CHAPTER NINE

*"and until otherwise provided by law, in all cases where the amount in dispute, exclusive of costs, exceeds the sum of seventy-five hundred dollars."**

9.010. INTRODUCTION

Since the constitutional amendment of 1884, the Missouri Supreme Court has had original appellate jurisdiction based on "amount in dispute."[1] The discussion in this chapter of the cases involving jurisdictional "amount" has two objects: first, the cases in which "amount" jurisdiction was an issue decided by the courts will be discussed and classified; second, the development of the rules will be traced to illustrate the problems inherent in an appellate system with original appellate jurisdiction based on the "amount in dispute."

Determining the constitutional purpose for establishing the enumerated categories of original supreme court jurisdiction is useful to a study of the "amount" rules developed by the courts. If the function of exclusive monetary jurisdiction is to insure that only the supreme court has jurisdiction in appeals involving the requisite "amount," it would seem that the rules defining "amount in dispute" should result in supreme court jurisdiction if any reasonable basis exists for finding the requisite "amount." However, if the purpose of setting an "amount" limit on jurisdiction is merely to divide the appellate case load between the two appellate levels, the criteria employed by the courts to define jurisdictional "amount" should be flexible enough to permit definitions of "amount in dispute" which aid in dividing the case load according to the work capacities of the two appellate

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* The present level is $15,000.

1. See "Introduction," text accompanying notes 10, 17. MO. CONST. art. VI, § 12 (1875) provided that appeals should lie from the St. Louis Court of Appeals to the supreme court in cases where the "amount in dispute" exceeded $2,500. The amendment of 1884, which created the mutually exclusive system of original appellate jurisdiction, gave the general assembly power to increase or diminish the pecuniary limit of jurisdiction of the courts of appeals. Thereafter, the limit was increased to $4,500 (Mo. Laws 1901, at 107-08), then to $7,500 (Mo. Laws 1909, at 397). The present limit of $15,000 is set by MO. REV. STAT. § 477.040 (1959): "The courts of appeals of Missouri shall have jurisdiction of appeals in all cases where the amount in dispute, exclusive of costs, shall not exceed the sum of fifteen thousand dollars." The provisions of the 1875 constitution as amended which related to the jurisdiction of the appellate courts were substantially re-enacted by the current 1945 constitution. Therefore, jurisdictional authority prior to 1945 is valid in current cases. Trokey v. United States Cartridge Co., 214 S.W.2d 526 (Mo. 1948), *trans'd*, 222 S.W.2d 496 (Ct. App. 1949).

levels. Although little valuable information exists to explain the original purpose of "amount" jurisdiction,[2] it presently is used to accomplish a numerical division of the appellate case load.[3]

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2. The use of an "amount" criterion for appellate jurisdiction seems to be a peculiarly American invention. The idea was first suggested to limit the appeals from colonial courts to the Privy Council, but by the eighteenth century amount jurisdiction was popular as a limitation on appeals to state supreme courts. See POUND, APPELLATE PROCEDURE IN CIVIL CASES 145, 146 (1941).

It has generally been assumed that cases meeting the jurisdictional "amount" comprehend the most "important" cases and that this was the general purpose for the category. For a statement that the "amount" jurisdiction imposed on early federal courts was to limit jurisdiction to "important" cases, see Note, *Federal Jurisdictional Amount: Determination of the Matter in Controversy,* 73 HARV. L. REV. 1369 (1960).

3. This conclusion derives from the APPELLATE PRACTICE COMM., REPORT OF SPECIAL COMM. ON MONETARY JURISDICTION OF APPELLATE COURTS (January 21, 1957) (as amended), on file with Missouri Bar Association, Jefferson City, Mo. [hereinafter cited as APPELLATE PRACTICE REPORT]. The report is compiled in four phases: (1) Progress Report filed January 21, 1957; (2) Supplemental and Final Report filed January 24, 1958; (3) Amendment to (2) offered by Judge Justin Ruark; and (4) Additional Statistical Information, January 22, 1959.

The purpose of the report was to consider three problems of appellate jurisdiction: (a) advisability of increasing the amount limit of the supreme court's appellate jurisdiction; (b) methods of eliminating the "present uncertainties" in the phrase "amount in dispute"; and (c) methods of clarifying other definitional problems in the supreme court's original appellate jurisdiction.

Basically, the report is a study of the work loads of Missouri appellate courts with the purpose of equalizing the loads by reducing the supreme court's load. The reporters—lawyers and appellate judges—felt that the most appropriate guide for measuring distribution of work load was the number of written opinions filed per man per year in each court. The study compiled these figures:

	Written opinions filed per man per year		
Supreme Court	St. Louis Ct. App.	Kansas City Ct. App.	Springfield Ct. App.
	Five year period (1952-56)		
22.52	23.1 (1956-57)	14.6	19.33
23.7	21.08 (1957-58)	14.6	20.6
23.5	19.8	19.8	19.7

The figures do not reflect administrative work peculiar to the supreme court; because of its work in processing writs, the judges of that court actually handle the equivalent of 3.2 more opinions per man annually. The reporters concluded that the difficulty of writing appellate decisions makes it infeasible for an appellate judge to have a work load greater than 22 opinions per year.

The tentative conclusion of the initial report was that inequality existed in the work load of the various courts of appeals (note that the figures for the later years show a trend toward uniformity) and that equalization of their work load was a prerequisite to

The thesis of this chapter is that the supreme court has used flexible criteria to develop rules designed to restrict the load resulting from its original "amount" jurisdiction in two principal ways: (1) by permitting its jurisdiction to be lost if events after the taking of the appeal reduce an "amount" which had been sufficient and (2) by so increasing the burden of establish-

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an increase of the supreme court's monetary limit with the corresponding shift of case load to courts of appeals. The following were considered as devices to effect equalization:

Redistribution through boundary changes

This proposal was deemed inefficacious because figures from the St. Louis Court of Appeals show that 76 per cent of its docket came from the City and County of St. Louis. In addition, the flow of cases from boundary counties is inconstant and unpredictable.

Transfer of Judicial Personnel

A plan was conceived whereby cases involving an amount between $7,500 and $15,000 would be filed in the supreme court where transfer to the appropriate court of appeals could be initiated if that court's docket permitted. This form of concurrent jurisdiction was deemed to present constitutional problems as well as practical administrative difficulties. Moreover, because MO. CONST. art. V, § 13 would preclude transfer across boundaries to a court of appeals whose docket was not then crowded, its value was questionable.

CONCLUSION OF THE INITIAL AND FINAL REPORTS

The first conclusion was that equalization of appellate work loads was a complex problem which could be satisfactorily accomplished by no single method. It was recognized that the work load of the supreme court continued to be excessive, partly from inflation which by decreasing the value of the dollar caused a corresponding increase in the number of "amount" cases and partly from the court's administrative work which could not be alleviated. The scheme of concurrent jurisdiction was rejected because it was "cumbersome and uncertain and difficult of administration with the existing facilities." Outright increase of the monetary limit to $15,000 was recommended.

The report noted that "much effort is spent by the appellate judges in determining this [amount in dispute] jurisdictional question that might otherwise go into a consideration on the merits." An increase to $15,000 was thought to be the only way to effectively lessen the "troublesome and wasteful" results inherent in interpreting the phrase "amount in dispute." Raising the amount was seen as a valuable aid to the court in eliminating the workmen's compensation cases which formed a large proportion of its work load, involved tricky jurisdictional considerations, and exceeded the then jurisdictional limit but not the proposed limit of the courts of appeals. Appended data showed that the six-year average of the number of cases exceeding the then limit but within the proposed limit of the courts of appeals was 53.0. This data is contained in the Appendices to this treatise.

Recommendation was also made for the distribution of pamphlets containing standard rules and authorities for determining general jurisdictional issues. This would be a means of removing then existing jurisdictional confusion.

Finally, it was realized that the increase would cause an influx of cases to the courts of appeals which would require more manpower. Therefore, it was recommended that the increase should be accompanied by authorization to increase the number of commissioners on the courts of appeals.

ing the "amount in dispute" as to make it impossible to satisfy in large classes of cases.

It has been necessary to develop restrictive rules because the definition of jurisdiction in article V, section three, potentially requires jurisdiction in the supreme court based on "amount" in such a large number of cases that non-restrictive rules would give an impossibly disproportionate work load to the supreme court. However, the restrictive tests which have been developed are critical and difficult to employ, resulting in numerous jurisdictional transfers.

9.011. *Affirmative Appearance on the Record*

The general rule is that monetary appellate jurisdiction is determined "by the amount that remains in dispute between the parties on the appeal, and subject to determination by the appellate court."[4] In measuring the "amount," the courts consider (1) the claims of the parties at trial, (2) the amounts of each part of the judgment entered, and (3) the parts of the judgment from which appeal is taken. To determine jurisdictional "amount" in a specific case they utilize precise formulae which conclusively fix the "amount" in the standard and uncomplicated cases. The courts also consider the possible qualifications which may effect an increase or decrease.[5]

The vehicle for this determination is an examination of the whole trial record from which the "amount" must affirmatively appear without conjecture or speculation.[6] The court's restrictive view of its jurisdiction is manifested by the evolution of the affirmative appearance requirement with the severe burden it places upon the appellant seeking to establish jurisdiction.[7]

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4. State *ex rel.* Lingenfelder v. Lewis, 96 Mo. 146, 148, 8 S.W. 770, 770-71 (1888).

5. The qualifications for suits involving a claim for a money judgment are considered individually in § 9.020. The application of the general rule to suits for non-money relief forms § 9.033.

6. See, *e.g.*, Nemours v. City of Clayton, 351 Mo. 317, 172 S.W.2d 937, *trans'd*, 237 Mo. App. 497, 175 S.W.2d 60 (1943); Higgins v. Smith, 346 Mo. 1044, 144 S.W.2d 149 (1940) (en banc), *trans'd*, 150 S.W.2d 539 (Ct. App. 1941).

7. See, *e.g.*, Molasky v. Lapin, 384 S.W.2d 613 (Mo. 1964), *trans'd*; Esmar v. Haeussler, 341 Mo. 33, 106 S.W.2d 412 (1937), *trans'd*, 234 Mo. App. 217, 115 S.W.2d 54 (1938); Hanssen v. Karbe, 106 S.W.2d 415 (Mo. 1937), *trans'd*, 234 Mo. App. 663, 115 S.W.2d 109 (1938). In cases which pose difficulties in fixing a definite sum certain, the requirement that the "amount in dispute" be conclusively shown, when strictly applied, presents the appellant with a burden impossible to sustain. See particularly "non-money" judgments § 9.030.

The approach of the federal courts to the burden of establishing amount jurisdiction is noteworthy even though it is trial rather than appellate jurisdiction, a difference which

The court has ruled that parties to an appeal cannot confer appellate jurisdiction by agreement, consent or waiver[8] because "under a constitutional government the acts of a court not within the powers prescribed by the organic law are usurpations, and when done by a court of last resort may become a grave menace."[9] Therefore, the court will "pierce the shell of the pleadings, proofs, record and judgment"[10] to protect the constitutional integrity of its jurisdiction.

9.012. *Jurisdictional Statement in Brief*

In order to require an appellant to "advise the court of the basis of his choice" of appellate forum and to insure that the confusion attending that choice may "be lessened and more quickly ended," the supreme court in 1940 instituted a rule compelling inclusion of a statement of jurisdiction in the appellant's brief.[11] The present rule requires an appellant to make a "concise statement of the grounds on which jurisdiction of the review court is invoked."[12] To enforce its rule, the court may dismiss any appeal represented by a brief with an inadequate statement.[13] In practice, however, the court is generally unwilling to impose this "harsh penalty,"[14] although it

is minimized when the appellate court considers the record of an appeal from a directed verdict. The federal approach places the burden upon the party asserting jurisdiction to establish essential jurisdictional facts, but when that jurisdiction is challenged it will not be defeated unless it affirmatively appears that jurisdiction *does not* exist. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 289 (1938). Here, the Supreme Court noted its policy of rigorous restriction of diversity jurisdiction but nevertheless was unwilling to impose as strict a burden on the party asserting jurisdiction as the Missouri Supreme Court has done.

8. *E.g.*, Drew v. Platt, 329 Mo. 442, 44 S.W.2d 623 (1931), *trans'd*, 52 S.W.2d 1041 (Ct. App. 1932); *In re* Wilson's Estate, 320 Mo. 975, 8 S.W.2d 973 (1928), *trans'd*, 16 S.W.2d 737 (Ct. App. 1929); Pyle v. University City, 318 Mo. 856, 1 S.W.2d 799 (1927), *trans'd*; *In re* Bennett's Estate, 243 S.W. 769 (Mo. 1922), *trans'd*, 249 S.W. 685 (Ct. App. 1923).

9. Vordick v. Vordick, 281 Mo. 279, 284, 219 S.W. 591, 592, *trans'd*, 205 Mo. App. 555, 226 S.W. 59 (1920). Mo. CONST. art. V, § 11 provides that a court must transfer any appeal over which it does not have jurisdiction. This provision first appeared in the 1945 constitution (see "Introduction," notes 40-42 and accompanying text) but the courts have always considered it their initial duty to determine jurisdiction and transfer any appeal if they do not have proper jurisdiction. As a result, they will raise the question of jurisdiction sua sponte.

10. Ashbrook v. Willis, 338 Mo. 226, 89 S.W.2d 659, 660 (1936), *trans'd*, 231 Mo. App. 460, 100 S.W.2d 943 (1937).

11. See (Judge) Douglas, *Comments on Appellate Jurisdiction*, 10 J. Mo. B. 84, 85 (1939), which remarks upon the delay inherent in the Missouri system of exclusive appellate jurisdiction.

12. Mo. SUP. CT. R. 83.05(a), formerly numbers 15 and 1.08 (a) (1).

13. Mo. SUP. CT. R. 83.09.

14. *E.g.*, Trokey v. United States Cartridge Co., 214 S.W.2d 526, 527 (Mo. 1948), *trans'd*, 222 S.W.2d 496 (Ct. App. 1949); Hicks v. La Plant, 145 S.W.2d 142 (Mo.

has frequently expressed dissatisfaction with a perfunctory jurisdictional statement which demonstrates merely "formal compliance" with the "spirit and purpose" of the rule.[15] Although the supreme court has generally not commented on jurisdictional statements which it deemed exemplary,[16] one may infer from its language that a statement at least should contain the precise facts which form the legal issue or dispute and the theory of action[17] supported by case citations of jurisdictional authority.[18] Yet there appear to be a large number of briefs filed containing merely conclusionary statements, and it is likely that such unsatisfactory statements contribute significantly to jurisdictional transfers.[19]

1940), *trans'd,* 236 Mo. App. 299, 151 S.W.2d 104 (1941). See generally Comment, 23 WASH. U.L.Q. 565 (1938).

15. A conclusionary kind of statement—"the amount 'in dispute' exceeds . . . $7,500" —was condemned in Langhammer v. City of Mexico, 327 S.W.2d 831, 833 (Mo. 1959); Jameson v. Fox, 364 Mo. 237, 260 S.W.2d 507 (1953); Bachler v. Bachler, 339 S.W.2d 846 (Mo. Ct. App. 1960); see Mo. SUP. CT. R. 83.05(b), comment. For a statement of the basis of the court's policy, see MISSOURI BAR ASS'N, MISSOURI APPELLATE PRACTICE 36-37 (1963). The first expression of the purpose of the rule in a decision was Hicks v. La Plant, *supra* note 14, in which the court described the purpose as "primarily for the benefit of litigants, to the end that the question of appellate jurisdiction be given some thought when appeals are taken, and thus avoid the delay of having cases come to [the wrong] court before finding that [the] court is without appellate jurisdiction." Emerson Elec. Mfg. Co. v. City of Ferguson, 359 S.W.2d 225 (Mo. 1962), *trans'd,* 376 S.W.2d 643 (Ct. App. 1964), illustrates the fate of counsel who have not anticipated a jurisdictional issue: "While none of the parties initially questioned the jurisdiction of this court, we have entertained substantial doubt that we have jurisdiction. We questioned counsel *at some length on this score during the oral argument . . . .*" *Id.* at 226. (Emphasis added.)

16. For a case in which the court did comment favorably upon a jurisdictional statement, see Bartlett v. Green, 352 S.W.2d 17, 19 (Mo. 1961). Evidence of the court's desire that the basis for jurisdiction be adequately investigated is furnished by Mo. SUP. CT. R. 83.05(b) which suggests a form to guide attorneys.

17. See, *e.g.,* Bartlett v. Green, *supra* note 16.

18. See, *e.g.,* Maxwell v. Andrew County, 347 Mo. 156, 161, 146 S.W.2d 621, 623 (1940).

19. That inadequate statements are a large factor in the number of transferred appeals was indicated by a random sample check (not a statistical computation which is beyond the scope of this chapter) of the briefs (on file in the Washington University Law Library) in which appellate transfers occurred. The result, although not offered as documentary evidence, revealed a high correlation between a brief's non-compliance with the "spirit and purpose" of the court rule and transfer by an appellate court.

One example of an insufficient jurisdictional statement leading to confusion, although it did not result in a transfer, is in Brief for Appellant, pp. 1-2, Freed v. Feeney, 374 S.W.2d 75 (Mo. 1964): "The jurisdiction of this Court is invoked because this case involves the validity of such [special levee district] assessments which amount to an estimated amount of $120,000." This statement did not specify whether jurisdiction was based on the "amount" or on construction of revenue laws but was apparently left ambiguous because of the difficult jurisdictional problem. The court failed to condemn the statement and made an initial statement in its opinion that was worded similarly to the

9.013. *Superintending Power*

In addition to the categories of exclusive appellate jurisdiction, the constitution gives the supreme court "superintending power" over the courts of appeals with the concomitant power to hear and issue original remedial writs.[20] This form of original jurisdiction provides the court with a direct means to control the jurisdiction of all appeals filed in the state.

Upon application for a writ of mandamus, the supreme court can compel the court of appeals to transfer an appeal presently before it by deciding that the court of appeals is without jurisdiction.[21] It can also use mandamus to compel a court of appeals to hear an appeal.[22] With its writ of certiorari, the supreme court can quash a decision of a court of appeals made without jurisdiction.[23]

The faculty of the supreme court to supervise and enforce its jurisdictional decisions invests the litigants with a responsibility to act by application for an extraordinary writ if the appeal is filed with the wrong court. Because a decision in an appellate court made without jurisdiction is of no effect, a litigant—respondent or appellant—could have a favorable decision later appealed to the court that in fact has jurisdiction.[24] The supervisory power

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appellant's statement so that it also failed to designate upon which category jurisdiction was based. For a discussion of the resulting confusion, see § 3.040, text accompanying note 45.

20. Mo. CONST. art. V, § 4. Mo. CONST. art. VI, § 3 (1875) listed the writs that the supreme court could use to implement its supervisory power. The present section uses the general language "issue and determine original remedial writs."

