⁸⁹ If title has not yet passed to the condemnor, the judgment of the trial or appellate court can have no direct *effect* on title, whether it is in favor of the condemnor or the condemnee. The court can only arrest the whole condemnation proceeding or sanction its continuation. If, on the other hand, the title has been appropriated by the condemnor prior to the court's determination of the public use question, and the judgment has the effect of divesting that title from the condemnor, then it could be said that the *effect* requirement is met.¹⁹⁰ The

187. Mo. CONST. art. I, § 27 for practical purposes precludes the raising of the public use issue with regard to excess condemnation; Mo. CONST. art. VI, § 21 relieves cities and counties engaged in redevelopment projects of many public use challenges. See also Mo. CONST. art. IV, § 29 regarding public use and highway access.

188. In *State ex rel. Highway Comm'n v. Schade*, 265 S.W.2d 383, 384 (Mo.), *trans'd*, 271 S.W.2d 196 (1954), it is stated: "Appellant does not question that the land is being taken for public use, therefore, title to real estate is not involved." *Accord*, *Kansas City v. National Eng'r & Mfg. Co.*, 265 S.W.2d 384, 386 (Mo. 1954), *trans'd*; *City of St. Louis v. Butler Co.*, 358 Mo. 1221, 1224, 219 S.W.2d 372, 374 (1949) (en banc), discussed in text accompanying note 178 *supra*.

189. The implications stem from a statement in *State ex rel. Highway Comm'n v. Day*, 327 Mo. 122, 35 S.W.2d 37 (1930) (en banc), discussed *supra* note 175. In *Day* the supreme court held that the divestiture of title is within the power of the condemnor, *not the courts*; then, in a statement not necessary to the decision, or even to the point it was attempting to establish, the court said: "The only function that the court performs in a condemnation proceeding is the ascertainment of just compensation, *unless the question of public use be drawn into the proceeding.*" *Id.* at 125, 35 S.W.2d at 38. (Emphasis added.)

In *City of St. Louis v. Butler Co.*, 358 Mo. 1221, 219 S.W.2d 372 (1949) (en banc), discussed *supra* note 178, the supreme court gave birth to the doctrine conceived in *Day*. In *Butler*, the court interpreted *Day* as stating that a condemnation suit "does not involve the title to real estate except incidentally, *unless the question of public use be drawn into the proceeding.*" *Id.* at 1224, 219 S.W.2d at 374. The *Day* case, however, did not hold that an issue of public use would directly involve title to real estate, but said only that such an issue would give the court another duty, *i.e.*, to decide whether the proposed use is public, while the power to affect title yet remained only in the condemnor. This public use "doctrine" of the *Butler* case was reinforced in *State ex rel. Highway Comm'n v. Schade*, *supra* note 188, at 384, in which the supreme court said "appellant does not question that the land is being taken for public use, *therefore*, title to real estate is not involved." (Emphasis added.) The statement was quoted and followed in a companion case, *Kansas City v. National Eng'r & Mfg. Co.*, 265 S.W.2d 384 (Mo. 1954), *trans'd* (action by city to condemn property for expressway).

190. This possibility is apparently ignored by the court. Even this possibility is precluded, however, if such a judgment would only order the condemnor to divest *itself*

implications in the cases, however, are not conditioned upon the time at which title has passed and thus the cases give an unsatisfactory explanation of why title is *involved* if a question of public use is raised.

Whether a question of public use gives the court power to affect the title bears only on the *effect* requirement. There remains the express basis of the *Butler* decision denying supreme court jurisdiction: there is no *dispute* about which party has title at the moment the proceedings are begun. Even if a public use question exists, title is conceded to be in one party or the other at the time the action is commenced.¹⁹¹

5.140. SUITS SEEKING SPECIFIC PERFORMANCE OF LAND CONTRACTS

Two principal conditions must exist before it may be said that there is *involvement* of title:¹⁹² (1) the judgment sought must, if rendered, directly *determine* a title issue, and (2) there must be a *dispute* between the parties about which has title at the moment suit is filed. The first requirement is satisfied in actions for specific performance of contracts for the sale of land because the judgment sought would directly *effect* a passage of title. Further, by statute, a decree of specific performance serves as a deed when recorded.¹⁹³

Satisfaction of the second requirement, however, is doubtful in specific performance cases. Legal title is conceded to be in the vendor at the

of title, since the judgment itself would not then directly operate on the title.