21. Fleischaker v. Fleischaker, 338 Mo. 797, 92 S.W.2d 169 (1936) (writ denied); State *ex rel.* Union Elec. Light & Power Co. v. Reynolds, 256 Mo. 710, 165 S.W. 810 (1914) (writ issued); State *ex rel.* Missouri Pac. Ry. v. Broaddus, 212 Mo. 685, 111 S.W. 508 (1908) (writ issued); State *ex rel.* Hartley v. Rombauer, 130 Mo. 288, 32 S.W. 660 (1895) (writ issued); King v. Gill, 107 Mo. 44, 17 S.W. 758 (1891) (writ denied).

Prohibition will also lie to prevent the court of appeals from deciding a case without jurisdiction. State *ex rel.* Wurdeman v. Reynolds, 275 Mo. 113, 204 S.W. 1093 (1918) (en banc); State *ex rel.* Federal Lead Co. v. Reynolds, 245 Mo. 698, 151 S.W. 85 (1912) (en banc); State *ex rel.* Lingenfelder v. Lewis, 96 Mo. 146, 8 S.W. 770 (1888).

22. State *ex rel.* Wabash Ry. v. Shain, 341 Mo. 19, 106 S.W.2d 898 (1937); State *ex rel.* Heye v. St. Louis Court of Appeals, 87 Mo. 569 (1885).

23. State *ex rel.* Brenner v. Trimble, 326 Mo. 702, 32 S.W.2d 760 (1930); State *ex rel.* Long v. Ellison, 272 Mo. 571, 199 S.W. 984 (1917) (en banc). A decision of the court of appeals acting without jurisdiction will be quashed even though the court got the appeal by transfer from the supreme court. State *ex rel.* Brown v. Hughes, 345 Mo. 958, 137 S.W.2d 544 (1940) (en banc). Also, it is irrelevant that the party seeking a writ to quash is the one who caused the appeal to go to the court of appeals, or that he waited to apply until that court decided against him. State *ex rel.* Brenner v. Trimble, *supra.*

24. State *ex rel.* Brenner v. Trimble, *supra* note 23, is a clear expression of the supreme court's general views that jurisdiction is a kind of objective fact, that the con-

is also a natural vehicle which the court has used effectively for promulgation and implementation of uniform jurisdictional "rules." Nevertheless, the supreme court may not assume appellate jurisdiction it otherwise would not have in order to give effect to its supervisory power, even when the court of appeals is incapable of rendering a decision, because the "powers of each [court] are absolute if exercised within the [jurisdictional] limits."[25] However, in spite of each court's autonomy, the supreme court has the power and duty to instruct the court of appeals on the proper jurisdictional

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sent or acquiescence of the parties is irrelevant (see cases cited note 8 *supra*), and that the act of a court without jurisdiction is a nullity. This policy necessarily precludes jurisdiction based on estoppel. One supreme court case, however, used estoppel to uphold jurisdiction in the court of appeals when that court apparently acted without jurisdiction. In Minter v. Toole-Campbell Dry Goods Co., 204 S.W. 725 (Mo. 1918), *trans'd from* 187 Mo. App. 16, 173 S.W. 4 (1915), *retrans'd*, 207 S.W. 840 (Mo. 1919), the court stated:

> Now at this late date the plaintiff contends that he appealed the case to the wrong court and waged his battle in the wrong forum. *Well, suppose he did; it was his own wrong, and he should not be permitted to take advantage of his own premeditated wrong,* after speculating with the chances of victory in the Court of Appeals. *Id.* at 726. (Emphasis added.)

The court in *Minter* impliedly recognized the two competing policies attendant on a decision as to the permanence of the jurisdictional fact. If the court permitted jurisdiction to be waived, *i.e.*, deferred to consent of the parties, the language of the constitution establishing the distribution of jurisdiction—whatever the end that grant sought to effect—would be meaningless. Yet, if the losing party in the appellate court in every case attempted to void the decision by asserting that the court acted without jurisdiction, the system would be burdened with a steady flow of jurisdictional decisions. In effect, a decision by a court would not be final until its jurisdiction had been repeatedly tested, with delay in satisfying judgments increased measurably. While this is an inherent problem in exclusive jurisdiction, it appears that the courts have been able to control it. No other case has foreclosed "amount" jurisdiction on an estoppel theory, and the only subsequent mention of *Minter* was by a court of appeals which found it "unnecessary to consider whether the . . . defendant is estopped" from asserting jurisdiction. McKim v. Metropolitan St. Ry., 209 S.W. 622 (Mo. Ct. App. 1919). Certainly, the courts constantly assert that consent or acquiescence cannot "waive" jurisdiction, and the frequent jurisdictional decisions are not affected by facts similar to those present in the *Minter* case. See, *e.g.*, State *ex rel.* Brown v. Hughes, 345 Mo. 958, 137 S.W.2d 544 (1940) (en banc); State *ex rel.* Brenner v. Trimble, 326 Mo. 702, 32 S.W.2d 760 (1930) (issue not raised by respondent until after adverse decision); *In re* Bennett's Estate, 243 S.W. 769 (Mo. 1922), *trans'd*, 249 S.W. 685 (Ct. App. 1923); *cf.* Kendrick v. Sheffield Steel Corp., 166 S.W.2d 590 (Mo. Ct. App. 1942) (jurisdiction challenged in motion for rehearing by asserting trial court failed to enter final judgment).

Mandamus is also appropriate for use by either party to cause the court of appeals to transfer a case which it decided without jurisdiction. Fleischaker v. Fleischaker, 338 Mo. 797, 92 S.W.2d 169 (1936).

25. State *ex rel.* Allen v. Trimble, 321 Mo. 230, 234, 10 S.W.2d 519, 520 (1928) (en banc).

rules to be applied whenever considering an application for a remedial writ or an appeal transferred to it by the court of appeals.[26]

9.014. *Doubt as a Basis for Transfer*

In cases in which the jurisdictional issue presented to the court of appeals was not capable of easy solution or in which the applicable test used previously by the supreme court was contradictory, the courts of appeals developed the policy of transferring to the supreme court "to have the question of jurisdiction set finally at rest."[27] Whether this policy is consistent with the concept of mutually exclusive jurisdiction requires one to question whether the supreme court ultimately should decide *all* jurisdictional issues. The supreme court's supervisory power to determine whether the appellate court is acting with jurisdiction would support the position that the court of appeals could, consistently with the concept of exclusive jurisdiction, cause the supreme court to decide questions of jurisdiction.[28]

26. In State *ex rel.* Allen v. Trimble, *supra* note 25, the court was presented with an application for mandamus to cause the court of appeals to transfer a case pending before the latter. The peculiar facts were that the court of appeals had reached a tentative ruling in favor of relator, but rearguments were ordered. However, one judge disqualified himself on bias and the judge assigned to prepare the opinion became incapacitated, leaving no quorum in the court. Relator argued that the supreme court's supervisory power was sufficient to enable it to decide the case to prevent the plaintiff's being left remediless. The court held that it could not invade the "absolute jurisdiction" of the court of appeals even though it was incapable of being exercised. The unfortunate result in this case has two alternative explanations. This may be simply an unduly harsh view of the court's jurisdictional prerogatives confined to this isolated situation, or if such a restriction of the exercise of its supervisory power is generally necessary to maintain the integrity of its jurisdiction, such results are an inherent difficulty in a mutually exclusive appellate jurisdictional system.

27. Gartside v. Gartside, 42 Mo. App. 513, 515 (1890). Followed by Mayor v. Mayor, 340 S.W.2d 172 (Mo. Ct. App. 1960) (doubt implied); Nickels v. Borgmeyer, 246 S.W.2d 382 (Mo. Ct. App. 1952) (express); Hogue v. St. Louis-San Francisco Ry., 12 S.W.2d 103 (Mo. Ct. App. 1928) (express); Craton v. Huntzinger, 177 S.W. 816 (Mo. Ct. App. 1915); Bach v. Hammett, 61 Mo. App. 457 (1895). For a statement of the courts of appeals' "established policy" of resolving doubts against their jurisdiction in "title to real estate" cases, see Chapman v. Schearf, 220 S.W.2d 757 (Mo. Ct. App. 1949), *trans'd,* 360 Mo. 551, 229 S.W.2d 552 (1950) (en banc); *accord, In re* Schell's Estate, 370 S.W.2d 816 (Mo. Ct. App. 1963), *trans'd,* 381 S.W.2d 864 (Mo. 1964); Dillen v. Edwards, 254 S.W.2d 44 (Mo. Ct. App.), *trans'd,* 263 S.W.2d 433 (Mo. 1953); Null v. Howell, 40 Mo. App. 329 (1890), *trans'd,* 111 Mo. 273, 20 S.W. 24 (1892). For examples of transfer because of doubt in "constitutional question" cases, see State v. Becker, 268 S.W.2d 51 (Mo. Ct. App.), *trans'd,* 364 Mo. 1079, 272 S.W.2d 283 (1954); *accord,* City of Olivette v. Graeler, 329 S.W.2d 275, 281 (Mo. Ct. App. 1959), *trans'd,* 338 S.W.2d 827 (Mo. 1960) (en banc).

28. It is also arguable that the duty to transfer (Mo. CONST. art. V, § 11) would support the practice by the court of appeals of transferring when in doubt. Having an absolute duty to transfer when it is without jurisdiction, the court of appeals *could* feel obligated to do so when the issue shades into a penumbra.

But a policy of deference toward the court of highest appeal (albeit for the laudable purpose of achieving uniformity in the criteria to ascertain "amount in dispute") is contrary to the usual practice whereby "doubt" concerning jurisdiction is resolved in favor of the court of general jurisdiction.[29] Further, it is anomalous that the court of appeals should uniformly seek a jurisdictional determination by the supreme court, ostensibly to conclude the matter,[30] when courts of appeals have held that the supreme court decisions on jurisdiction are not res judicata.[31] While most cases transferred for "doubt" by the courts of appeals express uncertainty about the jurisdictional rule or law, those courts also transfer appeals in which they cannot decide the factual problem of jurisdiction. In these cases they are competing with the supreme court which *also* transfers to the courts of appeals all "doubtful cases" in which it does not affirmatively appear that supreme court jurisdiction exist.[32]

29. In City of Poplar Bluff v. Poplar Bluff Loan & Bldg. Ass'n, 369 S.W.2d 764 (Mo. Ct. App. 1963), the court of appeals declined to transfer a case in which jurisdiction was "somewhat cloudy" because it recognized it was a court of general jurisdiction, and the supreme court's jurisdiction was not clear. See, *e.g.,* Tinney v. McClain, 76 F. Supp. 694 (N.D. Tex. 1948), indicating a policy in the federal system of having courts of general jurisdiction decide "doubtful" cases.

30. In some cases presented to the supreme court by the appellate court stating that the jurisdictional issue was unclear and causing difficulty, the supreme court has avoided a decision on the knotty jurisdictional issue and retransferred by noting the absence of some technical requirement for presentation of the issue on which the doubtful jurisdiction turned. See, *e.g.,* Mayor v. Mayor, 340 S.W.2d 172 (Mo. Ct. App. 1960), *trans'd,* 349 S.W.2d 60 (Mo.), *retrans'd,* 351 S.W.2d 810 (Ct. App. 1961) (whether appraisal fees were "costs" unanswered by supreme court); Nickels v. Borgmeyer, 246 S.W.2d 382 (Mo. Ct. App. 1952), *trans'd,* 256 S.W.2d 560 (Mo.), *retrans'd,* 258 S.W.2d 267 (Ct. App. 1953) (whether counterclaim "merged" "amounts in dispute" not answered by the supreme court).

31. The earliest cases had held that decisions by the supreme court were res judicata on the issue of jurisdiction and that the courts of appeals were bound to hear an appeal which the supreme court decided was within the courts of appeals jurisdiction. Wolff v. Matthews, 39 Mo. App. 376 (1890), *trans'd from* supreme court; Mills v. Williams, 31 Mo. App. 447 (1888), *trans'd from* supreme court. *But see* Hilton v. City of St. Louis, 63 Mo. App. 179, *trans'd from* 129 Mo. 389, 31 S.W. 771 (1895), *retrans'd* (court of appeals retransferred because supreme court had "overlooked" a basis for its jurisdiction). In recent cases, however, the court of appeals has declined to accept jurisdiction of appeals sent to them by the supreme court and has retransferred to the supreme court which decided the case. The leading case is Odom v. Langston, 237 Mo. App. 721, 170 S.W.2d 589, *trans'd from* 159 S.W.2d 686 (Mo. 1942), *retrans'd,* 351 Mo. 613, 173 S.W.2d 826 (1943); *accord,* Corp v. Joplin Cement Co., 323 S.W.2d 385 (Mo. Ct. App. 1959), *trans'd from* supreme court, *retrans'd,* 337 S.W.2d 252 (Mo. 1960) (en banc); Briley v. Thompson, 285 S.W.2d 27 (Mo. Ct. App. 1955), *trans'd from* supreme court, *retrans'd*; Schmidt v. Morival Farms, Inc., 232 S.W.2d 215 (Mo. Ct. App. 1950), *trans'd from* supreme court, *retrans'd,* 240 S.W.2d 952 (Mo. 1951).

32. Consolidated School Dist. v. Gower Bank, 53 S.W.2d 280 (Mo.), *trans'd,* 55 S.W. 2d 713 (Ct. App. 1932), is a single example of this kind of case, the multitude of

9.015. *Standard Rules*

If the plaintiff appeals his non-recovery, the amount stated in his petition determines jurisdiction.[33] This is because his claim for that amount cannot

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which are catalogued in § 9.030. The firm policy of the supreme court established by the myriad decisions makes curious the language of a recent case in which the supreme court retained jurisdiction because a state officer or a constitutional question was involved: "*With some misgivings* we hold that the director is thus made a contesting party upon the review and thereafter. There is also *some merit* in the contention that a decision here involves a construction of the due process clause of our Constitution." Wilson v. Morris, 369 S.W.2d 402, 405 (Mo. 1963). (Emphasis added.)

33. *E.g.*, Charles F. Curry & Co. v. Hedrick, 378 S.W.2d 522 (Mo. 1964); Myers v. City of Palmyra, 355 S.W.2d 17 (Mo. 1962); Nydegger v. Mason, 315 S.W.2d 816 (Mo. 1958); Page v. Laclede Gas Light Co., 245 S.W.2d 23 (Mo. 1951); Dille v. St. Luke's Hosp., 355 Mo. 436, 196 S.W.2d 615 (1946); Germo Mfg. Co. v. Combs, 287 Mo. 273, 229 S.W. 1072 (1921), *trans'd*, 209 Mo. App. 651, 240 S.W. 872 (1922); Willi v. Lucas, 40 Mo. App. 70 (1890). The rule applies similarly to a person in the position of a plaintiff, such as a defendant who appeals an adverse verdict on his counterclaim. *E.g.*, Townsend v. Maplewood Inv. & Loan Co., 351 Mo. 738, 173 S.W.2d 911 (1943); Conrad v. De Montcourt, 138 Mo. 311, 39 S.W. 805 (1897). Despite its simplicity, the standard rule is difficult to apply in certain complicated cases. *E.g.*, Crouch v. Tourtelot, 350 S.W.2d 799 (Mo. 1961) (en banc). Third party plaintiff (defendant in the principal suit) appealed the dismissal of his cross petition against the third party defendant. The claim of the original plaintiff had not been finally adjudicated, so the only amount in the case was the amount for which the third party plaintiff might finally be liable to the original plaintiff, represented in unliquidated form by the original plaintiff's petition. The court held that that petition was also the petition of the third party plaintiff and applied the standard rule. Three judges made out a strong case in the dissenting opinion that the amount the original plaintiff would recover was "contingent" (see "Contingencies" § 9.022(a)). *Accord,* Campbell v. Preston, 379 S.W.2d 557 (Mo. 1964); Pierce v. Ozark Border Elec. Co-op., 378 S.W.2d 504 (Mo. 1964); Woods v. Juvenile Shoe Corp. of America, 361 S.W.2d 694 (Mo. 1962); *cf.* Finley v. Smith, 170 S.W.2d 166 (Mo. Ct. App.), *trans'd*, 352 Mo. 456, 178 S.W.2d 326 (1943). Appellant in *Finley* had executed a release after being injured by respondent but sued for injuries sustained in the accident. The court of appeals was without jurisdiction of an appeal from a decree in a *separate* proceeding declaring the release valid and enjoining prosecution of the *pending* personal injury action in which more than the jurisdictional "amount" was sought.

Another problem arises when the plaintiff sues for a money judgment but does not specify a sum certain in his petition, in which case the supreme court has rejected jurisdiction. General Theatrical Enterprises, Inc. v. Lyris, 121 S.W.2d 139 (Mo. 1938), *trans'd*, 131 S.W.2d 874 (Ct. App. 1939). *But see* Simmons v. Friday, 359 Mo. 812, 224 S.W.2d 90 (1949) ("amount" not specified but "inherent" in plaintiff's second amended petition); Kimmie v. Terminal R.R. Ass'n, 344 Mo. 412, 126 S.W.2d 1197 (1939) (contract count for $6,000 and quantum meruit for reasonable value of attorney's fees).

A special problem is presented by a landowner seeking compensation in a condemnation case. Since the owner does not file the suit and is considered a nominal defendant, there is no petition or prayer on which he can base the amount of an appeal. These cases consistently hold that the value of the owner's property as shown by his "evidence" or "evaluation" takes the place of a formal petition. *E.g.*, State *ex rel.* Kansas City

be advanced if the verdict of the trial court is upheld, while if it is reversed he will be able to prosecute a suit for that amount. If plaintiff's petition is composed of several counts, the sum of the separate claims is the value of the petition.[34] However, to the extent that the plaintiff's petition has been reduced by amendment during the trial or consisted of a colorable or frivolous claim,[35] it would not be part of the suit nor part of the amount

Power & Light Co. v. Salmark Home Builders, Inc., 375 S.W.2d 92 (Mo. 1964); Union Elec. Co. v. Pfarr, 375 S.W.2d 1 (Mo. 1964); State *ex rel.* Kansas City Power & Light Co. v. Keen, 332 S.W.2d 935 (Mo. 1960); City of St. Louis v. Kisling, 318 S.W.2d 221 (Mo. 1958); State *ex rel.* Highway Comm'n v. Conrad, 310 S.W.2d 871 (Mo. 1958). While it is clear that the plaintiff must present some evidence of the land's value in lieu of a formal petition, how persuasive that evidence must be is doubtful. See State *ex rel.* Highway Comm'n v. Mahon, 343 S.W.2d 165 (Mo.), *trans'd,* 350 S.W.2d 111 (Ct. App. 1961) (landowner's proof of damage involved a "contingency"). Seemingly all the qualifications which might influence a formal petition (*e.g.,* a contingency as in this case) operate similarly in condemnation cases.