See *State ex rel. Stratton v. Maughmer*, 240 Mo. App. 714, 214 S.W.2d 754 (1948), which suggests that title may pass to the condemnor who may enter the land and proceed with construction even while issues raised by the owner are being litigated. In an analogous situation, however, the supreme court held title was involved in an appeal from an order overruling the landowner's motion to vacate the judgment granting condemnation after the condemnor had already taken title: "whatever title respondents have to the property sought to be condemned is derived from the condemnation proceedings." *Caruthersville School Dist. v. Latshaw*, 360 Mo. 1211, 1213, 233 S.W.2d 6, 8 (1950). The court's additional statement that the divestment of title was effected by the *judgment* rather than the acts of the condemnor conflicts with the statement in *State ex rel. Highway Comm'n v. Day*, 327 Mo. 122, 35 S.W.2d 37 (1931), discussed *supra* note 175.

191. It is possible that the courts, in implying the existence of supreme court jurisdiction when a public use question exists, mean to imply that a *constitutional question* arises automatically with such an issue. But that is not true. The *Butler* case indicates that the existence of a "public use" issue does not give supreme court jurisdiction *per se*. *City of St. Louis v. Butler Co.*, 358 Mo. 1221, 219 S.W.2d 372 (1949) (en banc), discussed in text accompanying note 178 *supra*. In *Butler*, a question of public use was the primary basis for appeal, but the supreme court held the trial court could have ruled on the issue without a construction of the constitution. See § 1.022(c).

192. *E.g.*, *City of St. Louis v. Butler Co.*, 358 Mo. 1221, 219 S.W.2d 372 (1949) (en banc), discussed text accompanying note 178 *supra*; notes 27-32, 42 *supra*.

193. MO. REV. STAT. §§ 511.280, .320 (1959). The *in rem* statutes are discussed in § 5.104.

time suit is filed.¹⁰⁴ Nevertheless, supreme court jurisdiction has been uniformly sustained without any discussion of the *dispute* requirement.¹⁰⁵ The result might be justified by use of the doctrine of equitable conversion—equitable title is held by the vendee as soon as the contract is executed—but no cases were found that rested jurisdiction upon this doctrine.

5.150. SUITS SEEKING INJUNCTIVE RELIEF

As a general rule, appeal from an action seeking only injunctive relief does not involve title to real estate,¹⁰⁶ even though the sole issue litigated

194. *E.g.*, *Barnes v. Stone*, 198 Mo. 471, 95 S.W. 915 (1906); *Miller v. St. Louis & K.C. Ry.*, 162 Mo. 424, 63 S.W. 85 (1901).

195. *Rice v. Griffith*, 349 Mo. 373, 161 S.W.2d 220 (1942), *trans'd from* 144 S.W.2d 837 (Ct. App. 1940); *Barnes v. Stone*, 198 Mo. 471, 95 S.W. 915 (1906); *Miller v. St. Louis & K.C. Ry.*, 162 Mo. 424, 63 S.W. 85 (1901); *Tant v. Gee*, 236 Mo. App. 133, 146 S.W.2d 61 (1940), *trans'd*, 348 Mo. 633, 154 S.W.2d 745 (1941); *Hawkins v. Hyde*, 219 S.W. 974 (Mo. Ct. App.), *trans'd*, 238 S.W. 1082 (Mo. 1920). Other cases holding title involved in suits for specific performance of a contract to sell but not discussing the effect upon or dispute of title: *Rookstool v. Neaf*, 377 S.W.2d 402 (Mo. 1964); *Price v. Ridler*, 373 S.W.2d 59 (Mo. 1963); *State ex rel. Highway Comm'n v. Hammel*, 372 S.W.2d 852 (Mo. 1963); *Cossairt v. Reich*, 370 S.W.2d 291 (Mo. 1963); *Kerrick v. Schoenberg*, 328 S.W.2d 595 (Mo. 1959); *Barr v. Snyder*, 294 S.W.2d 4 (Mo. 1956); *Kauffman v. Turek*, 277 S.W.2d 540 (Mo. 1955); *Farrow v. Farrow*, 277 S.W.2d 532 (Mo. 1955); *Drake v. Hicks*, 249 S.W.2d 358 (Mo. 1952); *McCroory v. Brinckman*, 379 S.W.2d 882 (Mo. Ct. App. 1964), *trans'd to* supreme court; *Herzog v. Ross*, 192 S.W.2d 23 (Mo. Ct. App.), *trans'd*, 196 S.W.2d 268 (Mo. 1946) (en banc). Although divestiture is not discussed, the supreme court has held title involved when an option to purchase is sought to be enforced. *Kalivas v. Hauck*, 365 Mo. 923, 290 S.W.2d 94 (1956); *Beets v. Tyler*, 365 Mo. 895, 290 S.W.2d 76 (1956). Title was held involved when the judgment did not grant specific performance, but gave the vendor the *option* to deliver a deed, subject to certain penalties if he failed to do so. *State ex rel. Place v. Bland*, 353 Mo. 639, 183 S.W.2d 878 (en banc), *trans'd from* 180 S.W.2d 538 (Ct. App. 1944). The supreme court here felt that because the "alternative [to the transfer of title by the defendant] was (as it might be) so onerous as to be coercive, in practical effect it [the decree] amounted to enforcing performance." *Id.* at 647, 183 S.W.2d at 884. This decision indicates a rare judicial willingness to subordinate form to substance. Technically, the "effect" requirement was probably not met because of the contingency of the final effect of the judgment on title.