In cases in which the plaintiff sues joint tort-feasors and recovers against one (or several) but one (or several) escape liability, on plaintiff's appeal of non-recovery against those defendants who escaped liability, the amount of plaintiff's recovery against the other defendant(s) and not the amount of his petition fixes appellate jurisdiction. This is because only one judgment can be entered in an action which must resolve the issues as to all parties, so that the defendants who avoided liability could pay the verdict in plaintiff's favor entered against the other defendants and terminate plaintiff's action. This rule is expressly restricted to instances where plaintiff appeals only from the non-recovery and does not include in his appeal a complaint of the inadequacy of his recovery against the other defendant. Joffe v. Beatrice Foods Co., 335 S.W.2d 34 (Mo.), *trans'd,* 314 S.W.2d 880 (Ct. App. 1960); Lemonds v. Holmes, 360 Mo. 626, 229 S.W.2d 691 (1950) (en banc), *trans'd,* 241 Mo. App. 463, 236 S.W.2d 56 (1951); Deming v. Williams, 321 S.W.2d 720 (Mo. Ct. App. 1959); Heninger v. Roth, 260 S.W.2d 855 (Mo. Ct. App. 1953). If one of the defendants stipulates a judgment be entered against him for an amount agreeable to plaintiff, the appeal as to the other defendants cannot involve as the "amount" more than the amount of plaintiff's judgment against the first defendant. Deming v. Williams, *supra.* The rule equally applies whether the defendants against whom plaintiff appeals were released from liability by the jury or granted a directed verdict by the court. An attempt to assert that a defendant who enjoyed a directed verdict became an "inactive party" to the trial and therefore cannot be benefited by the limit on plaintiff's recovery against the other defendant will be rejected. Joffe v. Beatrice Foods Co., *supra.*

34. Cases cited § 9.023(b)(2).

35. The leading case is Vanderberg v. Kansas City Gas Co., 199 Mo. 455, 97 S.W. 908 (1906), *trans'd,* 126 Mo. App. 600, 105 S.W. 17 (1907), in which the court expressed an unwillingness to give a plaintiff "whimsical and unregulated power to control its jurisdiction by a mere stroke of his pen in his petition." However, in cases where the plaintiff appeals a personal injury suit, the problem becomes especially delicate. The courts have been reluctant to reject jurisdiction on the basis that plaintiff's claim exceeds his injuries. This is because the supreme court had early held in State *ex rel.* Hartley v. Rombauer, 130 Mo. 288, 290-91, 32 S.W. 660, 661 (1895) that:

> It is not to be understood . . . that because . . . an appellate court has a right, in the exercise of its appellate jurisdiction, to review the entire evidence and make a finding of its own, it can also measure its own jurisdiction by the amount which, upon a review of the evidence, it may believe to be due. Such a course would make

subject to review by the appellate court and therefore, not the basis of

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> the jurisdiction depend, not upon the amount in dispute, but upon what, in the opinion of the court, the judgment should have been. . . . An appellate court has the right to examine the record in order to ascertain if it have jurisdiction, *but it has no right to review the evidence unless it have jurisdiction.* (Emphasis added.)

The court clearly indicated that a decision on the merits of the appellant's claim would be an exercise of *appellate jurisdiction,* which would be wholly inconsistent with a finding that it had no jurisdiction to hear the case.

Necessarily, however, the courts must be able to exclude from the basis of "amount" jurisdiction any matter not involved in the trial and therefore not alive in the judgment appealed. This would include abandoned or conceded claims, or claims that were uncollectable or frivolous (*e.g.,* Vanderberg v. Kansas City Gas Co., *supra*). This type of exclusion is in accordance with the rule announced in a landmark jurisdictional opinion that the "amount in dispute" for purposes of appeal is the amount for which the "dispute could at that date [date of judgment] have been settled," *i.e.,* the amount which would satisfy the judgment. Schwyhart v. Barrett, 223 Mo. 497, 122 S.W. 1049, 1050 (1909), *trans'd,* 145 Mo. App. 332, 130 S.W. 388 (1910). In other words, if the plaintiff appeals a non-recovery, the "amount" is determined as of the time of judgment and that is the amount which defendant would be required to pay to satisfy the petition.

Although in some cases the determination of jurisdictional "amount" is so closely tied to a decision on the merits that the two are practically indistinguishable, the Missouri Supreme Court has, at least until recently, deemed it necessary to make such a distinction. State *ex rel.* Brenner v. Trimble, 326 Mo. 702, 709, 32 S.W.2d 760, 762 (1930) ("it [court of appeals] could not first determine the merits of the controversy in order to determine whether it had jurisdiction of the appeal"); State *ex rel.* Hartley v. Rombauer, *supra*; Palmer v. Lasswell, 279 S.W.2d 535 (Mo. Ct. App. 1955), *trans'd,* 287 S.W.2d 822 (Mo. 1956); *cf.* Storckman, J., dissenting in Feste v. Newman, 368 S.W.2d 713, 716 (Mo. 1963) (en banc). That the distinction has been required in the federal system is manifested by the words of the United States Supreme Court:

> Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction. . . . Bell v. Hood, 327 U.S. 678, 682 (1946).

There are several compelling reasons against tempering the amount of plaintiff's petition by the legal limit of recovery which his evidence warrants. As a practical matter, if the court in every case were to examine the law governing the amount which a plaintiff appealing his non-recovery in a personal injury action could recover consistent with his injuries and theories of action prior to its assumption of appellate jurisdiction, it would saddle itself with a "back-breaking" work load. Further, an appellate court, by deciding what the trial court would permit the jury to find, invades the traditionally sacred function of the jury and ignores those "intangible factors to be weighed ultimately" by that body. Wade v. Rogala, 270 F.2d 280, 285 (3d Cir. 1959). Clearly, this ought not be done until a court having jurisdiction is *reviewing* the actions of the trial court.

The resulting conflict can best be illustrated by considering the probable results in two cases otherwise identical except that one was fully tried with all the evidence relating to the amount of damages presented and in the other the defendant got a directed verdict. It appears unlikely that the court could be equally certain in both cases that the "evidence" did not support a claim of sufficient value to involve the jurisdictional "amount." Moreover, it is obvious that a determination which might be easy and permit

appellate jurisdiction.[36] If the plaintiff recovers but appeals alleging that

of a definitive result in a simple case might require the nicest of discriminations in a close case. Vanderberg v. Kansas City Gas Co., *supra.*

Despite these considerations, a recent decision, purporting to be merely an application of the *Vanderberg* reasoning, appears to conflict with the law of earlier Missouri decisions cited above, although it does not expressly overrule these cases. In Fowler v. Terminal R.R. Ass'n, 363 S.W.2d 672 (Mo.), *trans'd,* 372 S.W.2d 497 (Ct. App. 1963), the court held as a matter of law that the injuries allegedly sustained by plaintiff would not support the $17,500 claimed as damages in his petition.

The *Fowler* decision, by allowing a determination of jurisdiction to shade into a decision on the merits, could logically be extended into absurdities which the court undoubtedly would not accept. For example, if a plaintiff sued for damages in excess of the jurisdictional "amount" and appealed an adverse judgment but the pleadings disclosed an affirmative defense which as a matter of law would deny the claim or reduce it below the "amount" required, *Fowler* would compel the supreme court to transfer the appeal. The difficulty inherent in applying the *Fowler* rule can be seen by comparing the case with an earlier decision which recognized the same test but reached a different result. "We think we may not say that the existing state of the law is *so stare decisis on the precise issue on the merits* as to cause the beneficiary's claim . . . to be 'not in good faith.'" Bearup v. Equitable Life Assur. Soc. of the United States, 351 Mo. 326, 329, 172 S.W.2d 942, 944 (1943). (Emphasis added.) Perhaps the most absurd result that *Fowler* could cause is illustrated by Vordick v. Vordick, 281 Mo. 279, 219 S.W. 591, *trans'd,* 205 Mo. App. 555, 226 S.W. 59 (1920). There the court on a *Fowler* theory denied jurisdiction since the amount of alimony which was asserted as the jurisdictional predicate could not under the law exceed $7,500 (the then jurisdictional "amount"). When, however, the court of appeals decided the case it instructed the trial court to enter a decree for *exactly* $7,500.

The real importance of the *Fowler* decision is that it reveals a desire of the supreme court to restrict its appellate jurisdiction. The policy in this context, however, appears to have the anomalous result of requiring the court to broaden the range of its inquiry into the merits of a claim and to devote more of its time to consideration of jurisdictional problems to accomplish a restriction. By slavishly adhering to a restrictive interpretation of the constitution, *i.e.,* limitation of its jurisdiction by the most stringent of tests, the court has caused confusion and uncertainty. Rather than attempting to circumscribe its jurisdiction severely by a "case-by-case" approach, it would seem desirable that the court develop a conceptualized overall view of jurisdiction having as its purpose the facilitation of the appellate process by making the rules as simple as possible. Decisions such as *Fowler* appear to be decided on an *ad hoc* basis, in a vacuum devoid of practical considerations. For a further discussion of deciding jurisdiction by an anticipation of the merits, see § 7.030.

36. The problems reflected by the "elimination" cases (these cases are fully discussed § 9.021(a)) and the cases discussed in the last footnote are basic and troublesome. Essentially they reveal two inconsistent criteria for determining jurisdiction and the time when this determination is made. Probably the approach would be more standardized and the court would rely exclusively on the value of the judgment at the time it was entered if it did not fear jurisdiction would be asserted on the basis of a completely bogus claim. By reserving the right to exclude these claims from jurisdiction, the court provides the potential for uncertainty in determining the time jurisdiction vests in an appellate court. This problem is discussed in § 9.021(b). The fact that this basic inconsistency does exist—and has for fifty years—and that it runs throughout the entire range of "amount" determination rules, will be developed in

his recovery is inadequate, the amount of his petition minus the amount of his recovery fixes jurisdiction.[37] Plaintiff's petition is reduced to the extent of his recovery because the fact that he could have accepted the recovery removes it from the realm of dispute.

If appeal is taken by the defendant from the plaintiff's judgment, the amount of the recovery sets jurisdiction since that is the limit for which defendant will be liable (or which the plaintiff will lose) by the decision of the appellate court.[38] Of course, if the defendant does not appeal the

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various parts of this chapter. *Compare, e.g.,* Powers v. Missouri Pac. Ry., 262 Mo. 701, 172 S.W. 1 (1914), *with* Stepp v. Rainwater, 373 S.W.2d 162 (Mo. Ct. App. 1963). In *Powers,* plaintiff who had petitioned for $10,000 appealed to the court of appeals after amending his petition below the then jurisdictional limit. That court transferred without opinion to the supreme court which accepted jurisdiction on the basis that the full $10,000 was in dispute, that being the "amount" at the date of the judgment against plaintiff. In the *Stepp* case, however, the supreme court transferred to the court of appeals an appeal by defendants from a judgment entered for plaintiff which was over the jurisdictional "amount" but which had been reduced by settlement with one of the defendants during the pendency of the appeal in the supreme court.

37. The first case found to employ this rationale is Leahy v. Davis, 49 Mo. App. 519 (1892), *trans'd,* 121 Mo. 227, 25 S.W. 941 (1894). It has been consistently followed. *E.g.,* Miller v. Harner, 373 S.W.2d 941 (Mo. 1964); Caen v. Feld, 371 S.W.2d 209 (Mo. 1963); Baker v. Brown's Estate, 365 Mo. 1159, 294 S.W.2d 22 (1956); Combs v. Combs, 284 S.W.2d 423 (Mo. 1955); Conner v. Neiswender, 360 Mo. 1074, 232 S.W.2d 469 (1950); Holker v. Hennessey, 141 Mo. 527, 42 S.W. 1090 (1897); Dowd v. Westinghouse Air Brake Co., 57 Mo. App. 219 (1894), *trans'd,* 132 Mo. 579, 34 S.W. 493 (1896).

The same formula is used if the plaintiff recovers, but the verdict is set aside and plaintiff appeals and also alleges inadequacy as part of the appeal. See, *e.g.,* Vogrin v. Forum Cafeterias of America, 301 S.W.2d 406 (Mo. Ct. App.), *trans'd,* 308 S.W.2d 617 (Mo. 1957). Similarly if the plaintiff gets a new trial on the ground of inadequacy and the defendant appeals, the "amount" for jurisdiction is computed by subtracting the recovery from the original claim. The reason is that the new trial will permit plaintiff to prosecute another suit for the full amount of the original petition, but the recovered amount must be subtracted, since the plaintiff could have accepted that amount and by not doing so, he has taken it from the realm of dispute. See, *e.g.,* Sofian v. Douglas, 324 Mo. 258, 23 S.W.2d 126 (1929); Jones v. Allred, 298 S.W.2d 525 (Mo. Ct. App. 1957). Conversely, if the plaintiff gets a new trial on the basis of the inadequacy of recovery after recovering $250 in a suit for $25,000 and the defendant appeals, the jurisdictional amount is $24,750 since the defendant has in effect conceded liability for $250. Craton v. Huntzinger, 177 S.W. 816 (Mo. Ct. App. 1915), *trans'd,* 187 S.W. 48 (Mo. 1916). See generally "Appeal From New Trial Order," § 9.025.

38. *E.g.,* Akers v. St. Louis Pub. Serv. Co., 370 S.W.2d 347 (Mo. 1963); Hill v. St. Louis Pub. Serv. Co., 340 S.W.2d 712 (Mo. 1960); Lockhart v. St. Louis Pub. Serv. Co., 318 S.W.2d 177 (Mo. 1958); Moore v. Adams' Estate, 303 S.W.2d 936 (Mo. 1957); Jacques v. Goggin, 362 Mo. 1005, 245 S.W.2d 904 (1952); Ford v. Louisville & N.R.R., 183 S.W.2d 137 (Mo. 1944). If the plaintiff's action based upon a particular statute should have resulted in a recovery, if at all, for an "amount" sufficient for supreme court jurisdiction, but the judgment from which an appeal is taken is improperly for an insufficient "amount," the supreme court does not have jurisdiction,

entire judgment, but appeals the verdict as excessive, the amount asserted to be excessive is the "amount" of the dispute for jurisdiction.[39]

9.016. *Costs*

"Costs" are excluded from calculations of jurisdictional "amount in dispute" by specific constitutional[40] and statutory[41] provisions. The logical reason for the exclusion is that costs are not the direct object of a suit but an incidental result of its prosecution. The costs excluded from calculation of jurisdictional "amount" are the allowances to the prevailing party for expenses of litigation definitely fixed by statute which the clerk is required to tax as a ministerial duty.[42] Allowances taxed as costs which the court alone can order and which are the subject matter of a separate judicial investigation and determination are included in the "amount."[43]

Although the word "costs" is frequently understood as including at-

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although the court of appeals may correct the judgment—so that in effect the full amount provided by the statute is involved. Mathews v. Metropolitan St. Ry. Co., 231 Mo. 632, 132 S.W. 1074 (1910), *trans'd,* 156 Mo. App. 715, 137 S.W. 1003 (1911); *cf.* Marsh v. Kansas City So. Ry., 104 Mo. App. 577, 78 S.W. 284 (1904) (statute required recovery of "amount" over court of appeals jurisdiction but plaintiff requested and got an "amount" that was less).

39. *E.g.*, Sleyster v. Eugene Donzelot & Son, 323 Mo. 822, 20 S.W.2d 69 (1929), *trans'd,* 223 Mo. App. 1166, 25 S.W.2d 147 (1930). See generally "Eliminations" § 9.021(a).

40. Mo. CONST. art. V, § 3, formerly, Mo. CONST. art. VI, § 12 (1875).

41. Mo. REV. STAT. § 477.040 (1959).

42. Mo. REV. STAT. § 514.060, .260 (1959). When the court reviews the clerk's action upon a motion to retax (Mo. REV. STAT. § 514.270 (1959)), it is merely "correcting errors" and performing the same ministerial function. Burton v. Chicago, & A.R.R., 275 Mo. 185, 195, 204 S.W. 501, 504 (1918).

43. See Noll v. Noll, 286 S.W.2d 58 (Mo. Ct. App. 1956) (award of alimony pendente lite in separate hearing on wife's financial needs and husband's ability to pay); Flynn v. First Nat'l Safe Deposit Co., 273 S.W.2d 756 (Mo. Ct. App. 1954), *trans'd,* 284 S.W.2d 593 (Mo. 1955) (allowance of expenses and attorney fees to garnishee when plaintiff fails to recover against him). In most of these cases the allowances *are* the "amount" and are seldom sufficient for supreme court jurisdiction. Nevertheless, an order taxing attorney's fees or other expenses as costs will be appealable to the supreme court if the order is not a separate proceeding but a "component part" of the original judgment from which an appeal lies in the supreme court. Flynn v. First Nat'l Safe Deposit Co., *supra.* The twofold problem which arises—what happens if costs are properly assessable in a separate action and what happens if the trial court modifies the original judgment (perhaps erroneously) to assess costs—is discussed § 9.024.

The distinction between items which are merely incidental and items which are the principal claim in itself (or an essential element thereof) is discussed in the "interest" cases § 9.021(b)(2).

torney's fees,[44] in Missouri costs do not include attorney's fees unless such fees are defined as costs by statute.[45] Thus attorney's fees are not excluded in the determination of jurisdictional "amount" in actions on a contract or instrument which provides for their payment,[46] when they are expressly recoverable by statute,[47] or if they are allowed as an element of damages.[48]

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44. This is the English view as noted in the early case of Frissell v. Haile, 18 Mo. 18 (1853):

> [A]ttorney[s] and solicitor[s] in England. . . . are recognized officers of the court, and are entitled to fees for the services performed by them in the same manner as the clerks of our courts of record. Their fees are ascertained and fixed by rules of court, and are recognized in the taxation of the costs of a suit. Such being their foundation, the law confers a lien on papers and on judgments to secure their payment . . . . *Id.* at 20-21.

In the federal courts attorney's fees are not recoverable as costs and are not included in calculation of "jurisdictional amount" unless there is legal authority—contract, statute or applicable state statute—for their recovery. See WRIGHT, FEDERAL COURTS § 35 nn.4-7 (1963). See generally Annot., 77 A.L.R. 991, 1011 (1932).

45. Munday v. Thielecke, 290 S.W.2d 88 (Mo. 1956); Cohn v. St. Louis, I.M. & So. Ry., 227 Mo. 369, 131 S.W. 881, *trans'd,* 151 Mo. App. 661, 133 S.W. 59 (1910); Albers v. Merchants' Exch., 138 Mo. 140, 39 S.W. 473 (1897); State *ex rel.* Patterson v. Tittmann, 134 Mo. 162, 35 S.W. 579 (1896); Prudential Ins. Co. of America v. Goldsmith, 239 Mo. App. 188, 192 S.W.2d 1 (1945). In the *Cohn* case, *supra,* a suit to recover damages for freight overcharges, the treble damages provided by statute were exactly $7,500 and therefore insufficient under the then limit. The supreme court refused jurisdiction by excluding attorney's fees which were part of plaintiff's petition, because the statute creating the cause of action "designated" the fees as "costs." Designation by a state legislature of an item as "costs" will not preclude inclusion by federal courts in their calculation of jurisdictional "amount." Missouri State Life Ins. Co. v. Jones, 290 U.S. 199 (1933); Note, 45 IOWA L. REV. 832, 839-41 (1960) (citing authority that *Erie* doctrine will not alter result in *Jones*).