When a request for specific performance is premature because the time for execution of a deed has not arisen, it has been held that title cannot be involved since the judgment could not affect the title without subsequent proceedings. *Atkinson v. Smothers*, 291 S.W.2d 645 (Mo. Ct. App. 1956). It is arguable, however, that in making this *jurisdictional* decision the court must make at least a partial determination of the merits of the petition, contrary to the refusal to anticipate the consideration of the merits in *Fisher v. Lavelock*, 282 S.W.2d 557 (Mo. 1955), *trans'd*, 290 S.W.2d 655 (Ct. App. 1956).

196. *E.g.*, *State ex rel. Northside Church of God v. Church of God*, 243 S.W.2d 308 (Mo. 1951), *trans'd*, 247 S.W.2d 542 (Ct. App. 1952); *Mueller v. Klinhart*, 164 S.W.2d 928 (Mo. 1942), *trans'd*, 167 S.W.2d 670 (Ct. App. 1943); *Mexico Refractories Co. v. Roberts*, 161 S.W.2d 420 (Mo.), *trans'd*, 237 Mo. App. 299, 167 S.W.2d 660

may be one of title. Any title investigation is made by the court for the sole purpose of reaching a decision whether to grant the injunction;¹⁹⁷ the injunction operates only *in personam* and not upon the title.¹⁹⁸ Thus, when the defendant claims the title in an action to enjoin trespass, jurisdiction on appeal is in the court of appeals, even though the trial court must decide who has title to render a judgement.¹⁹⁹

Appeals from suits to enjoin the opening of roads established by the county court were held to involve title to real estate until the case of *Dillard v. Sanderson*²⁰⁰ in 1920. There the title was held only incidentally and collaterally involved since the title interest taken for the road was established by the administrative order of the county court and could not be *affected* by the injunction action. Similarly, a suit to enjoin obstruction of public and private roads do not involve title; the judgment therein cannot establish or destroy the establishment of the title or interest necessary for the roadway.²⁰¹

(1942); *Mulik v. Jorganian*, 326 Mo. 106, 30 S.W.2d 998 (1930), *trans'd*, 37 S.W.2d 963 (Ct. App. 1931); *Nettleton Bank v. Estate of McGauhey*, 318 Mo. 948, 2 S.W.2d 771 (en banc), *trans'd*, 222 Mo. App. 1084, 11 S.W.2d 1093 (1928).

197. *State ex rel. Northside Church of God v. Church of God*, *supra* note 196; *Hall v. Gernhardt*, 171 S.W.2d 669 (Mo.), *trans'd*, 174 S.W.2d 915 (Ct. App. 1943), discussed *infra* note 201; *Mexico Refractories Co. v. Roberts*, *supra* note 196; *Nettleton Bank v. Estate of McGauhey*, *supra* note 196. See *Mexico Refractories Co. v. Pignet's Estate*, 161 S.W.2d 417, 419 (Mo. 1942), holding injunction will not lie as an original and independent action to try title, and that title is only collaterally involved in injunction actions.

198. *St. Louis-San Francisco Ry. v. Silver King Oil & Gas Co.*, 117 S.W.2d 225 (Mo. 1938), *trans'd*, 234 Mo. App. 589, 127 S.W.2d 31 (1939); *Oliver v. Wilhite*, 329 Mo. 524, 45 S.W.2d 1083 (1932), *trans'd from* 41 S.W.2d 825 (Ct. App. 1931), *retrans'd*, 55 S.W.2d 491 (Ct. App. 1932); *Boland v. Byrne*, 145 S.W.2d 755 (Mo. Ct. App. 1940).

199. *Sikes v. Turner*, 242 S.W. 940 (Mo. 1922), *trans'd*, 212 Mo. App. 419, 247 S.W. 803 (1923); *Marshall v. Reddick*, 177 S.W. 381 (Mo. 1915).

200. 282 Mo. 436, 222 S.W. 766 (1920) (en banc), *trans'd*, 206 Mo. App. 217, 227 S.W. 658 (1921), overruling *Ripkey v. Gresham*, 279 Mo. 521, 214 S.W. 851 (1919) and cases cited therein upholding supreme court jurisdiction.

201. *Hall v. Gernhardt*, 171 S.W.2d 669 (Mo. 1943), *trans'd*, 174 S.W.2d 915 (Ct. App. 1943); *State ex rel. Pulley v. Thompson*, 306 Mo. 239, 267 S.W. 605 (1924), *trans'd from* 211 Mo. App. 434, 244 S.W. 940 (1922), *retrans'd*, 277 S.W. 56 (Ct. App. 1925); *Brader v. City of Carthage*, 250 S.W. 43 (Mo.), *trans'd*, 256 S.W. 548 (Ct. App. 1923). The *Hall* case, *supra*, was purportedly overruled by the supreme court because it allegedly was a condemnation action holding title involved. *City of St. Louis v. Butler Co.*, 358 Mo. 1221, 219 S.W.2d 372 (en banc), *trans'd*, 223 S.W.2d 831 (Ct. App. 1949). However, since the *Hall* case was actually an injunction action, and the court had transferred it to the court of appeals because of *lack* of involvement of title, its overruling by *Butler* was erroneous. The *Pulley* case, *supra*, was mistakenly overruled for the same reason as the *Hall* case in *Missouri Power & Light Co. v. Creed*, 325 Mo. 1194, 30 S.W.2d 605 (en banc), *trans'd*, 32 S.W.2d 783 (Ct. App. 1930). Therefore, the *Hall* and *Pulley* cases should still be good authority.

5.160. ACTIONS TO QUIET AND DETERMINE TITLE

Since 1897, any person claiming any title, estate or interest in real estate adverse to the claim of another party may bring an action seeking a determination and adjudication of the interests disputed.²⁰² The effect of the judgment in this action is a final determination of these disputed interests.²⁰³

Generally, jurisdiction of an appeal from an action to quiet title to various disputed interests in real estate is in the supreme court.²⁰⁴ Since whatever interest is sought to be adjudicated is finally *determined* between the parties, the *effect* requirement is fulfilled.

But title must also be *disputed* in an action to determine title, if title is to be *involved*. The mere form of action to quiet title does not in itself determine jurisdiction of an appeal.²⁰⁵ If the ownership of the fee is conceded, and the parties dispute only the ownership of a lien,²⁰⁶ a lease,²⁰⁷ or an option to purchase,²⁰⁸ *title* is not "involved" because these interests do not

202. Mo. Laws 1897, at 74 (now Mo. REV. STAT. § 527.150 (1959)). Prior to 1897, only a party *in possession* of the real estate could institute an action the possible effect of which was a final adjudication of title.

203. Mo. REV. STAT. § 527.150 (1959).

204. DeBold v. Leslie, 381 S.W.2d 816 (Mo. 1964); Beauchamp v. Beauchamp, 381 S.W.2d 804 (Mo. 1964); Clemmons v. Smith, 379 S.W.2d 532 (Mo. 1964); Buschmeyer v. Eikermann, 378 S.W.2d 468 (Mo. 1964); Wolf v. Miravalle, 372 S.W.2d 28 (Mo. 1963); Lloyd v. Garren, 366 S.W.2d 341 (Mo. 1963); Parrish v. McDaniel, 358 S.W.2d 32 (Mo. 1962); Franck Bros., Inc. v. Rose, 301 S.W.2d 806 (Mo. 1957); Evans v. Buente, 284 S.W.2d 543 (Mo. 1955); Albi v. Reed, 281 S.W.2d 882 (Mo. 1955); Stull v. Johnson, 280 S.W.2d 71 (Mo. 1955); Barker v. Allen, 273 S.W.2d 191 (Mo. 1954); Tayler v. Tayler, 243 S.W.2d 310 (Mo. 1951); Northcutt v. Eager, 132 Mo. 265, 33 S.W. 1125 (1896); Missouri City Coal Co. v. Walker, 183 S.W.2d 350 (Mo. Ct. App. 1944), *trans'd*, 188 S.W.2d 39 (Mo. 1945); Juede v. Sims, 147 Mo. App. 65, 126 S.W. 251 (1910), *trans'd*, 258 Mo. 26, 166 S.W. 1048 (1914); Kelmel v. Nine, 121 Mo. App. 718, 97 S.W. 635 (1906), *trans'd*.

205. Bussen v. Del Commune, 195 S.W.2d 666, 668 (Mo. 1946), *trans'd*, 239 Mo. App. 859, 199 S.W.2d 13 (1947); Peatman v. Worthington Drainage Dist., 168 S.W.2d 57, 59 (Mo.), *trans'd*, 238 Mo. App. 64, 176 S.W.2d 539 (1943).

206. Stumpe v. City of Washington, 328 Mo. 1081, 43 S.W.2d 414 (1931) (en banc), *trans'd*, 54 S.W.2d 731 (Ct. App. 1932); Platt v. Parker-Washington Co., 235 Mo. 467, 139 S.W. 124 (1911), *trans'd*, 161 Mo. App. 663, 144 S.W. 143 (1912); Rowe v. Current River Land & Cattle Co., 167 Mo. 305, 66 S.W. 928 (1902).