46. When an attorney sues for collection of attorney's fees they *are* the "amount in dispute." Kimmie v. Terminal R.R. Ass'n, 344 Mo. 412, 126 S.W.2d 1197 (1939); *cf.* Leslie v. Carter, 268 Mo. 420, 187 S.W. 1196 (1916) (to recover expenses of previous litigation). When a trustee is permitted by a trust agreement to employ counsel for reasonable compensation, an allowance of these fees by the trial court is included in jurisdictional "amount." Vest v. Bialson, 365 Mo. 1103, 293 S.W.2d 369 (1956).

47. MO. REV. STAT. § 375.420 (1959) provides that in an action against an insurance company for "vexatious" refusal to pay a claim "the court or jury may, in addition to the amount [of loss] . . . and interest, allow the plaintiff damages not to exceed ten per cent on the amount of the loss and a reasonable attorney's fee; and the court shall enter judgment for the aggregate sum found in the verdict." Attorney's fees *had* to be included to attain the jurisdictional requisite in only one case involving the statute. Still v. Travelers' Indem. Co., 374 S.W.2d 95 (Mo. 1963). In other cases, the fees were only apparently included since the court did not articulate the basis for its jurisdiction, evidently assuming it was obvious. State Mut. Life Assur. Co. v. Dischinger, 263 S.W.2d 394 (Mo. 1953); Lemmon v. Continental Cas. Co., 350 Mo. 1107, 169 S.W.2d 920 (1943); Rodgers v. Travelers Ins. Co., 311 Mo. 249, 278 S.W. 368 (1925); *accord,* Morrow v. Loeffler, 297 S.W.2d 549 (Mo. 1956) (garnishment action seeking to recover on policy which allegedly should have been issued).

Federal courts support the Missouri Supreme Court's interpretation of the effect of a statute upon monetary jurisdiction. *E.g.,* Catalogue Direct Sales, Inc. v. United States

Consequently, the present status of the rule appears to be that attorney's fees which are allowed as part of a cause of action are includable as part of the jurisdictional "amount" in the absence of a statute authorizing their taxation as costs.[49]

9.020. Suits for a Money Judgment

The cases in this section are appeals from suits instituted for a definite and express money claim. The organization classifies the cases according to the issue that determines jurisdiction.

9.021. *Reducing the Plaintiff's Petition or Judgment to the "Amount in Dispute"*

The general rules for the determination of jurisdictional "amount" are qualified by acts of the parties which remove part of the monetary claim from the sphere of controversy. The reduction may occur before judgment or after appeal, and the usual effect in both situations is to reduce the

Fire Ins. Co., 163 F. Supp. 308 (E.D. Mo. 1958), holding that a "prayer to invoke a statutory penalty and attorney's fee for vexatious refusal to pay an insurance claim, puts that issue in controversy and adds such amounts as can be statutorily and reasonably calculated to the sum in controversy, for the purpose of determining jurisdiction." *Id.* at 309.

48. See Vannorsdel v. Thompson, 315 S.W.2d 121 (Mo. 1958), *trans'd,* 323 S.W.2d 252 (Ct. App. 1959). Plaintiff was awarded $28,000 jury verdict which was offset by the sum of $24,000 (which included a total of $6,000 for interest and attorney's fees) for which the trial judge had directed a verdict on defendant's counterclaim, leaving a judgment of $4,000. Plaintiff-appellant claimed he was entitled to a judgment of $10,000, contending that only $18,000 should have been subtracted from his verdict by virtue of the counterclaim; as a result, the only amount disputed on appeal was the total of $4,000 interest and $2,000 attorney's fees which was insufficient. Compare Mayor v. Mayor, 340 S.W.2d 172 (Mo. Ct. App. 1960), *trans'd,* 349 S.W.2d 60 (Mo.), *retrans'd,* 351 S.W.2d 810 (Ct. App. 1961).

49. See Mayor v. Mayor, *supra* note 48. Appellant contested not only the alimony award ($7,500) but the allowance of an appraiser's fee ($50) which, if aggregated, yielded a total in excess of the requisite "amount." Arguing from the case in which attorney's fees were excluded because they were designated "costs" by statute (Cohn v. St. Louis, I.M. & So. Ry., 227 Mo. 369, 131 S.W. 881 (1910), discussed *supra* note 45), the court of appeals transferred since it could not *exclude* the sum of $50 in the absence of of a "statute authorizing the assessment of appraiser's fees, or attorney's fees for that matter, as costs." The supreme court did not pass upon the court of appeals' theory but instead, "assuming it to be correct," retransferred on the ground that the taxing as costs of the appraiser's fee was not a "live" issue on appeal because of failure to preserve it. (The appellant by his failure to move for a new trial on the alleged error had not complied with Mo. Sup. Ct. R. 79.03.)

Quaere whether the supreme court's removal of the item of the appraiser's fee on procedural grounds completely eliminated "the ever troublesome question of appellate jurisdiction" from the case. A tenable conclusion is that the court abdicated its responsibility to resolve the "doubt" implicit in the court of appeals' opinion that it did not have jurisdiction.

"amount in dispute." However, it is important to recognize that the reasons for reduction which are valid in the first situation are not necessarily valid in the second.

9.021(a). *Changes Before the Judgment: "Eliminations"*

9.021(a)(1). *By Act of the Parties*

If the plaintiff amends his pleadings to eliminate or reduce a part of his petition, the excluded amount cannot be recovered or considered as part of the jurisdictional "amount." The practice of the appellate courts to subtract any eliminated amount is well established, and when the amendment is formally made, no jurisdictional difficulty generally results.[50] More troublesome are reductions without formal amendment,[51] because the courts con-

50. See, *e.g.*, Simmons v. Friday, 359 Mo. 812, 818, 224 S.W.2d 90, 93 & n.5 (1949).

51. Plaintiff's manifestations of an intent to accept a reduced amount have been variously described, but are most frequently deemed results of his "trial theory." Wartenbe v. Car-Anth Mfg. & Supply Co., 353 S.W.2d 570 (Mo.), *trans'd*, 362 S.W.2d 54 (Ct. App. 1962) (statements to jury manifesting reduction); Beasley v. Athens, 365 Mo. 158, 277 S.W.2d 538, *trans'd*, 284 S.W.2d 62 (Ct. App. 1955) (statements to jury which indicated trial theory); Gillespie v. American Bus Lines, 246 S.W.2d 797 (Mo. 1952), *trans'd* (trial theory did not support claim for "amount" on which appellant sought to base jurisdiction); Wagner v. Mederacke, 354 Mo. 977, 192 S.W.2d 865, *trans'd*, 195 S.W.2d 108 (Ct. App. 1946) (pre-trial conference agreement and stipulation reduced "amount"); State *ex rel.* Cravens v. Thompson, 322 Mo. 444, 17 S.W.2d 342, *trans'd*, 22 S.W.2d 196 (Ct. App. 1929) (petition for "amount" over limit but pre-trial stipulation for below); Hannan-Hickey Bros. Constr. Co. v. Chicago, B. & Q. Ry., 226 S.W. 881 (Mo. 1920), *trans'd*, 247 S.W. 436 (Ct. App. 1922) (petition for "amount" over limit but new trial motion set "amount" below); Fergusson v. Comfort, 264 Mo. 274, 174 S.W. 411 (1915), *trans'd from* 159 Mo. App. 30, 139 S.W. 218 (1911), *retrans'd*, 194 Mo. App. 423, 184 S.W. 1192 (1916) (plaintiff agreed to fact which destroyed part of his claim and in open court abandoned that part); Anchor Milling Co. v. Walsh, 97 Mo. 287, 11 S.W. 217 (1889), *trans'd* (trial theory and instructions to jury); Kerr v. Simmons, 82 Mo. 269 (1884), *appeal dismissed* (demurrer admitted defendant's answer thereby reducing "amount"); Sharp Bros. Contracting Co. v. Commercial Restoration, Inc., 334 S.W.2d 248 (Mo. Ct. App. 1960) (trial theory); Daly v. Schaefer, 331 S.W.2d 150 (Mo. Ct. App. 1960) (statements to jury); Mitchell v. Southwestern Bell Tel. Co., 298 S.W.2d 520 (Mo. Ct. App. 1957) (trial theory); Vandagrift v. Grand Commander of Knights Templar, 176 Mo. App. 441, 158 S.W. 461 (1913) (abandoned during trial); Mathews v. Danahy, 25 Mo. App. 354 (1887) (instructions to jury and pre-trial stipulation).

If during the course of the trial the plaintiff should amend his petition to increase the amount demanded, jurisdiction of a subsequent appeal could include the increase. New First Nat'l Bank v. C. L. Rhodes Produce Co., 332 Mo. 163, 58 S.W.2d 742 (1932), *trans'd from* 225 Mo. App. 438, 37 S.W.2d 986 (1931). Of course, counsel cannot, while the appeal is pending, amend so that the *record* demonstrates sufficient "amount" for jurisdiction in the supreme court. McGregory v. Gaskill, 317 Mo. 122, 296 S.W. 123, *trans'd*, 296 S.W. 833 (Ct. App. 1927).

If jurisdiction is predicated on the "amount" of defendant's counterclaim, the "abandonment" principle equally applies. Kingshighway Presbyterian Church v. Sun Realty

sider any act manifesting to the trial court or jury that the plaintiff is seeking a reduced amount as an "equivalent to an amendment of the prayer of the petition."[52]

If the "amount" eliminated by the express or implied amendment reduces the "amount" of plaintiff's petition below the jurisdictional level of the supreme court, an appeal by the plaintiff from an adverse verdict lies to the court of appeals.[53] The same result obtains if the defendant concedes partial liability, thereby reducing the "amount in dispute" to the jurisdictional level of the court of appeals.[54]

9.021(a)(2). *By Operation of Law*

Using precedent from the cases in which an act of the parties during the course of the trial reduced the "amount in dispute," the courts extended the doctrine of "eliminations" to include another kind of pre-judgment reduction.

In *Vanderberg v. Kansas City Gas Co.*,[55] the plaintiff appealed her nonrecovery to the supreme court, basing jurisdiction on the aggregate of two counts, one for actual and one for punitive damages. Upon an examination

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Co., 324 Mo. 510, 24 S.W.2d 108 (1930), *trans'd* (defendant abandoned by failure to litigate and by use of trial theory which excluded the "amount"). Also important is plaintiff's concession of part of defendant's counterclaim as a "credit" which can offset the amount plaintiff claims and thus preclude vesting of supreme court jurisdiction on plaintiff's appeal. Hannan-Hickey Bros. Constr. Co. v. Chicago, B. & Q. Ry., *supra*.

52. Wartenbe v. Car-Anth Mfg. & Supply Co., *supra* note 51, at 571.

53. In developing "amendment" rules, it is likely that the courts first excluded from the "amount in dispute" any part of plaintiff's petition that had been formally dropped; the next cases on this authority excluded claims impliedly abandoned. This evolution is apparent in the early case of Mathews v. Danahy, 25 Mo. App. 354 (1887).

54. *E.g.*, State *ex rel.* Burcham v. Drainage Dist., 271 S.W.2d 525 (Mo. 1954), *trans'd*, 280 S.W.2d 683 (Ct. App. 1955) (condemnation case); 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) (pleadings contained concession of partial liability on insurance policy); Lynn v. Stricker, 207 S.W.2d 290 (Mo.), *trans'd*, 213 S.W.2d 672 (Ct. App. 1948) (plaintiff had already received some of property claimed without contest from defendant); Bietsch v. Midwest Piping & Supply Co., 76 S.W.2d 1079 (Mo. 1934), *trans'd*, 86 S.W.2d 187 (Ct. App. 1935); Sleyster v. Eugene Donzelot & Son, 323 Mo. 822, 20 S.W.2d 69 (1929), *trans'd*, 223 Mo. App. 1166, 25 S.W.2d 147 (1930); Pittsburgh Bridge Co. v. St. Louis Transit Co., 205 Mo. 176, 103 S.W. 546 (1907), *trans'd*, 135 Mo. App. 579, 116 S.W. 467 (1909); *In re* Burke's Estate, 169 Mo. 212, 69 S.W. 277, *trans'd*, 96 Mo. App. 295, 70 S.W. 156 (1902); Emerson v. Treadway, 270 S.W.2d 614 (Mo. Ct. App. 1954) (partial liability conceded in answer); Spink v. Mercury Ins. Co., 260 S.W.2d 757 (Mo. Ct. App. 1953); Dixon v. Postlewait Glass Co., 241 Mo. App. 174, 238 S.W.2d 93 (1951); Anderson v. Aetna Bricklaying & Constr. Co., 226 Mo. App. 1119, 27 S.W.2d 755 (1930).

55. 199 Mo. 455, 97 S.W. 908 (1906), *trans'd*, 126 Mo. App. 600, 105 S.W. 17 (1907).

of the entire record, the court concluded that the claim for punitive damages was completely unfounded and transferred the appeal because the amount of actual damages was insufficient for jurisdiction. The rule of the decision is that if part of plaintiff's petition is frivolous, colorable or uncollectable as a matter of law, that amount cannot form a basis for jurisdiction.

In other kinds of cases, part of plaintiff's claim is excluded from calculation of the jurisdictional "amount" by operation of law. This results when part of the petition would not be affected by the judgment of the court, *e.g.*, plaintiff is entitled in any event to part of the amount claimed.[56]

The cases in which the "amount" is reduced by operation of law represent a logical extension of the cases involving "amendment" by act of the parties. The effect of holding that a claim is frivolous and uncollectable is to rule that as a matter of law the claim was not in "real dispute" at the trial and that the trial judgment reflects the reduction. As a practical matter, the fact that a claim is not ruled uncollectable until the decision of an appellate court causes real jurisdictional difficulty, and cases have been frequently transferred by the supreme court[57] because a claim necessary for

56. *In re* Dean's Estate, 350 Mo. 494, 166 S.W.2d 529 (1942) (en banc), *trans'd,* (widow would take "contested" property by will or statute); Blakenship v. Ratcliff, 335 Mo. 387, 73 S.W.2d 183, *trans'd,* 76 S.W.2d 741 (Ct. App. 1934) (plaintiffs would take by disputed contract or as statutory heirs); Lamkin v. Kaiser, 256 S.W. 558 (Mo. Ct. App. 1923) (plaintiff entitled to one-half the disputed property under residuary clause). Other kinds of cases, ultimately rationalized by the standard rules (§ 9.015), are superficially similar to these cases. For example, jurisdiction cannot be founded on the value of an estate when the relators would take in any event and the actual issue is the naming of an administrator; the "amount" is the value of administration fees. State *ex rel.* Mitchell v. Guinotte, 180 Mo. 115, 79 S.W. 166 (1904) (en banc), *trans'd,* 113 Mo. App. 399, 86 S.W. 884 (1905); *cf.* Strahl v. Turner, 310 S.W.2d 833 (Mo. 1958) (in will construction case widow's statutory share subtracted from devise). By analogy, the defendant cannot seek to have jurisdiction based on the "amount" of plaintiff's recovery if part of that "amount" will not actually be recovered by plaintiff. City of St. Louis v. Franklin Bank, 98 S.W.2d 534 (Mo. 1936), *trans'd,* 108 S.W.2d 636 (Ct. App. 1937) (condemnation recovery partially offset by special benefits); *cf.* Hannan-Hickey Bros. Constr. Co. v. Chicago, B. & Q. Ry., 226 S.W. 881 (Mo. 1920), *trans'd,* 247 S.W. 436 (Ct. App. 1922) (plaintiff's admission of part of defendant's counterclaim subtracted as a "credit").

57. *E.g.*, Fowler v. Terminal R.R. Ass'n, 363 S.W.2d 672 (Mo.), *trans'd,* 372 S.W.2d 497 (Ct. App. 1963); Strothkamp v. St. John's Community Bank, Inc., 329 S.W.2d 718 (Mo. 1959), *trans'd*; Nemours v. City of Clayton, 351 Mo. 317, 172 S.W.2d 937, *trans'd,* 237 Mo. App. 497, 175 S.W.2d 60 (1943) (evidence of property diminution in injunction action insufficient); Bell v. Wagner, 169 S.W.2d 374 (Mo. 1943), *trans'd,* 238 Mo. App. 152, 178 S.W.2d 813 (1944) (evidence to support claim for loss of business and good will insufficient); Vordick v. Vordick, 281 Mo. 279, 219 S.W. 591, *trans'd,* 205 Mo. App. 555, 226 S.W. 59 (1920); Roll v. Fidelity Nat'l Bank & Trust Co., 115 S.W.2d 148 (Mo. Ct. App. 1938) (evidence showed suit for conversion of stock would yield only nominal damages).

The difficulty presented to the court by its own rulings is illustrated by the *Fowler*

jurisdiction was "eliminated" by operation of law under the *Vanderberg* principle.[58] Nevertheless, the court has extended this policy to exclude amounts abandoned after appeal.[59]

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and *Vordick* cases, *supra* (see discussion of *Fowler, supra* note 35). In *Vordick,* an action for divorce and alimony, the wife appealed the amount recovered for alimony in gross as inadequate. The supreme court concluded that the amount plaintiff might recover in a new trial was less than the "amount" necessary to confer jurisdiction on that court. In its transferring opinion, the court observed that determination of the jurisdictional issue had required considerable effort, and that it "would have been easier" to have answered the case on the merits:

> This case presents a striking instance of the difficulty often encountered in determining from the record the amount in dispute when jurisdictional. From the very nature of the controversy an examination of the evidence to determine the amount in dispute involves to some extent a consideration of the merits . . . . 281 Mo. at 287, 219 S.W. at 593.

The court further noted that if the plaintiff had stated a definite claim, it would not have been challenged, as it obviously would not have been colorable or fictitious. It can be seen from this decision that to police claims by evaluating the evidence in the case and the applicable law to determine if the jurisdictional "amount" is involved, requires the court to pursue a treacherous course. On the one hand, it cannot go too deeply into the merits to decide the jurisdictional issue or it will have decided the case. The *Vordick* case, *supra,* illustrates what can happen in a close case. The court of appeals, taking the case on transfer, found for the plaintiff-appellant, holding that *at least* $7,500 (the then jurisdictional amount) was due the plaintiff, and ordered a decree to increase the amount of plaintiff's alimony by *exactly* $7,500, since a larger award would have destroyed its jurisdiction.