207. Bussen v. Del Commune, 195 S.W.2d 666 (Mo. 1946).

208. In Fisher v. Lavelock, 282 S.W.2d 557 (Mo. 1955), *trans'd*, 290 S.W.2d 655 (Ct. App. 1956), the plaintiff sought to cancel an option to purchase. The court held title not involved notwithstanding the plaintiff's prayer that the court declare the defendant have no further right, title, or interest. The real issue was the validity of the option, which in itself transferred no interest in real estate, and jurisdiction over that issue was not determined solely on the prayer for relief. Of course, if the holder of the option had brought suit to enforce it, jurisdiction on appeal would be in the supreme court. Beets v. Tyler, 365 Mo. 895, 290 S.W.2d 76 (1956). See § 5.140, note 195 *supra* and accompanying text.

constitute title to real estate. When the full title itself or some interest constituting real estate is disputed, title thereto is "involved" in an action to quiet and determine title to that interest.²⁰⁹

5.170. CONCLUSION

The purpose of this section is to formulate a simplified statement of the tests used by the courts in determining "real estate" appellate jurisdiction, to suggest methods by which to resolve the inconsistencies which have developed and to appraise the function performed by the "real estate" category of original appellate jurisdiction.

5.171. *Analysis of "Title to Real Estate" and "Involvement"*

The constitutional mandate suggests a two-step analysis in determining if a case is properly appealable to the supreme court: (1) whether there is any interest constituting *title to real estate* in the case, and (2) whether that title to real estate is *involved* according to criteria derived from the case law.

5.171(a). *"Title to Real Estate" as the Jurisdictional Referent*

In analysis of its jurisdiction, the court first refers to the interests sought to be affected by the judgment and determines whether any constitutes title to real estate, *i.e.*, ownership of an estate in land. It is not sufficient that a question of real estate be implicated in the facts of the case; this might have been sufficient, however, had the constitutional provision been worded "involve real estate." Rather, title to a specific interest in real estate must be the subject matter of the dispute in order to confer supreme court jurisdiction. Little difficulty is generally experienced in defining what constitutes an estate in land. In addition to the fee itself, a number of interests less than total enjoyment of the land will suffice for supreme court jurisdiction. Generally the line between real estate and non-real estate interests has been drawn at easements. For example, equitable interests under a trust, life estates and easements are real estate; possession, liens and dower inchoate are not. The definitive line is clear except for certain marginal interests; there is doubt whether restrictive covenants and deeds of trust constitute real estate. Problems arising at this stage concern actions to set aside or establish muniments; in some cases the court need only point out that muniments evidence an underlying freehold, but in cases in which

209. See, *e.g.*, *Taylor v. Taylor*, 243 S.W.2d 310 (Mo. 1951) (defendant claimed life estate); *Missouri City Coal Co. v. Walker*, 183 S.W.2d 350 (Mo. Ct. App.), *trans'd*, 188 S.W.2d 39 (Mo. 1944) (dispute of the full title claimed by adverse possession).

the muniment is a deed of trust or mortgage an inconsistency has arisen resulting from the view that the mortgage or deed of trust is only a security interest—not title to real estate—in suits to *establish*, but that it evidences an estate in land in suits to *cancel*. It would seem desirable that all appeals concerning mortgages and deeds of trust be heard by one or the other of the mutually exclusive appellate courts, a result which could be effected by consistent definition of the interest evidenced by a deed of trust.

5.171(b). "Involvement" of Title to Real Estate

The second and more troublesome inquiry is whether title is *involved*. For "involvement," (1) the judgment must *directly affect* the title, and (2) the parties must ordinarily *dispute* which has title at the time the suit is filed.

It has been implied in some cases that for title to real estate to be *involved*, a judgment that would "encumber the land and cloud the clarity of defendants' otherwise perfect fee simple title" would be sufficient.²¹⁰ Were this true, suits seeking to establish liens or leaseholds would be heard only by the supreme court (which is not the case). However, the cases which imply that "encumbrance" involves title (notably "easement" cases) actually require in addition that the judgment would affirm the fact that an interest in real estate has been carved out of the fee simple estate and establish it in the claimant.

A judgment *directly affects* title if it is a finally binding *determination or adjudication* that title is in the prevailing party. Title is also directly affected if the judgment sought would *divest* any aspect of title from one of the parties without the aid of subsequent proceedings. A judgment divesting title from one party and giving it to another is a final determination and acts as a deed to the prevailing party of the title interest litigated.