58. The solution to jurisdictional confusion in these cases lies in the ability of counsel to determine which claims the court will rule uncollectable. While this should not be difficult in cases in which the plaintiff is entitled, in any event, to part of the amount claimed (obviously colorable and spurious claims would be rarely filed), it can be very difficult in personal injury claims to determine the amount for which a verdict would stand in cases in which plaintiff appeals on the grounds of non-recovery. The example of Fowler v. Terminal R.R. Ass'n, 363 S.W.2d 672 (Mo.), *trans'd,* 372 S.W.2d 497 (Ct. App. 1963), is graphic. The decision to transfer rested on an analysis of the cases in which recovery for injuries similar to the plaintiff's in the instant case was upheld, in order to determine how large a verdict the court would permit. Because the amount for which the court would permit recovery was lower than the jurisdictional "amount," although plaintiff's claim had been above, the *Vanderberg* principle was invoked. For discussion of this case see note 35 *supra.*

In the analysis used in this section, the cases have been catalogued to depict the cause of the "elimination"—whether act of the parties, or, in some form, operation of law—and very precisely, the time when it was effected. The courts have not made this breakdown and have applied the *Vanderberg* principle in all these cases. While the classification used is somewhat artificial, it is needed in order to point up the entirely different situation when matters, in dispute at the trial, are dropped after the judgment and while the appeal is pending (§ 9.021(b)).

59. Remittiturs are another kind of "elimination" which because of their use to control the jurisdiction of the appeal have caused difficulty. Thus the supreme court has held that a plaintiff recovering an "amount" meeting its jurisdictional requirement and having that verdict set aside by an order for a new trial may not appeal to that court if he remits the verdict to below the jurisdictional level before an appeal is taken. State *ex*

9.021(b). *Changes After the Judgment: "Subsequent Events"*

9.021(b)(1). *Conditionally Determined Jurisdiction and "Divestment"*

The "elimination" rules developed to subtract amounts abandoned before the judgment have been expanded to require subtraction from the "amount in dispute" any abandonment which occurs after judgment and while the case is pending on appeal. Although the cases which subtract post-judgment "eliminations" had their origin in the authority supporting the *Vanderberg* principle,[60] neither *Vanderberg* nor the cases on which it relied involved exclusions *after judgment.*[61] Nevertheless, recent cases have

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rel. Long v. Ellison, 272 Mo. 571, 199 S.W. 984 (en banc), *quashing* 196 S.W. 409 (Ct. App. 1917). The court of appeals reached a different result, believing that the control the rule gave to an appellant was inconsistent with the spirit of exclusive jurisdiction, but its decision was quashed by the supreme court. Reynolds v. Grain Belt Mills Co., 59 S.W.2d 744 (Mo. Ct. App. 1933), *trans'd,* 334 Mo. 712, 69 S.W.2d 947, *retrans'd,* 229 Mo. App. 380, 78 S.W.2d 124 (1934). Because the remittitur is effective before the final judgment from which appeal is taken, these cases are not authority for post judgment "eliminations." *Accord,* Hensler v. Stix, 185 Mo. 238, 84 S.W. 894 (1904), *trans'd,* 113 Mo. App. 162, 88 S.W. 108 (1905); McKim v. Metropolitan St. Ry., 196 Mo. App. 544, 209 S.W. 622 (1919); Barrett v. Stoddard County, 183 S.W. 644 (Mo. Ct. App. 1916); Oborn v. Nelson, 141 Mo. App. 428, 126 S.W. 178 (1910) (plaintiff voluntarily remitted more than order of trial court).

However, the courts in an apparent effort to restrain appellants from reducing their petitions to control the appellate forum, have held some "eliminations" ineffective to reduce the "amount in dispute." In one case, the plaintiff, anticipating an impending directed verdict for the defendant, reduced his petition below the jurisdictional level of the supreme court; when a verdict was entered for defendant, the plaintiff appealed his reduced petition. On the theory that a favorable appellate decision would allow the plaintiff, in a new trial, to reinstate the full amount of his original claim, the court of appeals transferred the case to the supreme court, which accepted jurisdiction. Poe v. Kansas City, C.C. & St. J. Ry., 238 S.W. 1082 (Mo. 1922); *accord,* Powers v. Missouri Pac. Ry., 262 Mo. 701, 172 S.W. 1 (1914); Eads v. Kansas City Elec. Light Co., 180 S.W. 994 (Mo. Ct. App. 1915) (transfer by court of appeals based on *Powers).* While no recent decision has considered these cases, they are probably questionable authority.

60. The court extended *Vanderberg* apparently without considering the time when the "elimination" was effected as significant. As a result, *Vanderberg* has been consistently used as authority whether the "elimination" occurred before or after the appeal was taken. The case illustrating this transition is Fergusson v. Comfort, 264 Mo. 274, 174 S.W. 411 (1915), *trans'd from* 159 Mo. App. 30, 139 S.W. 218 (1911), *retrans'd,* 194 Mo. App. 423, 184 S.W. 1192 (1916). There the supreme court subtracted part of plaintiff's claim, holding that it had been abandoned during trial, but noted further that the matter had not been briefed and presented on appeal—apparently to bolster its conclusion of abandonment at the trial.

61. In State *ex rel.* Lingenfelder v. Lewis, 96 Mo. 148, 8 S.W. 770 (1888), the court stated that jurisdiction was to be based on the "amount remaining in dispute and subject to the determination of the appellate court." Despite the language of the *Lewis* case and its citation in *Vanderberg* as authority for the exclusion of matters eliminated at the

indiscriminately applied *Vanderberg* to appeals involving both types of elimination, for the announced purpose of predicating the "amount in dispute" on only the amount remaining in dispute at the time of the appellate tribunal's decision.

The leading case on post-judgment abandonment is *Ashbrook v. Willis*.[62] This was an action by plaintiff for personal injuries ($10,000) and property damages ($1,056.30) in which defendant counterclaimed ($2,733). Both parties obtained verdicts of $500, which were set aside by an order granting plaintiff a new trial on the grounds of the inadequacy of his recovery and error in giving defendant's instruction. The defendant appealed to the supreme court. Under the then jurisdictional limits of that court ($7,500), jurisdiction would normally have existed, based on the effect of the new trial reinstating plaintiff's claims—an "amount" sufficient for supreme court jurisdiction.[63] However, the plaintiff-respondent did not brief or argue his claim for personal injuries; the court ruled that the claim was excluded from the "amount in dispute" and transferred the cause to the court of appeals.

Subsequent cases have followed *Ashbrook* and employed its rule to reject supreme court jurisdiction of appeals when the "amount" has been reduced after the appeal was filed. The most frequent kinds of post-judgment abandonment are failure to brief and argue issues upon which part of the appeal was predicated[64] and settlement or dismissal of part of the appeal.[65]

trial, the *Lewis* decision did not reject, but rather upheld jurisdiction in the supreme court.

Conspicuously absent in both *Vanderberg* and cases following it was a citation to a case which predated *Vanderberg* and which in fact involved a "post-judgment" elimination. In Reichenbach v. United Masonic Benefit Ass'n, 112 Mo. 22, 20 S.W. 317 (1892), *trans'd from* 47 Mo. App. 77 (1891), discussed *infra* note 65, a dismissal of one of two appeals from the same judgments before the supreme court (to which the cause had been transferred) left one appeal involving less than the requisite jurisdictional "amount," and the supreme court rejected jurisdiction of the remaining appeal.

62. 338 Mo. 226, 89 S.W.2d 659 (1936), *trans'd,* 231 Mo. App. 460, 100 S.W.2d 943 (1937).

63. See "Appeal From New Trial Order," § 9.025 and "Standard Rules," § 9.015, note 37 and accompanying text.

64. Haley v. Horwitz, 286 S.W.2d 796 (Mo.), *trans'd,* 290 S.W.2d 414 (Ct. App. 1956) (dictum) (excessiveness of award not established on record); Heuer v. Ulmer, 273 S.W.2d 169 (Mo.), *trans'd from* 264 S.W.2d 895 (Ct. App. 1954), *retrans'd,* 281 S.W.2d 320 (Ct. App. 1955) (counterclaim issue not included in defendant-appellant's brief); Kansas City v. National Eng'r & Mfg. Co., 265 S.W.2d 384 (Mo. 1954) (amount of inadequacy of appellant's verdict reduced in his brief); Buddon Realty Co. v. Wallace, 188 S.W.2d 28 (Mo.), *trans'd,* 238 Mo. App. 900, 189 S.W.2d 1002 (1945) (failure to brief issue of indebtedness deemed "admission" of colorability); Ewing v. Kansas City, 350 Mo. 1071, 169 S.W.2d 897 (1943), *trans'd,* 238 Mo. App. 266, 180 S.W.2d 234 (1944) (jurisdiction based only on "live issues" presented to appellate court).

65. *Settlement cases*: Two clear examples transferred by the supreme court to the

Ashbrook introduces a flexible rule for measuring jurisdictional "amount." This flexibility gives rise to conflicting theories which presently coexist in the

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court of appeals without opinion are: Hopkins v. St. Louis Pub. Serv. Co., 382 S.W.2d 442 (Mo. Ct. App. 1964); Stepp v. Rainwater, 373 S.W.2d 162 (Mo. Ct. App. 1963). In both cases, two defendants appealed a plaintiff's verdict to the supreme court (in *Hopkins,* the verdict was in favor of husband and wife on separate counts) which totaled more than the jurisdictional "amount." While the case was pending there, plaintiff settled with one appellant, and a motion to transfer was sustained because the remaining "amount" was insufficient for supreme court jurisdiction. *But see* Pierce v. Ozark Border Elec. Co-op., 378 S.W.2d 504 (Mo. 1964), in which (defendant) third party plaintiff appealed the judgment in favor of third party defendant dismissing third party plaintiff's petition for any damages for which he might become liable to plaintiff. *After* the appeal, third party plaintiff settled plaintiff's claim of $150,000 for $34,500. Although in this case either "amount" was sufficient, the court found the "amount" requirement satisfied because the claim for $150,000 "fixes the amount in dispute for the purpose of our jurisdiction." *Id.* at 506. By its denial of the effect of the settlement upon jurisdiction, the court indicates that it would have had jurisdiction even if the third party plaintiff had successfully compromised plaintiff's claim for less than the jurisdictional requisite.

A problem similar to settlement arises if plaintiff recovers part of his claim which is appealed by one defendant and plaintiff also appeals, seeking to preserve his claim against the other defendant if a new trial is ordered. Feste v. Newman, 368 S.W.2d 713 (Mo. 1963) (en banc), *trans'd.* In this case, plaintiff's appeal of the verdict for the second defendant would have conferred jurisdiction upon the supreme court had it not been dismissed by plaintiff's failure to brief and argue it as a contention of error.

Dismissal Cases: In Hutchinson v. Missouri Pac. Ry., 288 S.W. 91 (Mo. Ct. App. 1926), a suit against three defendants for $50,000, two of the defendants had judgment rendered in their favor but plaintiff recovered an amount against one defendant insufficient for supreme court jurisdiction. The losing defendant appealed plaintiff's recovery and plaintiff appealed the judgment in favor of the other defendants to the court of appeals. The ordinary practice of aggregating the separate "amounts" of two appeals would have given a total "amount" which was sufficient for supreme court jurisdiction, but plaintiff's appeal was excluded because it was dismissed by plaintiff while still pending in the court of appeals. That court ruled against the defendant's argument that jurisdiction lay in the supreme court because the appeals originally vested there. Reichenbach v. United Masonic Benefit Ass'n, 112 Mo. 22, 20 S.W. 317 (1892), *trans'd from* 47 Mo. App. 77 (1891), *retrans'd,* involved cross appeals which provided supreme court jurisdiction. After transfer by the court of appeals to the supreme court, plaintiff dismissed her appeal. Because the "amount" of the second appeal was insufficient, the supreme court retransferred, holding that jurisdiction had not irrevocably vested.

> Here the appeal from the judgment against defendant, based on the finding upon the second count, is the only matter for examination, and the defendant alone complains of that judgment. In this state of the record we are of the opinion that the amount involved is to be determined as though *defendant alone* had originally appealed. . . . *Id.* at 25, 20 S.W. at 318. (Emphasis added.)

Contra, Wilson v. Buchanan County, 298 S.W. 842 (Mo. 1927), *trans'd from* court of appeals (plaintiff did not "press" his appeal of inadequacy); *cf.* Pierce v. Ozark Border Elec. Co-op, *supra.*

A problem similar to "dismissal" is involved when the defendant appeals the denial of his motion to set aside a verdict for plaintiff and on appeal concedes partial liability. In Briley v. Thompson, 285 S.W.2d 27 (Mo. Ct. App. 1955), *trans'd from* supreme

supreme court's catalog of jurisdiction. According to one, jurisdiction is determined on the record at the time of judgment from those parts of the judgment which are appealed. The rationale of this rule is that because the appeal is taken from the adverse judgment, the "amount" of the appeal is the amount of recovery denied or liability assessed *by the judgment.*[66] The

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court, *retrans'd,* the defendant induced transfer from the supreme court by filing a motion stipulating that his appeal was predicated on the excessiveness of plaintiff's verdict, but that it was not excessive by an "amount" sufficient for supreme court jurisdiction. The appeal was retransferred, however, when his appellate theory in the court of appeals placed plaintiff's entire verdict (an "amount" over the then jurisdictional limits) in issue.

The "dismissal" cases must be distinguished from standard cases in which appeal is taken from only *part* of the judgment. In Anthony v. Morrow, 306 S.W.2d 581 (Mo. Ct. App. 1957), defendant appealed a judgment which contained a verdict for plaintiff ($6,500) and a dismissal of defendant's cross claim ($15,000). However, the notice of appeal stated only that defendant appeals from the judgment "in favor of plaintiff" and the court of appeals retained jurisdiction, concluding that the only amount *appealed* was plaintiff's verdict. Likewise, in a suit to cancel a lease and to recover damages to which defendant filed a cross bill for damages, the jurisdiction of an appeal by defendant from the cancellation of the lease for plaintiff and denial of defendant's damage claim against plaintiff would be predicated solely on the issues appealed (defendant's non-recovery), even though plaintiff did not recover on his damage claim; if plaintiff had also appealed, jurisdiction would have been in the supreme court. Jackson v. Merz, 358 Mo. 320, 219 S.W.2d 320, *trans'd,* 223 S.W.2d 136 (Ct. App. 1949); see Nickels v. Borgmeyer, 256 S.W.2d 560 (Mo. 1953).

Crawford v. Dixon, 166 Mo. 501, 66 S.W. 159 (1901), *trans'd,* 97 Mo. App. 558, 71 S.W. 470 (1903), is a further indication the court does not consider that jurisdiction irrevocably vests at the time the appeal is taken. In this case the "amount" was sufficient for the supreme court, but while the appeal was pending in that court, the legislature increased its jurisdictional limit to an "amount" greater than that involved. The court based its transfer on the legislative act which stated that appeals pending but not involving the increased jurisdictional "amount" should be transferred.

66. This was the precise holding in the case of Schwyhart v. Barrett, 223 Mo. 497, 122 S.W. 1049 (1909), *trans'd,* 145 Mo. App. 332, 130 S.W. 388 (1910). In this case, the court refused to include interest that had accrued after the judgment was entered but before appeal was taken. In conclusion, the court stated "that 'the amount in dispute' . . . is the amount for which the judgment was rendered December 14, 1906." *Id.* at 504, 122 S.W. at 1051. *Schwyhart* has been a prolific authority because of its clear expression of guides for determining jurisdictional "amount."

Supreme court cases recurringly quote the phrase that "appellate jurisdiction over the subject matter is determined upon the record at the time the appeal is granted and 'nothing subsequently occurring will defeat or confer jurisdiction on this court.'" Pierce v. Ozark Border Elec. Co-op, 378 S.W.2d 504, 506 (Mo. 1964). Particularly significant is the fact that this frequent usage is generally limited to those cases in which the court would have jurisdiction in any event. In *Pierce,* the court by footnote incorporated "qualifications," but the case cited (Feste v. Newman, 368 S.W.2d 713 (Mo. 1963) (en banc), discussed *infra* note 71), stands *on its facts*—expressed by precise language—for a rule that is the exact antithesis of the general rule quoted by *Pierce.*

"Amount" jurisdiction in federal cases provides a parallel. The rule consistently applied is that "events occurring subsequent to the institution of the suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction." Saint Paul Mer-

conflicting position, represented by *Ashbrook,* is that jurisdiction is not capable of *conclusive determination* at the time of judgment, but is "conditional" and subject to divestment as long as the "amount" of the appeal can be revalued.[67]

As authority for its decision in *Ashbrook,* the court cited holdings that jurisdiction based on a "constitutional question" exists only if the constitutional issue is briefed and argued.[68] It also relied on *Vanderberg,*

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cury Indem. Co. v. Red Cab Co., 303 U.S. 283, 289-90 (1938); Wade v. Rogala, 270 F.2d 280 (3d Cir. 1959) (claimant's death while suit pending did not "oust" jurisdiction although limiting recovery). This was also the rule when the Supreme Court had "amount" appellate jurisdiction. In Cook v. United States, 69 U.S. (2 Wall.) 218 (1865), appeal was taken from a judgment entered against defendant for an "amount" over the jurisdictional level. While the appeal was pending, Congress remitted the recovery by the United States to below the jurisdictional "amount" but the Supreme Court rejected a motion to dismiss the appeal. "The jurisdictional facts existed at the time of issuing and serving the writ of error. By its issue and service the court obtained jurisdiction over the cause, and this jurisdiction once acquired, cannot be taken away by any change in the value of the subject of the controversy." *Ibid.*

MO. REV. STAT. § 512.050 (1959) prescribing the time allowed to file a notice of appeal, supports the position that filing the notice of appeal invests the court with jurisdiction (if in fact the requisite "amount" then exists) from the time appeal is taken:

> After a timely filing of such notice of appeal, failure of the appellant to take any of the further steps to secure the review of the judgment or order appealed from *does not affect the validity of the appeal,* but is ground for such action as the appellate court deems appropriate, which may include dismissal of the appeal. *Ibid.* (Emphasis added.)

Additional support for the view that "amount" jurisdiction must be determined at the time the appeal is taken is found in a proposed constitutional amendment—an 1896 concurrent resolution which was rejected at the polls. There "amount in dispute" was defined as "the money value of the real dispute *at the date of the judgment appealed from,* and the courts shall look to the entire record for the purpose of ascertaining such value." (Emphasis added.) "Introduction," notes 35-37 and accompanying text.

67. *Ashbrook* does not clearly articulate this jurisdictional philosophy and purportedly stands on the ground that a matter dropped *after* appeal was never part of the dispute at the trial because it is colorable and uncollectable as a matter of law. But this basis for the decision is a fiction because *on its facts Ashbrook* predicates jurisdiction on the shifting basis of the "amount" which will be the subject of appellate determination. This decision places the court in the position of determining jurisdiction at a time at least as late as the filing of the appellate briefs. The latest time at which the jurisdictional issue can be decided has not been defined. See Briley v. Thompson, 285 S.W.2d 27 (Mo. Ct. App. 1955) (oral argument induced transfer), discussed *supra* note 65.