Also, in order that title be involved it is generally required that the parties

210. Under the dictionary meaning of "involvement" as "entanglement" or "complication," it could be said that any judgment establishing an encumbrance "involves" the fee title. Although this rationale has been rejected by the majority of cases, it was the basis for jurisdiction in *Toothaker v. Pleasant*, 315 Mo. 1239, 1248, 288 S.W. 38, 42 (1926). The case concerned restrictive covenants which, said the court, "entangled" and "complicated" title. It has also been implied that if a decree purported to remove a cloud from plaintiffs' title, jurisdiction would be in the supreme court. *Superior Press Brick Co. v. City of St. Louis*, 152 S.W.2d 178, 183 (Mo.), *trans'd*, 155 S.W.2d 290 (Ct. App. 1941) (suit to enjoin enforcement of zoning ordinance). Among the cases rejecting this argument are *Pendleton v. Gundaker*, 370 S.W.2d 720, 723 (Mo. Ct. App. 1963), *trans'd*, 381 S.W.2d 849 (Mo. 1964) (dictum); *Chapman v. Chapman*, 185 S.W. 221, 227 (Mo. Ct. App. 1917). In the latter case the court held title was not "involved" even though "a judgment awarding plaintiff alimony as a special lien . . . fastens a charge upon the husband's interest in the property."

dispute which party has title at the time the suit is filed. For example, in suits to quiet title, the parties both claim that title previously vested in them, offer proof of their title, and seek its adjudication. Appeals from judgments in quiet title actions are properly lodged in the supreme court. In condemnation actions, however, supreme court jurisdiction fails because title is conceded to be in the condemnee.

The supreme court has not been consistent in denying jurisdiction of appeals from suits in which title is not disputed at the time the action is brought. In some cases in which title is *conceded* in the defendant—suits for specific performance of a land contract²¹¹ or to authorize divestiture of defendant's title²¹²—the supreme court has upheld its jurisdiction.

5.172. *Application of the Nettleton Bank Formula: Suggested Approach*

The test for *involvement* has been often quoted from *Nettleton Bank v. Estate of McGauhey*: “The judgment sought or rendered must be such as will determine title in some measure or degree adversely to one litigant and in favor of another, *or*, as some of the cases say, take title from one litigant and give it to another.”²¹³

In actions in which there is a dispute concerning which party has title at the time the suit is filed, the suit's object is the resolution of the controversy. The judgment sought would then only declare that one party has acquired title in the past, adversely to the contentions of the other. Such is the case, for example, in suits for partition or to quiet title. The second disjunctive in *Nettleton Bank* that the judgment sought or rendered must “take title from one litigant and give it to another” is incompatible with the *dispute* requirement. The *Nettleton Bank* disjunctive can be satisfied only when divestiture of title is the object of the claimant, who must not only concede but assert title in the other party in order that he may bring the proper parties into court. The requirements of title *dispute* and title *divestiture* are mutually exclusive and cannot both be met in the same case.

The results reached by application of the *Nettleton Bank* formula have been mainly uniform, but the imprecision of the language and its interpretation in some cases that for judgment to involve title it *must take title from one litigant and give it to another* has provided the potential for dishar-

211. § 5.140; *McCrorry v. Brinckmann*, 379 S.W.2d 882 (Mo. 1964).

212. *German Evangelical St. Marcus Congregation v. Archambault*, 383 S.W.2d 704 (Mo. 1964). Defendants were concededly the owners of burial lots but the trial decree, granting the relief prayed, authorized abandonment of the cemetery. The supreme court had jurisdiction “in view of the object of the relief sought to terminate the interests of burial lot owners in the land in question.” *Id.* at 706.

213. 318 Mo. 948, 953, 2 S.W.2d 771, 774 (en banc), *trans'd* from court of appeals, *retrans'd*, 222 Mo. App. 1084, 11 S.W.2d 1093 (1928). (Emphasis added.)

mony, and has in fact caused inconsistent results. In *Ashauer v. Peer*,²¹⁴ the plaintiff sought a judgment determining the dividing line between two adjoining tracts of land, a determination requiring construction of the two deeds that had passed title to the tracts. The supreme court transferred the appeal, holding that the judgment only accomplished the removal of an ambiguity in description and the settling of the controversy as to the location of a boundary line. In effect, the parties disputed and sought adjudication of title to the strip of land between the lines claimed by the adverse parties. When such dispute of prior vesting of title is sought to be finally adjudicated, title is usually considered to be involved, because the judgment will directly "determine the title in some measure or degree adversely to one litigant and in favor of another." However, in *Ashauer* the court denied jurisdiction on the basis of the second *Nettleton Bank* disjunctive because "the judgment did not take title from plaintiff and give it to [defendant] . . . and this because there was never any title in plaintiff except to the land described in her deed, and that title was not molested. . . . The only thing the judgment did was to settle the controversy between plaintiff and [defendant] . . . as to what land was conveyed by their respective interest."²¹⁵ It is submitted that this is the precise procedure followed in actions to quiet title, which appeals are now accepted by the supreme court.²¹⁶

If the disjunctive in *Nettleton Bank* requiring divestiture were correctly viewed as a *sufficient alternative* to the "determination" effect of the preceding clause rather than an *independent requisite* to title involvement, results such as the *Ashauer* case could be avoided. A simpler and more easily administered test for involvement could be formulated by elimination of the divestiture disjunctive of *Nettleton Bank* and modification of the dispute requirement by requiring only that the parties dispute title at the time of judgment. This definition of dispute would not change the jurisdictional result in any case in which title is presently held to be involved, whether actions to establish a prior vesting of title or to effect a title divestiture, except condemnation proceedings.

5.173. *The Category of "Title to Real Estate": An Appraisal*

The drafters of the constitution primarily intended to solve the work load problem of the supreme court when they adopted the categorical allocation

214. 346 Mo. 218, 139 S.W.2d 991 (1940), *trans'd*, 147 S.W.2d 144 (Ct. App. 1941).

215. *Id.* at 222-23, 139 S.W.2d at 992; see *City of Marshfield v. Haggard*, 300 S.W.2d 419 (Mo.), *trans'd*, 304 S.W.2d 662 (Ct. App. 1957); *Brotherton v. City of Jackson*, 385 S.W.2d 836 (Mo. Ct. App. 1965). *But see* *Grimes v. Armstrong*, 304 S.W.2d 703 (Mo. 1957).

216. Section 5.160. Garnett, *Appellate Practice, Work of the Missouri Supreme Court for 1940*, 6 Mo. L. REV. 390, 394 (1941), indicates "that the court might well have sustained its jurisdiction upon the theory that the substantive effect of the trial court's decree was to quiet the title in accordance with the clarified description; but the court

of original appellate jurisdiction.²¹⁷ By the nature of the categories which they selected—for example, felony rather than misdemeanor, and cases involving sums of money only above a specified “amount”—the drafters manifested an intention to accomplish the division on the basis of importance of cases.

Evidence of the drafters’ intent is found in the statement in an early case that “the object of the constitutional provision on this subject [title to real estate] is to appoint the supreme court as the tribunal for the final settlement of real property law in Missouri, in the hope thereby to secure *uniformity of decision* on that important branch of jurisprudence.”²¹⁸ It is questionable whether uniformity of decision in real property cases is still the underlying basis of judicial administration of this category of jurisdiction. By taking only those cases in which the judgment technically “affects” title, the supreme court has diverted to the courts of appeals many cases in which the substantive “title” issues are identical to those decided in cases fulfilling the technical “effect” requirement. The decisions of the courts of appeals on these issues, as well as those of supreme court, stand as precedent. Abandonment of a “uniformity of decision” basis for treatment of this category was accomplished by adoption of article V, section ten of the 1945 constitution, which forestalls the need of maintaining uniformity through use of article V, section three. By article V, section ten the supreme court in its discretion may review any appeal which it believes is important.²¹⁹

The significance attached to real estate law by the drafters was no doubt influenced by the prominence of real estate in a primarily agricultural economy. Land was the primary measure of wealth. It was not a mere commodity but the heritage of families which moved rarely even in the span of generations. Our present-day economy, however, is primarily industrial and urban. Questions of real estate, as a result, would seem no longer to be of more inherent importance than other questions of law.²²⁰ It is no longer acceptable that a question whether plaintiff had acquired a driveway easement did not take that view of the matter and transferred the cause to the proper court of appeals.”

217. See “Introduction,” part I, notes 12-18.

218. *Fischer v. Johnson*, 149 Mo. 433, 439, 41 S.W. 203, 205 (1897) (dissenting opinion). (Emphasis added.)

219. The significance of discretionary selection of important cases by the supreme court is discussed in the following portions of this symposium: “Conclusion,” part II; “Introduction,” part II, notes 50-54 and accompanying text; § 6.051(a), note 33; § 6.060.

220. In a study commenting on the provision in the Illinois Constitution of 1870 confining jurisdiction of the supreme court to “cases in which a . . . freehold . . . is involved,” it was stated: “Assuming that the categories selected for Supreme Court review accurately reflected the appellate review needs of a predominately agricultural community, it is doubtful that they satisfy contemporary requirements.” *A Study of the Illinois Supreme Court*, 15 U. CHI. L. REV. 107, 110 (1947).

ment of several hundred dollars value is more important than a question whether a note for a personal debt for \$14,000 was properly executed.

Without expressly acknowledging it, the supreme court has ignored the importance of the case principle. The tests of determining whether "title to real estate" is "involved" developed in the early cases and still remain with only slight modifications. The court early chose to give the word "involve" a procedural rather than a substantive content. Instead of basing jurisdiction on substantive issues raised in the course of the trial of the case, the court chose instead to consider any issue concerning title to land "collateral and incidental" which was not *procedurally* involved in the judgment. The court's interpretations of "involve" were no doubt motivated by a realization that if the supreme court were to review every case touching upon a real property question "on the way to the judgment" an overly burdensome work load would have resulted.