68. Note, however, that the "constitutional question" cases relied on by the court also held that the failure to brief and argue *evidences the colorability* of the matter as a question at the trial court. Therefore, if these cases actually hold that the issue on which jurisdiction was attempted to be based, was not in dispute at the trial—because it was colorable, *e.g., Vanderberg*—and if they do not hold that an issue in dispute at the trial but abandoned *after* appeal was taken from the judgment is excluded from jurisdictional consideration, they do not support the *result* in *Ashbrook.* There are "constitutional question" cases which have flatly identified the failure to brief and argue as the sole cause of a transfer to the court of appeals. *E.g.,* Wright v. Tucker, 137 S.W.2d 557 (Mo.

implying that the failure to contest an issue at the appellate level created a sort of presumption[69] that the issue was colorable and frivolous and therefore not in "real" dispute at the trial court.

The court's efforts to bring its decision within the *Vanderberg* principle obviously stemmed from its recognition that its theories conflicted and that the existing rule, uniformly stated although sporadically followed, was that jurisdiction is "determined upon the record in the trial court at the time the appeal is granted."[70] The cases following *Ashbrook* have generally maintained its rationalization when rejecting jurisdiction on post-judgment abandonment grounds, but the reasoning appears strained.[71] It is especially

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1940), *trans'd*; Cooper County Bank v. Bank of Bunceton, 310 Mo. 519, 276 S.W. 622 (1925), *trans'd*, 221 Mo. App. 814, 288 S.W. 95 (1926).

69. For an unequivocal statement of the fictional "presumption," see Buddon Realty Co. v. Wallace, 188 S.W.2d 28 (Mo.), *trans'd*, 238 Mo. App. 900, 189 S.W.2d 1002 (1945):

> Furthermore, in the brief filed in this court by the plaintiffs, the issue of indebtedness is abandoned. This is an *admission* that the claim of indebtedness, as alleged in plaintiff's petition is *colorable* and for that reason cannot be considered in determining the question of appellate jurisdiction. *Id.* at 29. (Emphasis added.)

In Snowbarger v. M.F.A. Cent. Co-op., 317 S.W.2d 390 (Mo. 1958) (en banc), *trans'd*, 328 S.W.2d 50 (Ct. App. 1959), the court stated that the "jurisdictional facts" must have existed at the time appeal was taken:

> Certainly, none will question that the amount in actual dispute for jurisdictional purposes is determined at the time the appeal is taken, and that nothing that subsequently occurs should be invoked to confer jurisdiction which did not exist at the time of the appeal, and that the possibility or contingency that a subsequent event will reduce the amount that was *actually in dispute* at the time an appeal was taken should not deprive the court of the jurisdiction which it had at the time of the appeal. *Id.* at 393.

While this statement is perfectly correct, the court does not pass on (because unnecessary in the case) the real source of difficulty, *i.e.*, what are the criteria to determine whether an issue was in "real dispute" at the trial. The *Vanderberg* case holds the court must base this decision on the facts existing at the time the judgment was entered and appeal taken. *Ashbrook* holds that the court may also consider events subsequent to the appeal.

70. Ashbrook v. Willis, 338 Mo. 226, 89 S.W.2d 659 (1936), *trans'd*, 231 Mo. App. 460, 100 S.W.2d 943 (1937).

71. That the reasoning in *Ashbrook* rests on a fiction is demonstrated by the facts. Although constrained by the "rule" that jurisdiction must be fixed as of the time the appeal is taken, the court obviously found alluring the denial of jurisdiction when a decision on the merits would only affect an "amount" below its jurisdictional level. Therefore, it postulated the theory that failure of counsel to contest the issue of respondent's claim for personal injuries in the appellate court, *ipso facto*, made the claim colorable. The court declined to state as its holding that *jurisdiction is determined when the briefs are filed and when the case is submitted for appellate determination*, but in effect this was done. In *Ashbrook* plaintiff got a new trial which reinstated his damage claims for over the "amount" limit. Because on defendant's appeal if the order of new trial was upheld, plaintiff would be able to assert the "abandoned" claim notwithstanding the court's decision that it was no longer involved, the court's reasoning seems weak.

The opinions transferring on the authority of *Ashbrook* continue to writhe on the horns of the dilemma it created. The court has gravitated from fictional use of the *Vanderberg*

difficult to accept *Ashbrook* because there the *respondent* was the party who did not preserve the issue.[72] Probably the fundamental reason for maintaining "conditional" jurisdiction is to permit the court to take into account subsequent events that reduce the "amount in dispute" in order to restrict its appellate jurisdiction.[73] It does not appear to be used to "confer" juris-

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principle towards an express adoption of the view that facts which occur *after* judgment and appeal are determinative. In Ewing v. Kansas City, 350 Mo. 897, 169 S.W.2d 897 (1943), discussed *supra* note 64, the court talked about "live issues" on appeal as the jurisdictional litmus before it reverted to the *Ashbrook* fictionalization of *Vanderberg*. In Heuer v. Ulmer, 273 S.W.2d 169 (Mo. 1954), discussed *supra* note 64, defendant cross appealed to the court of appeals his loss on a counterclaim which was above the "amount" limit, but in his brief in the supreme court (to which the case had been transferred by joint motion of the parties) he stated that the entire trial had been properly conducted and he had appealed only to protect his counterclaim if plaintiff got a new trial. Relying in part on *Ashbrook*, the court transferred, holding that its jurisdiction depended on "live issues," which remain " 'in dispute between the parties *on the appeal*, and subject to determination by the appellate court.' " *Id.* at 170. Finally in Feste v. Newman, 368 S.W.2d 713 (Mo. 1963) (en banc), discussed *supra* note 65, the court squarely faced the issue:

> This presents the question whether appellate jurisdiction is *irrevocably established as of the time the appeal is taken*, or whether if jurisdiction in a court of limited jurisdiction is established by the record at the time of taking the appeal it may *subsequently* be lost by failure to preserve or present for appellate review an issue within the scope of the limited jurisdiction.

It went on to hold that:

> However, even though the record indicates that appellate jurisdiction exists in this court at the time the appeal is taken, the failure to preserve and keep alive for appellate review issues essential to the exercise of jurisdiction will result in the lack of jurisdiction of this court to rule the case on appeal. *Id.* at 715. (Emphasis added.)

Citing *Ewing* and *Heuer*, the court in *Feste* clearly recognized that it was using a principle of jurisdiction that *divested* it of the power which had once existed to decide the case. Nevertheless, at the end of its opinion the court lapsed into a quotation from *Heuer* to the effect that abandoned issues are considered " 'colorable and meritless, and insufficient to vest appellate jurisdiction' " implying that the "amount" was never in dispute. *Id.* at 716. That jurisdiction of an appeal may properly lie in the supreme court only to be lost or divested by operation of an event subsequent to the appeal is conclusively illustrated by the settlement cases cited *supra* note 65. Obviously, no fiction can transform a settlement of part of plaintiff's judgment (the total of which is over the jurisdictional amount) into a claim "colorable" *ab initio* and insufficient to "vest" jurisdiction.

72. Respondent-plaintiff would be able to reinstitute his full claim if for any reason the new trial order were affirmed. If the appellate court held that the giving of defendant's instruction was error and the proper basis for ordering a new trial, the damage issues argued by respondent—after being reinstated by the new trial—appear to be an unalterable ground for jurisdiction. *Cf.* Poe v. Kansas City, C.C. & St. J. Ry., 238 S.W. 1082 (Mo. 1922). Powers v. Missouri Pac. Ry., 226 Mo. 701, 172 S.W. 1 (1914), discussed *supra* note 59, suggests that there is jurisdiction in the supreme court if—on *Ashbrook* facts—before the defendant appeals the new trial, plaintiff intentionally amends his petition to preclude supreme court jurisdiction.

73. Evidence exists to indicate that the docket load of the supreme court historically has been very heavy, but the load of the courts of appeals disproportionately low. The

diction when events subsequent to the judgment increase the "amount."[74]

Because jurisdiction which is capable of being re-valued after the appeal has been perfected cannot be conclusively determined by the courts or litigants at any point of time, the court's adoption of this policy has injected serious practical difficulties into the appellate process. Unlike a simple definite jurisdictional formula, "conditional" jurisdiction permits counsel[75] to appeal and argue cases, and courts—at both appellate levels—to transfer,[76] dismiss,[77] or accept and hear cases on the merits,[78] although never com-

worst offender in burdening the court's calendar is the "amount" case which involves only slightly more than the limit. The court in an effort to relieve its docket attempted sundry solutions including suggestions for the raising of the "amount" level. The failure of the legislature to increase the amount until recently (the limit of the court was $7,500 from 1909 to about 1960) undoubtedly made it imperative that the court adopt restrictive rules. The "divestment" rule made possible a definition of jurisdiction that precluded appeal to the supreme court of some of the very many cases in which the "amount" exceeded $7,500 but was less than $15,000, cases which of late at least appear onerous to the supreme court. See APPELLATE PRACTICE REPORT, discussed *supra* note 3. This report demonstrated the increasing load of the supreme court and the somewhat lighter load of the courts of appeals and the number of cases (Exhibits E & F) in which jurisdiction would have been in the court of appeals if the limit had been increased to $15,000. The report throughout contains suggestions to improve the workings of "amount" jurisdiction, if it cannot be eliminated by constitutional amendment.

74. Certainly, if a defendant appeals a verdict of $15,000 several days after judgment was entered, the accrual of interest is not includable. See "Conferring Jurisdiction," § 9.021(b)(2).

75. In *Ashbrook*, counsel for appellant must answer in a second appellate forum because respondent in his brief abandoned a jurisdictional necessity. Similarly, in Stepp v. Rainwater, 373 S.W.2d 162 (Mo. Ct. App. 1963), the defendant-appellant who did not settle properly filed his appeal in the supreme court, but ultimately the appeal was in the court of appeals. Bewildered indeed the plaintiff-respondent must have been in Briley v. Thompson, 285 S.W.2d 27 (Mo. Ct. App. 1955), discussed *supra* note 65. After preparing to argue in the supreme court, respondent was forced by appellant's footwork to answer in the court of appeals. But argument there resulted in respondent again being transferred because of a determination by the court of appeals that appellant's "misinformation" induced the supreme court transfer.

76. An example of the supreme court transferring erroneously on the divestment principle is Briley v. Thompson, *supra* note 75. Even though the court of appeals properly sustained a motion to transfer to the supreme court, Heuer v. Ulmer, 273 S.W.2d 169 (Mo. 1954), discussed *supra* note 71, the appeal was returned by the supreme court because of abandonment by statements in the appellate briefs (unavailable to the court of appeals when it first transferred). Moreover, if it appears that the requisite "amount" is in dispute, a motion in the court of appeals to transfer will be sustained despite its expression of apprehension concerning what will be discarded by the appellate brief. Mitchell v. Mosher, 352 S.W.2d 932 (Mo. Ct. App.), *trans'd*, 362 S.W.2d 532 (Mo. 1962): "Of course, plaintiff's counsel might, by some such concession in his appellate brief or oral argument, ticket himself and his client for another ride on the jurisdictional merry-go-round and another stop on our stoop." *Id.* at 934; see Albers Milling Co. v. Carney, 335 S.W.2d 207 (Mo. Ct. App.), *trans'd*, 341 S.W.2d 117 (Mo. 1960).

77. Feste v. Newman, 368 S.W.2d 713 (Mo. 1963) (en banc), *trans'd*.

78. *Ibid.*; Briley v. Thompson, 285 S.W.2d 27 (Mo. Ct. App. 1955), discussed *supra* note 65.

pletely certain that the court has jurisdiction or will continue to retain it. Another vice of the policy is the added leverage for control of the appellate forum given to the litigants, both appellant and respondent.[79]

The supreme court remains in a quandary concerning the use of "conditional" jurisdiction. Current decisions continue to use language of the general rule denying the efficacy of events subsequent to the judgment to "defeat or confer" jurisdiction;[80] indeed in some cases the "rule" is clearly followed and the divestment principle expressly rejected.[81] Nevertheless,

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79. A certain degree of control is unavoidable. Generally little benefit can be gained by an appeal to one court rather than the other, but there are some advantages. A party might desire supreme court jurisdiction to avoid two appellate decisions when he appeals a case of such novelty and importance that an adverse decision in the court of appeals would be likely to be appealed to the supreme court. On the other hand, appeal to the court of appeals might be desirable to avoid the expense and delay of an appeal to the supreme court—especially when most appeals in the courts of appeals originate in the immediate vicinity of those courts. See APPELLATE PRACTICE REPORT, discussed *supra* note 3.

Some examples do exist of jurisdictional control which appear unfortunate. One technique available to a defendant appealing a plaintiff's verdict sufficient for supreme court jurisdiction is to pay enough of the judgment *after the appeal is taken* to cause a transfer. *Cf.* Hopkins v. St. Louis Pub. Serv. Co., 382 S.W.2d 442 (Mo. Ct. App. 1964), *trans'd from* supreme court; Stepp v. Rainwater, 373 S.W.2d 162 (Mo. Ct. App. 1963), *trans'd from* supreme court. Powers v. Missouri Pac. Ry., 262 Mo. 701, 172 S.W. 1 (1914), discussed *supra* note 59, illustrates that plaintiff-appellant could in appellate briefs or in arguments reduce the amount claimed and divest jurisdiction once well established in the supreme court. And it would cost plaintiff little, for if he won a new trial he could again amend his petition to reinstate the abandoned amount or claim. *Ashbrook* exemplifies the plaintiff-respondent who can divest jurisdiction by not pursuing a claim in the supreme court, but can still contest in the court of appeals a claim for a smaller "amount" which involves the same rule of law. If the new trial order is affirmed, respondent is able to prosecute both claims. Consider the defendant-appellant, who in his brief or oral argument in an appeal filed with the supreme court can divest jurisdiction by conceding partial liability but can rescind his concession when appearing before the court of appeals. Briley v. Thompson, *supra* note 78.

The problem of control has concerned the courts. See Poe v. Kansas City, C.C. & St. J. Ry., 238 S.W. 1082 (Mo. 1922), discussed *supra* note 72. For references to the problem in federal courts see WRIGHT, FEDERAL COURTS 89 n.37 (1963).

80. Generally, the language is used when the problem of abandonment is not an issue (Snowbarger v. M.F.A. Central Co-op, 317 S.W.2d 390 (Mo. 1958) (en banc), discussed *supra* note 69) or when the supreme court would have had jurisdiction in any event (Pierce v. Ozark Border Elec. Co-op., 378 S.W.2d 504 (Mo. 1964), discussed *supra* note 65).

81. In Yax v. Dit-Mco, Inc., 366 S.W.2d 363 (Mo. 1963), a decision handed down only three months prior to Feste v. Newman, 368 S.W.2d 713 (Mo. 1963) (en banc), *trans'd*, the supreme court considered its jurisdiction in a case concerning an increase in the value of corporate stock. At the time the appeal was filed, the "amount" of increase was sufficient for jurisdiction. However, during the pendency of the appeal, the stock value fell sufficiently to reduce the "amount" below the court's jurisdiction. Nevertheless, the court retained jurisdiction based on the facts "as of the time the appeal was taken."

recent approval of "conditionally determined" jurisdiction is witnessed by the "imprimatur" of the court en banc.[82]

9.021(b)(2). *Conferring Jurisdiction and Inclusion of Interest*

The rule that nothing occurring subsequent to the judgment will *confer* jurisdiction[83] is demonstrated by the cases considering the effect of interest on the determination of jurisdictional "amount." In cases *ex contractu*[84]—

366 S.W.2d at 366. *Yax* was not considered by the court in *Feste*, but the cases appear to be diametrically opposed.

In Pierce v. Ozark Border Elec. Co-op., *supra* note 80, discussed *supra* note 65, the compromise of the claim (for an "amount" over the jurisdictional limits) which was the basis of the appeal occurred while the appeal was pending. The court on the one hand noted the "qualifications" of *Feste*, and on the other specifically based jurisdiction on the *full amount of the claim, before settlement* and gave the specific date of August 17, 1962 as the time when it should "look at the record" to affix jurisdiction. This is the date appellant filed notice of appeal from the judgment of August 14, 1962 which dismissed appellant's cross-claim. Brief for Appellant, pp. 1, 8. Therefore, jurisdiction was based on the record at the time the appeal was taken and the supreme court would have had jurisdiction even if the claim on which jurisdiction was based ($150,000) had been settled during the pendency of the appeal for an amount less than $15,000 (in fact it was settled for $34,000, giving supreme court jurisdiction whichever test was used). This case also indicates that a problem exists whether these cases base jurisdiction on the judgment at the time of rendition *or* the time of appeal. This problem is thoroughly considered in § 9.021(b)(2).

82. Feste v. Newman, *supra* note 81.

83. The general rule denying any jurisdictional effect to events occurring subsequent to the judgment is stated by the courts as applying equally to those events which tend to "defeat" jurisdiction (§ 9.021(b)(1)) and those tending to "confer," discussed in this section.

84. Because the critical analysis and logical approach of the first Missouri case found which considered interest as a component of "amount" has been strictly followed by most of the "interest" cases, little jurisdictional difficulty has arisen. In Baerveldt Constr. Co. v. Bagley, 231 Mo. 157, 132 S.W. 688 (1910), the plaintiff sued in two counts, quantum meruit and on the contract. The amount allegedly owing on the contract was less than the jurisdictional requirement, but plaintiff also demanded interest on his claim from the date of demand on defendant. The "amount" of accrued interest at the time the suit was filed was insufficient to confer jurisdiction, but the supreme court had jurisdiction because the "amount in dispute" was the amount claimed plus interest until the *date of judgment* adverse to plaintiff:

> [W]e observe a distinction between an action in tort, where the amount of damages claimed in the petition *does not bear interest before judgment, and an action of this kind*, where the amount claimed arises out of a contract, express or implied, and where the petition states facts constituting a right to recover, not only the amount specified as principal, but also interest.
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> . . . .
>
> We call attention to the distinction to be observed in this particular case between a case *where interest does not run on the amount demanded in the petition and a case where it does run* . . . . *Id.* at 162-63, 132 S.W. at 690-91. (Emphasis added.)

Therefore, the general rule is based on the question whether the action permits interest to accrue before a judgment affixing liability.

Although interest is specifically excluded from jurisdictional "amount" in the federal

claims in which interest is an integral part of the cause of action,[85] or actions on instruments providing for payment of interest[86]—interest which has accrued to the time of judgment is included,[87] but interest *after* the judgment is generally held to be a "mere incident" and not part of the "amount in dispute."[88]

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system (28 U.S.C. §§ 1331-32 (1958)), the effect attributed to interest by the federal courts in determination of the "amount in controversy" is not unlike the approach of the Missouri courts. See generally WRIGHT, FEDERAL COURTS § 35 (1963); Annot., 77 A.L.R. 991, 995-1011 (1932); Note, 45 IOWA L. REV. 832 (1960).

85. Jenkins v. Meyer, 380 S.W.2d 315 (Mo. 1964) (bank certificates); Still v. Travelers Indem. Co., 374 S.W.2d 95 (Mo. 1963) (interest an element of recovery on insurance claim for vexatious delay); Cross v. Gimlin, 256 S.W.2d 812 (Mo. 1953) (profit sharing contract); Newco Land Co. v. Martin, 358 Mo. 99, 213 S.W.2d 504 (1948) (money had and received for recovery of trust funds); Lemmon v. Continental Cas. Co., 350 Mo. 1107, 169 S.W.2d 920 (1943) (contract of accident insurance); Harvey v. Peoples Bank, 136 S.W.2d 273 (Mo. 1939) (action to establish liquidated claim against insolvent bank); State *ex rel.* Commonwealth Trust Co. v. Reynolds, 278 Mo. 695, 213 S.W. 804 (1919) (en banc) (money had and received for funds deposited in bank); Baerveldt Constr. Co. v. Bagley, *supra* note 84 (suits in quantum meruit and contract to collect payments under building contract); Berry v. Crouse, 370 S.W.2d 724 (Mo. Ct. App. 1963), *trans'd*, 376 S.W.2d 107 (Mo. 1964) (purchase payments plus interest from date of demand to judgment); Beckemeier v. Baessler, 261 S.W.2d 511 (Mo. Ct. App. 1953), *trans'd*, 270 S.W.2d 782 (Mo. 1954) (mechanic's lien); Laustrup v. Bankers Life Co., 192 S.W.2d 35 (Mo. Ct. App.), *trans'd*, 355 Mo. 304, 196 S.W.2d 260 (1946) (en banc) (contract of life insurance); Fidelity Nat'l Bank & Trust Co. v. Tootle-Campbell Dry Goods Co., 220 S.W. 697 (Mo. Ct. App. 1920), *trans'd*, 293 Mo. 194, 238 S.W. 474 (1922) (written contract for purchase of corporate stock); Myers v. Myers, 22 Mo. App. 94 (1886), *trans'd*, 98 Mo. 262, 11 S.W. 617 (1889) (contest of probate settlement concerning interest bearing notes).

In addition to claims sounding in contract in which the petition is for a liquidated sum, appeals from garnishment actions to collect tort judgments also include interest. In these cases, the amount of interest included is that which accrued from the first judgment to the time of the judgment in the garnishment action. *E.g.*, Chailland v. M.F.A. Mut. Ins. Co., 375 S.W.2d 78 (Mo. 1964) (en banc); Meyers v. Smith, 375 S.W.2d 9 (Mo. 1964) (appeal from garnishee action instituted to collect $15,000 judgment); *cf.* Pruellage v. De Seaton Corp., 380 S.W.2d 403 (Mo. 1964), *trans'd* (interest included in action to revive judgment); Union Nat'l Bank v. Lamb, 358 Mo. 65, 213 S.W.2d 416 (1948) (revival of foreign judgment); Missouri, Kan. & E. Ry. v. Watson, 64 Mo. App. 465 (1896), *trans'd*, 144 Mo. 253, 45 S.W. 1101 (1898) (injunction action to restrain collection of judgment).

86. An example would be a suit on a promissory note. See Roethemeier v. Veith, 341 Mo. 706, 108 S.W.2d 346 (1937); Huttig v. Brennan, 328 Mo. 471, 41 S.W.2d 1054 (1931).

87. Interest is included until the time of *judgment*. However, this does not mean until all post-trial motions are filed and appeal is taken. Harrison v. Harrison, 334 S.W.2d 127 (Mo.), *trans'd*, 339 S.W.2d 509 (Ct. App. 1960).

88. The leading case is Schwyhart v. Barrett, 223 Mo. 497, 502, 122 S.W. 1049, 1050 (1909), *trans'd*, 145 Mo. App. 332, 130 S.W. 388 (1910); *accord*, Harrison v. Harrison, *supra* note 87.

In tort cases interest is never included because it does not begin to accrue until after the judgment. This result is reached in tort cases in which plaintiff's recovery is reduced by remittitur. If plaintiff recovers a judgment for $16,000 and remits $2,000, the trial court normally enters a new judgment for the smaller sum, in this example for $14,000. As in other tort cases, no interest is included in determining jurisdictional "amount."[89] However, the supreme court has not adhered unfalteringly to its policy of refusing to include interest which accrues after judgment. In *State ex rel. Missouri Pac. Ry. v. Broaddus*,[90] plaintiff recovered judgment for $5,500 (jurisdictional "amount" was $4,500) but filed a remittitur of $1,000 while post-trial motions were pending. The trial judge remitted plaintiff's verdict on the record but erroneously failed to enter a new judgment. Defendant was granted an appeal to the court of appeals from which it unsuccessfully attempted to transfer the cause. After the trial court decision was affirmed and a second motion to transfer overruled, the defendant petitioned the supreme court for mandamus to compel transfer, contending that the court of appeals decision was void because rendered without jurisdiction. The supreme court issued the writ, concluding that the interest which had accrued on the judgment to the date of remittitur made the "amount in dispute" $4,632. The court upheld relator's contention that the original judgment had not been nullified but was merely modified by the entry of the remittitur and it subtracted the remittitur as a "credit" on the record. The respondent argued that the proper basis for jurisdiction was the "amount" for which a new judgment should have been entered ($4,500) on the ground that the remittitur had nullified the original judgment, but the court rejected this argument apparently because such a holding would have left respondent with *no* judgment. The court specifically quashed the decision by the court of appeals by holding that the accrued interest was not erased by the effect of the remittitur and that the appellant-defendant would have had to pay the interest to satisfy the judgment. But it did not

89. For discussion of remittitur cases see note 59 *supra*.

90. 212 Mo. 685, 111 S.W. 508 (1908) (en banc), *quashing* Partello v. Missouri Pac. Ry., 141 Mo. App. 162, 107 S.W. 473 (1908).

The argument made in the court of appeals by appellant was that he would have had to pay the accrued interest at the time appeal was taken to satisfy the judgment. That court, in refusing to transfer to the supreme court, noted that appellant could have paid on the date the remittitur was entered which, just as on the day judgment was rendered, would have cost the appellant no interest. A simpler answer is that interest always accrues on a judgment and the amount—albeit very small—that would accrue before a timely appeal, would frequently give supreme court jurisdiction of appeals from *judgments* which themselves are insufficient. The question whether defendant would have to pay the interest accrued on the judgment should have been extraneous to the question of *inclusion* of interest in the "amount in dispute."

indicate why its holding that the original judgment was unimpeached resulted in the inclusion of interest in the calculation of jurisdictional "amount."[91]

Broaddus appears to be nothing more than an inexplicable departure from the general rule that events subsequent to the judgment cannot be included in the calculation of jurisdictional "amount" (in fact its application has been limited to "remittitur" cases).[92] By including the interest

91. The peculiar aspect of *Broaddus* is the effect given the remittitur by the court, for had it based jurisdiction on the "amount" of the original judgment unaffected by the remittitur, the result would have excluded interest; *i.e.*, if the court had held that the attempt to enter a remittitur was so defective that it could not be counted as a credit on the record it probably would have held the "amount in dispute" to be exactly $5,500. Thus if the original judgment in *Broaddus* had been for $4,500 and an attempt to remit the judgment to $3,500 was held ineffective, the "amount in dispute" would have been exactly $4,500, giving (at this time) jurisdiction in the court of appeals. Nor is there any reason to differentiate this case simply because interest was allowed to accrue as a result of the trial court's failure to enter a new judgment, because interest always accrues on a judgment.

Clearly the court wanted to include the *effect* of the remittitur since it held the "amount in dispute" was not the $5,500 original judgment. Since the trial judge erroneously failed to enter a new judgment, appeal must be from the original (the only) judgment. But the court clearly reckoned the effect of the remittitur in its holding, so it obviously based appeal on the original judgment as altered by remittitur. But by the time the remittitur took effect, interest had accrued. The jurisdictional amount was thus calculated by considering the $5,500 plus accrued interest of $132 and remitting that total by $1,000.

92. Gray v. Doe Run Lead Co., 331 Mo. 481, 53 S.W.2d 877 (1932); Osborn v. Chicago, R.I. & P. Ry., 1 S.W.2d 181 (Mo. 1927). *But see* Barrett v. Stoddard County, 183 S.W. 644 (Mo. Ct. App. 1916) (remanded to circuit court to enter second judgment where one had not been entered after remittitur—but for amount excluding accrued interest); *cf.* McKim v. Metropolitan St. Ry., 209 S.W. 622 (Mo. Ct. App. 1919) (plaintiff's remittitur "threw off" accrued interest where second judgment actually entered but first not set aside). In the normal remittitur case where a second judgment is entered after the first has been set aside, interest begins to accrue from the time of entry of the second judgment. Start v. National Newspaper Ass'n, 222 S.W. 870 (Mo. Ct. App. 1920). The *Gray* and *Osborn* cases, *supra*, demonstrate the theory the court has adopted: if, *after remittitur* without a new judgment, interest is not nullified and will be owing on the judgment, it is included in the calculation of jurisdictional "amount." See Start v. National Newspaper Ass'n, *supra* (plaintiff's remittitur could be worded to permit accrued interest to remain payable).

The supreme court obtained jurisdiction in another case apparently on the *Broaddus* principle. In Bunner v. Patti, 343 Mo. 274, 121 S.W.2d 153 (1938) (en banc), *trans'd from* 107 S.W.2d 143 (Ct. App. 1937), the court of appeals transferred on the principle that cross appeals put into dispute both the amount of plaintiff's recovery and the amount plaintiff failed to recover against the co-defendant. However, the supreme court, refusing the jurisdictional theory of the court of appeals, noted merely that it had jurisdiction because the respondent had recovered an amount "slightly in excess of $7,500" (the then jurisdictional limit of courts of appeals). The "amount," as reduced by remittitur, was *exactly* $7,500. The actual basis for the court's jurisdiction was uncovered from the court's files by Lemonds v. Holmes, 360 Mo. 626, 628, 229 S.W.2d 691, 693 n.1 (1950) (en

which accrued during the interim from the rendition of judgment until the judgment in effect assumed its "appealable" form (*i.e.*, modifying effect given to remittitur), *Broaddus* represents one of the conflicting formulae concerning the *time* at which jurisdiction is determined. It apparently holds that jurisdiction is based on the record at the date the appeal is taken and not on the state of the record when the judgment from which appeal is taken was entered.[93]

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banc). In a footnote the court revealed that jurisdiction in *Bunner* was based on the second judgment for $7,500 which had been entered after the first judgment had been set aside by a remittitur of $2,500, plus the interest which had accrued from the time of the first judgment until the second judgment was entered to give effect to the remittitur. The court overlooked the fact that the *Broaddus* case was not in point because a second judgment had been properly entered after the first had been set aside. The facts of *Bunner* conform to the standard remittitur cases in which post-judgment interest is considered irrelevant. See, *eg.*, Osborn v. Nelson, 141 Mo. App. 428, 126 S.W. 178 (1910), in which the plaintiff voluntarily entered a remittitur for an amount slightly greater than ordered by the trial court; as a result, the judgment entered—just within the court of appeals monetary limit—determined jurisdiction.

The result in the *Bunner* and the *Broaddus* cases is an anomaly. Cases not involving a remittitur adopt as axiomatic the principle that post-judgment interest is a "mere incident" and is not a product of the legal dispute. As a result, post-judgment interest is not part of the "amount" included for jurisdiction, although it accrues on every judgment of recovery and would have to be paid by the judgment debtor to satisfy the debt (the fact apparently causing the *Broaddus* rule). The leading case excluding post-judgment interest is Schwyhart v. Barrett, 223 Mo. 497, 122 S.W. 1049 (1909), *trans'd,* 145 Mo. App. 332, 130 S.W. 388 (1910); *accord,* Pyle v. University City, 318 Mo. 956, 1 S.W.2d 799 (1927), *trans'd*; see Harrison v. Harrison, 334 S.W.2d 127 (Mo.), *trans'd,* 339 S.W.2d 509 (Mo. Ct. App. 1960) (interest accruing during pendency of after trial motions before notice of appeal not includable). *But see* Kansas City Terminal Ry. v. Kansas City Transit, Inc., 339 S.W.2d 766, 767 (Mo. 1960), *trans'd,* 350 S.W.2d 828 (Ct. App. 1961) (dictum) (parenthetical indication that if appeal had not been taken on the same date as judgment interest from judgment to date of appeal would have been included).

A unique aspect of *Schwyhart* is that it cites and summarizes *Broaddus,* which reaches the opposite result but does not comment on the apparent conflict. If the two decisions were harmonious, the court's lack of discussion would be understandable, but that *Broaddus* is contradictory on its face is inescapable. If the *Schwyhart* case can be read as upholding *Broaddus,* the supreme court has never made it clear upon what ground this is accomplished.

The basis for the decisions in *Pyle* and *Schwyhart* is that although the interest does accrue and become part of the debt, it accrues after the judgment and therefore ought not be included. See Mo. REV. STAT. § 408.040 (1959). This reasoning would preclude with equal force inclusion of interest in a remittitur situation in which there were two judgments, *i.e., Bunner,* or an appeal from a single judgment after crediting remittitur, *i.e., Broaddus.* Moreover, a contrary rule would permit an appellant to control the forum of appeal in some cases by waiting until sufficient interest had accrued on the judgment to be determinative of jurisdiction.

93. Compare the cases on "subsequent events" defeating jurisdiction (§ 9.021(b)(1)) in which the court operates with a general rule that jurisdiction is not affected by events that occur *after appeal* is taken. The problem the remittitur cases raise is whether juris-

However, the recent case of *Harrison v. Harrison,*[94] although apparently disregarding *Broaddus,* destroyed that decision's only possible rational foundation. In *Harrison* a suit for a liquidated sum resulted in a verdict slightly below the requisite "amount," but by the time the appeal was filed, the judgment including interest was in excess of the court of appeals' limit. The supreme court rejected jurisdiction on the basis of the existing practice to ignore accruing interest, but the case definitely supports the conclusion that jurisdiction is determined on the record *at the time the judgment is entered* because it unequivocally excluded interest which accrued during the period in which post-trial motions were resolved and the judgment became appealable.[95]

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diction is determined by the judgment from which the appeal is taken at the time of its *entry,* or by the state of the judgment and the disputed "amount" which it represents calculated at the time *appeal is filed.* No case found recognized or discussed the potential for difference in result the two formulae provide.

The cases determining jurisdiction unqualified by "subsequent events," use the language that the jurisdiction must be determined "from the facts appearing in the transcript as of the time the appeal was taken." Yax v. Dit-Mco, Inc., 366 S.W.2d 363, 366 (Mo. 1963), discussed *supra* note 81. In Pierce v. Ozark Border Elec. Co-op., 378 S.W.2d 504 (Mo. 1964), discussed *supra* notes 66, 81, the court stated the rule that jurisdiction is determined by the judgment at the date the appeal is filed and referred to the date when appeal was taken as the date when jurisdiction vested. When using the *corollary principle* that events *after judgment* cannot *confer* jurisdiction, the court views the *judgment at the time of rendition* as the referent and holds that events which occur after judgment but before filing of appeal (*e.g.,* accruing interest) are not included in the calculation of "amount." The language of the cases considering the problem of accruing interest is the best example. Precisely in point is Harrison v. Harrison, 334 S.W.2d 127 (Mo. 1960), discussed *supra* note 92. The probable reason that the court has not distinguished between the time the judgment was entered and the time appeal was taken therefrom, when it considers a "divestment" problem is that nothing would be likely to occur in the interim to reduce the "amount." This fact permits imprecision in the court's language. However, in "conferring" jurisdiction cases, accruing interest and installment payments make the time difference crucial, forcing the court to precisely assert that the time at which the judgment is entered, as opposed to the time when appeal is taken therefrom, is the jurisdictional referent. Harrison v. Harrison, *supra,* holding that interest after the judgment but before post-trial motions had been filed to make the judgment appealable was not included.

94. 334 S.W.2d 127 (Mo.), *trans'd,* 339 S.W.2d 509 (Ct. App. 1960).

95. This holding would, in an installment award situation as well (see § 9.022(a)), preclude basing jurisdiction in the supreme court on an "amount" including installments accruing after the *judgment* until the time of appeal or appellate hearing. This is the result apparently reached by the courts, since no case can be found in which the court included the installments accruing during the interim. In light of the purpose of the policy to minimize confusion and control of jurisdiction, it appears anomalous that events can occur to defeat but not confer jurisdiction. See Feste v. Newman, 368 S.W.2d 713 (Mo. 1963) (en banc), discussed *supra* note 71. It is arguable that *Feste* would support the rule if something occurs to increase the amount which is to be determined by the decision on the merits, that amount is the "actual amount" and the "live issue subject

9.022. *Cases Where the "Amount" Is Indefinite or Incalculable*

9.022(a). *"Contingencies"*

The general rules for "amount" determination are subject to the qualification that the "amount in dispute" must affirmatively appear "independent of all contingencies." When the facts necessary to establish jurisdiction are unclear or speculative because they cannot be satisfactorily proved from the record, the supreme court will bolster its decision to transfer by utilizing the "contingency" language. Notwithstanding that the language is extensively used to indicate a failure of litigants to sustain the burden of establishing the jurisdictional fact, the "contingency" *principle* itself developed from cases in which uncertainty existed about the precise "amount" which could eventually be recovered under a judgment. In this context, the principle means that to the extent that the disputed claim or award involves a "right . . . not enforceable at all events,"[96] it is "contingent" and cannot support jurisdiction in the supreme court.

One class of "contingencies" includes cases in which a judgment affixes liability for an amount, but the potential value of the award is dependent upon the continued existence of certain operative facts. The most common example is the case in which the award sought or obtained is payable in installments which cease upon the occurrence of some future event. In *Stuart v. Stuart,*[97] a wife's appeal from an alimony award, the supreme court set the tone for future installment cases by excluding from its definition of jurisdictional "amount" any part of the award which was not payable at the date of judgment and which would cease to be payable if the wife died or resumed conjugal relations.[98]

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to determination by the appellate court" in its increased form, but the court's policy of restriction as opposed to expansion of its jurisdiction forecloses such a view.

The holding in *Harrison*—that the precise time when jurisdiction attaches is the entry of the judgment—is important also in cases which reject the "divestment" or "conditional jurisdiction" rule. These cases base jurisdiction on the value of the appeal at the time it is taken, stating the rule that "events after the appeal is filed cannot operate to defeat jurisdiction." *Harrison* would suggest that events after the *judgment* and *before the appeal* cannot operate to defeat jurisdiction otherwise in the supreme court. Generally, the rule is: jurisdiction is determined by the state of the judgment from which appeal is taken including only those parts of the judgment for which notice of appeal is given, calculated at the date the judgment was entered.