The cases have exhibited a gradual tendency toward restriction of supreme court jurisdiction. An early case holding title was involved in a trespass action because plaintiff's right to recover depended on maintenance of his claim of title was expressly overruled two years later because plaintiff's title could not be affected by the judgment.²²¹ A line of decisions upholding supreme court jurisdiction of suits to enjoin threatened trespasses were overruled in 1922.²²² The long line of cases holding that the supreme court had jurisdiction of appeals from ejectment actions was overruled in 1936²²³ and affirmed en banc less than two years later.²²⁴ The condemnation cases particularly illustrate the evolution of restrictive application of the "involvement" rule. In 1930, *Missouri Power & Light Co. v. Creed*²²⁵ overruled the decisions holding that suits to determine only the

221. *Fischer v. Johnson*, 349 Mo. 443, 41 S.W. 203 (1897), *trans'd*, overruling *Gray v. Worst*, 129 Mo. 122, 31 S.W. 585 (1895).

222. *Dillard v. Sanderson*, 282 Mo. 436, 222 S.W. 766 (1920) (en banc), *trans'd from court of appeals, retrans'd*, 206 Mo. App. 217, 227 S.W. 658 (1921), overruling *Ripkey v. Gresham*, 279 Mo. 521, 214 S.W. 851 (1919) (injunction to restrain establishment of public road) and cases cited therein. This holding was reinforced by *Oliver v. Wilhite*, 329 Mo. 524, 45 S.W.2d 1083 (1932), *trans'd from* 41 S.W.2d 825 (Ct. App. 1931), *retrans'd*, 227 Mo. App. 538, 55 S.W.2d 491 (1932), in which the supreme court declined jurisdiction of an appeal from a judgment granting an injunction against enforcement of an easement across plaintiff's land.

223. *Ballenger v. Windes*, 338 Mo. 1039, 93 S.W.2d 882, *trans'd*, 99 S.W.2d 158 (Ct. App. 1936), overruling *Williams v. Maxwell*, 82 S.W.2d 270 (Mo. 1935); *Tooker v. Missouri Power & Light Co.*, 336 Mo. 592, 80 S.W.2d 691 (1935), *trans'd from* 63 S.W.2d 217 (Ct. App. 1933).

224. *Gibbány v. Walker*, 342 Mo. 156, 113 S.W.2d 792 (en banc), *trans'd*, 233 Mo. App. 489, 121 S.W.2d 317 (1938), upholding *Ballenger v. Windes*, *supra* note 223.

225. 325 Mo. 1194, 30 S.W.2d 605 (en banc), *trans'd*, 32 S.W.2d 783 (Ct. App. 1930).

amount of compensation in condemnation cases were properly appealable to the supreme court. Finally, in *City of St. Louis v. Butler Co.*,²²⁶ in 1949, the supreme court eliminated virtually all condemnation cases from its "title to real estate" docket because of lack of a technical "dispute," notwithstanding that "a condemnation suit does take part (or sometimes all) of the landowner's title and gives it to the condemnor for just compensation."²²⁷

The *Butler* decision is the high-water mark of the supreme court's limitation of its jurisdiction. The supreme court has reached a position of strict application of its tests for involvement of title to real estate in order to relieve itself of hearing any more cases than absolutely necessary.

The importance of the case basis for the inclusion of real estate as a categorical allocation of supreme court cases has been virtually abandoned as a factor in the court's threshold determination of jurisdiction. Similarly, uniformity of decision upon substantive real property issues has been necessarily eliminated as a criterion in jurisdictional decision. It is submitted that the technical rules purportedly derived to effect these purposes have become the ends in themselves, and that the real estate category as now conceived performs only an allocation of cases. The trend of the decisions reflects a feeling that the category is burdensome and a judicial tendency to eliminate the appeals of right in real estate cases granted by article V, section three.

226. 358 Mo. 1221, 219 S.W.2d 372 (en banc), *trans'd*, 223 S.W.2d 831 (Ct. App. 1949), overruling *Highway Comm'n v. Gordon*, 327 Mo. 160, 36 S.W.2d 105 (1931) (en banc), and cases cited in *Butler*, *supra*, at 1224, 219 S.W.2d at 374 n.3. *But cf.* *German Evangelical St. Marcus Congregation v. Archambault*, 383 S.W.2d 704 (Mo. 1964), in which it was *conceded* that defendants held title to an easement—burial lots—but the supreme court had jurisdiction of an appeal from the judgment terminating their easement.

227. *City of St. Louis v. Butler Co.*, *supra* note 226, at 1225, 219 S.W.2d at 375.