96. Stuart v. Stuart, 320 Mo. 486, 488, 8 S.W.2d 613, 614 (1928), *trans'd,* 14 S.W.2d 524 (Ct. App. 1929).

97. Stuart v. Stuart, *supra* note 96.

98. *Accord,* Jenkins v. Jenkins, 251 S.W.2d 243 (Mo. 1952), *trans'd,* 257 S.W.2d 250 (Ct. App. 1953) (installment award which would cease on death or remarriage of wife contingent), *overruling* Maxey v. Maxey, 203 S.W.2d 467 (Mo. 1947) (installment alimony decree not contingent because enforceable during minority of dependent children); St. Louis Union Trust Co. v. Ghio, 240 Mo. App. 1033, 222 S.W.2d 556 (1949) (pay-

The court's second class of contingencies is illustrated by *Cotton v. Iowa Mut. Liab. Ins. Co.*[99] in which plaintiff sought a declaratory judgment concerning defendant insurance company's liability for plaintiff's injuries if negligence was established against the individual defendant. The "amount" determining jurisdiction was held not to be the coverage limit of the insurance contract (over the then jurisdictional limit) but the speculative and "contingent" amount of a judgment or settlement which plaintiff might eventually secure, precluding supreme court jurisdiction. At the time of the declaratory judgment action, no personal injury suit had been filed. The relief sought in the declaratory judgment cases is a declaration concerning *existence* of liability if negligence is established; the question of *how much* is "contingent" because the circumstance giving rise to a liability may never arise.[100]

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ment of trust income for life to beneficiaries rendered "indeterminate" total amount of future income that would be paid); *cf.* Thompson v. Thompson, 149 S.W.2d 867 (Mo.), *trans'd,* 156 S.W.2d 937 (Ct. App. 1941) (value of lease for life "contingent" on length of tenant's life); St. Louis Union Trust Co. v. Toberman, 343 Mo. 613, 134 S.W.2d 45 (1939), *trans'd,* 235 Mo. App. 559, 140 S.W.2d 68 (1940) (increased annual revenue payments to beneficiary for life "contingent" in action for investment of trust estate); Grant v. Bremen Bank & Trust Co., 108 S.W.2d 347 (Mo. 1937), *trans'd from* court of appeals, *retrans'd* (monthly trust payments to beneficiary "contingent" on length of his life); McCaskey v. Duffley, 335 Mo. 383, 73 S.W.2d 188 (1934), *trans'd,* 229 Mo. App. 289, 78 S.W.2d 141 (1935) (monthly rentals to continue as long as widow lived contingent).

The most recent installment "contingency" demonstrates that a contingency can operate in reverse to defeat jursdiction. In Baer v. Baer, 364 Mo. 1214, 274 S.W.2d 298 (1954) (en banc), *trans'd,* plaintiff-appellant's claim was for alimony in gross of $75,000 but she obtained a decree of $500 per month for one year and $400 for each month thereafter while she remained unmarried. She asserted jurisdiction in the supreme court on appeal (in effect on a theory of inadequacy of recovery) on the ground that because her judgment *was* "contingent, indefinite and uncertain" it *had no jurisdictional value* (except for $6,000 which she would recover in any event) which could be subtracted from her original claim of $75,000 to yield the necessary jurisdictional "amount." (The normal formula for amount jurisdiction when plaintiff appeals inadequacy of his verdict is to subtract the amount recovered from the amount claimed.) In rejecting this ingenious theory, the supreme court stated that the judgment might be worth "either more or less" than the $75,000 claimed. The court in effect held that even though in the usual "contingency" case the terminable award would be considered of *no definite value* for jurisdiction, in this case, because the husband *might eventually pay* $75,000 to satisfy the judgment, the effect of the contingency worked in reverse. Its effect was to destroy any basis for asserting that the claim for alimony in gross ($75,000) exceeded in value the judgment obtained by an "amount" sufficient to vest jurisdiction in the supreme court. Although this case is unique because the court looked to the maximum rather than the minimum possible recovery, the result is consistent with the court's application of the "contingency" principle.

99. 363 Mo. 400, 251 S.W.2d 246 (1952), *trans'd,* 260 S.W.2d 43 (Ct. App. 1953).

100. National Sur. Corp. v. Burger's Estate, 183 S.W.2d 93 (Mo. 1944), *trans'd,* 238 Mo. App. 730, 186 S.W.2d 510 (1945). In probate court the plaintiff surety corpora-

9.022(b). *Workmen's Compensation*

The general rules of the "installment contingency" section apply to awards in workmen's compensation cases which provide for payments in

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tion sought to be discharged from future liability under a surety bond executed on the estate of a minor on the theory that it was forced to assume a liability beyond that which it was willing to accept. The amount of the bond ($30,000) did not determine jurisdiction because the liability under the surety agreement was not presently existent but only future and "contingent." See State v. Public Serv. Comm'n, 378 S.W.2d 459 (Mo. 1964), *trans'd* (whether tariff change would effect reduction in gross revenue or net savings speculative and conjectural); Kansas City Terminal Ry. v. Kansas City Transit, Inc., 339 S.W.2d 766 (Mo. 1960), *trans'd,* 350 S.W.2d 828 (Ct. App. 1961) (partial costs of future maintenance expenses "contingent"); M.F.A. Mut. Ins. Co. v. Quinn, 251 S.W.2d 633 (Mo. 1952), *trans'd,* 259 S.W.2d 854 (Ct. App. 1953) (no definite "amount" in action for declaration of non-liability on insurance policy when amount of claim against insured not shown); *cf.* Warmack v. Crawford, 192 S.W.2d (Mo.), *trans'd,* 239 Mo. App. 709, 195 S.W.2d 919 (1946) (in will construction number of shares to be invested held speculative when investment was discretionary). *But see* M.F.A. Mut. Ins. Co. v. Southwest Baptist College, Inc., 381 S.W.2d 797 (Mo. 1964). See also Missouri Managerial Corp. v. Pasqualino, 323 S.W.2d 244 (Mo. Ct. App. 1959).

Analogous cases indicate that if a definite claim has been filed it will determine jurisdiction although the issue on appeal does not *directly* involve the claim. An example is the case in which the defendant interposes a release to plaintiff's petition. The issue of the release is separated for trial and an appeal from the determination of its validity must base jurisdiction on the "amount" of the petition. Bogus v. Birenbaum, 375 S.W.2d 156 (Mo. 1964); Conley v. Fuhrman, 355 S.W.2d 861 (Mo. 1962); Finley v. Smith, 170 S.W.2d 166 (Mo. Ct. App.), *trans'd,* 352 Mo. 465, 178 S.W.2d 326 (1943). The petition also determines jurisdiction if a third party plaintiff appeals the dismissal of his claim—for any amount collected by the original plaintiff—against the third party defendant. Crouch v. Tourtelot, 350 S.W.2d 799 (Mo. 1961) (en banc). In *Crouch* there was a three-judge dissent which asserted that the claim for an "amount" which might never be recovered created a "contingency." The rationale of the cases in which a "contingency" was held to exist (that no recovery might result even after a holding of liability) is equally applicable to the "release" and "third party petition" cases. The fact that a definite petition exists in these latter cases does not make it more certain that an "amount" over the jurisdictional limit will eventually be recovered. That the existence of a petition is sufficient to dispel any "contingency" indicates the emphasis placed by the court on the simple and easily applied rule that the petition (unless colorable) controls. See Farmers Mut. Auto. Ins. Co. v. Drane, 383 S.W.2d 719 (Mo. 1964). *But cf.* M.F.A. Mut. Ins. Co. v. Southwest Baptist College, Inc., *supra,* which held that the supreme court had jurisdiction in a declaratory judgment action on a fire insurance contract which had a $42,500 limit. No petition under the contract had been filed, but it appeared from the record that if the company were liable it would have to pay the policy limit because the insured building was completely destroyed. The question is thus raised (not wholly answered by the cases) whether a fact of this kind provides an adequate substitute for a formal petition.

These cases present a further problem usually discussed under the "collateral effects" doctrine, §9.032(a). The "collateral effects" principle raises the question of whether the claim on which jurisdiction is attempted to be based is *relevant* to the issue of jurisdiction. The "contingency" test raises the question *how much* of the judgment is speculative. But the "collateral effects" doctrine requires that the claim used for jurisdiction meet the additional requirement that it be the "direct object" of the suit from which the

installments subject to termination. The court gradually restricted and finally, in 1958,[101] virtually eliminated the class of workmen's compensation cases from its original jurisdiction docket. This factor, combined with the increase of the jurisdictional limit of the courts of appeals, makes the problem of exclusive appellate jurisdiction in these cases virtually moot. Nevertheless, a thorough consideration of these cases is valuable because they vividly illustrate the evolution of the Missouri courts approach to jurisdiction.

Significantly, the court did not arrive at a jurisdictional theory in com-

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appeal is taken. Authority exists—chiefly in the "non-money" cases discussed in notes 216-17 *infra*, which at least questions the directness of the relation between an appeal litigating the validity of a "release" and a separate monetary claim that might eventually be recovered. See, *e.g.*, Emerson Elec. Mfg. Co. v. City of Ferguson, 359 S.W.2d 255 (Mo. 1962), *trans'd*, 376 S.W.2d 643 (Ct. App. 1964). The body of cases discussing the "collateral effects" problem is much less well developed than the "contingency" cases and thus frequently causes difficulty in distinguishing the concepts. Generally, if the court is unable to calculate the "amount" of the claim asserted, a "contingency" is involved, whereas when the question is whether the amount should be considered at all, the problem is one of "collateral effects." The grey area between the two is illustrated by a case the facts of which closely parallel the "release" cases. In Cooper v. Armour & Co., 6 S.W.2d 567 (Mo. 1928), *trans'd from* 277 S.W. 967 (Ct. App. 1925), *retrans'd*, 222 Mo. App. 1176, 15 S.W.2d 946 (1929), plaintiff was injured in defendant's employ and while she was injured, her husband through his attorneys and without plaintiff's knowledge filed suit for $3,000. Defendant, also without plaintiff's knowledge, confessed judgment for that amount. Plaintiff filed a motion to vacate the judgment in her favor so that she could file suit for $50,000, the true extent of her injuries. This motion was overruled and plaintiff appealed to the court of appeals. That court transferred on the theory that the value of the relief to plaintiff was the ability to file suit for $50,000 and therefore that was the "amount" for jurisdiction. The supreme court retransferred, holding that the "gist" of the controversy was the authority of the husband's attorneys to bring the first suit. The amount of her injuries set out in her motion to vacate the judgment was "incidental." The court also noted that the "amount" for jurisdiction must be "*directly* involved . . . just as where jurisdiction is acquired because title to real estate is involved." It relied on the fact that although the motion from which appeal was taken laid plaintiff's damages at $50,000, no second suit had been filed. The question thus raised, whether jurisdiction would have been in the supreme court had a second suit actually been filed, appears to have been answered negatively:

> She [plaintiff] merely wants to expunge the record of the first suit so that the road will be clear to file another suit. This being true, it seems any inquiry about how much she will be entitled to sue for in the second action ought not to determine the jurisdiction on appeal in this case. *Id.* at 568.

One can conclude from the case that whether the second suit has been filed or not, it is not *relevant* to the determination of the jurisdictional issue ("collateral effect") and therefore cannot provide jurisdiction, and that even if the second suit has been filed a real issue of *how much* ("contingency") exists. To the extent that the case rules on the "contingency" issue decided in the "release" cases, its holding is contrary to the result in those cases.

101. Snowbarger v. M.F.A. Cent. Co-op., 317 S.W.2d 390, (Mo. 1958) (en banc), *trans'd*, 328 S.W.2d 50 (Ct. App. 1959), discussed *infra* note 119.

pensation cases based on a commuted (projected) value despite the existence of strong precedent both in federal cases[102] and within the court's own catalog of jurisdictional theory.[103] At the outset commuted value was considered, utilized in some areas, then allowed to falter and finally rejected.

The court's abandonment of the commuted value determination of "amount" in compensation cases was calculated to eliminate these cases from its jurisdiction. As the number of workmen's compensation cases burgeoned through the years without a corresponding increase in the jurisdictional limits of the courts of appeals, the work load of the court from these cases became onerous.[104] Undoubtedly reinforcing the desire to exclude the compensation cases was the feeling that the relative importance of the cases had so far diminished that they were peculiarly within the competence of the courts of appeals. Finally, the court's acquisition in 1945 of the ability to achieve uniformity of decision through an expanded supervisory power apparently foreclosed entirely the necessity of original jurisdiction in compensation cases.

9.022(b)(1). *Temporary Disability*

The earliest compensation cases did not consider the fact that an award which was terminable created a "contingency."[105] Moreover, some cases indicated that if the necessary data were available in the record, jurisdiction could be based upon the value of the award reduced to present worth[106] and a few cases did in fact base jurisdiction on the commuted value of the

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102. The United States Supreme Court held in a compensation case that if the state statute provides for a *"single action"* and a *"single judgment"* which is determinative of the claimant's *right* to all the payments, the possible termination is "immaterial." The fact conclusive of jurisdiction is that the *right* to the entire award is in issue. Aetna Cas. & Sur. Co. v. Flowers, 330 U.S. 464 (1947).

103. Lending support to the view that jurisdiction could be based on the present value of the installment award is the case of Schwyhart v. Barrett, 223 Mo. 497, 122 S.W. 1049 (1909), *trans'd,* 145 Mo. App. 332, 130 S.W. 388 (1910), and the numerous subsequent decisions for which it forms the basis. The holding in *Schwyhart*—that jurisdictional "amount" is determined by the amount for which the judgment could be satisfied on the date of its rendition—expresses a general theory of jurisdictional "amount" determination, and would compel affixing a value to a judgment at the time it was entered.

104. Workmen's compensation cases were singled out as involving difficulties in determining jurisdictional "amount" and as contributing a large portion of the cases in which the "amount in dispute" only slightly exceeded the then jurisdictional limit. APPELLATE PRACTICE REPORT, discussed *supra* note 3.

105. Sleyster v. Eugene Donzelot & Son, 323 Mo. 822, 20 S.W.2d 69 (1929), *trans'd on other grounds,* 223 Mo. App. 1166, 25 S.W.2d 147 (1930); Anderson v. Aetna Bricklaying & Constr. Co., 27 S.W.2d 755 (Mo. Ct. App. 1930).

106. *E.g.,* Hohlstein v. St. Louis Roofing Co., 328 Mo. 899, 42 S.W.2d 573 (1931), *trans'd,* 49 S.W.2d 226 (Ct. App. 1932).

installment formula.[107] However, these cases have been specifically overruled.[108]

The statute prescribes compensation for temporary disability injuries to be paid for a *fixed* number of dollars per week over a period of weeks *not to exceed* a fixed number, with all payments conditioned on the *continuance* of the disability.[109] The supreme court concluded that this kind of an award created a "contingency" and held, in effect, that the formula attached a kind of condition precedent to the unaccrued payments which excluded these installments from the "amount in dispute."[110]

9.022(b)(2). *Permanent Disability*

The compensation for permanent disability prescribes a *fixed* sum for a *fixed* number of weeks plus a *fixed* weekly sum for the continuance of the claimant's life, the payments being subject to *cessation* upon his recovery of the ability to work.[111] This formula was considered by the court to be more definite than that of the temporary disability award because the "contingency" arose from the effect of a *condition subsequent* which would operate in the future to cut off the award.[112] Nevertheless, several years after its decision that temporary disability awards were "contingent," the court held in *Hardt v. City Ice & Fuel Co.*[113] that to the extent that permanent disability payments were not due at the time of appeal, jurisdiction was defeated by a "contingency."

However, the *Hardt* case did not clearly define which part of the award was contingent. A plausible interpretation was that only the part of the award which provided for weekly payments for the remainder of the claimant's life after expiration of the payments for the fixed number of weeks was "contingent." In a carefully reasoned opinion, the St. Louis

107. Maddux v. Kansas City Pub. Serv. Co., 100 S.W.2d 535 (Mo. 1936); Schoenherr v. Stoughton, 336 Mo. 290, 78 S.W.2d 84 (1935), *trans'd from* court of appeals.

108. Hardt v. City Ice & Fuel Co., 340 Mo. 721, 102 S.W.2d 592, *trans'd,* 109 S.W.2d 896 (Ct. App. 1937).

109. Mo. Rev. Stat. §§ 287.170, .180 (Supp. 1961).

110. Platies v. Theodorow Bakery Co., 334 Mo. 508, 66 S.W.2d 147 (1933) (en banc), *trans'd,* 79 S.W.2d 504 (Ct. App. 1935). After comparing the language of the death award statute and the installment death award cases over which the supreme court had jurisdiction on appeal, the court made a "clear distinction" based upon the indefinite "character" of "temporary disability" judgments.

111. Mo. Rev. Stat. §§ 287.190, .200 (Supp. 1961).

112. Cases cited note 107 *supra,* in which the court held it had jurisdiction of an appeal from a judgment for permanent injuries without a discussion of its holding on temporary injury awards.

113. 340 Mo. 721, 102 S.W.2d 592, *trans'd,* 109 S.W.2d 896 (Ct. App. 1937). The court based its "contingency" theory squarely on its previous holding on temporary awards and equated the two as involving the same kind of jurisdictional uncertainty.

Court of Appeals, bolstered by its own conclusion that the nature of the permanent award was intended to be more definite than the temporary award, transferred to the supreme court a case in which the amount which would be paid under the terms of compensation for a fixed number of weeks exceeded the jurisdictional "amount."[114] On transfer, the supreme court rejected this distinction and retransferred, holding as "contingent" all unaccrued payments under any part of the award formula.[115]

9.022(b)(3). *Death Awards*

In construing the death award statute, the court early held that the language "single total death benefit"[116] envisioned an award that was definite for the full value of its terms even though paid by installments. The fact that an event after the judgment might cause the award to terminate before an "amount" sufficient for supreme court jurisdiction had been paid did not make the unaccrued payments "contingent." This reasoning was firmly entrenched by an en banc decision,[117] and repeatedly followed[118] until 1958, when the supreme court in *Snowbarger v. M.F.A. Cent. Co-op.*[119] held that

114. Scannell v. Fulton Iron Works Co., 280 S.W.2d 484 (Mo. Ct. App. 1955), *trans'd*, 365 Mo. 899, 289 S.W.2d 122 (1956), *retrans'd*. In distinguishing the inherent nature of temporary awards, the court of appeals relied on the statutory language, emphasizing that it provided payment under a condition precedent, while an award for permanent disability would be terminated only upon action of the Industrial Commission in creating a "different award which in no way vitiates the finality of the first award." *Id.* at 488.

The ambiguous language in the *Hardt* decision was the real leverage for the distinction made by the court of appeals:

> So in the case at bar, the award for permanent total disability was for 300 weeks at $20 per week, or *a total, at most, of only $6,000*. It is true that respondent may live long enough that he may receive a sum in excess [of the then jurisdictional "amount"] . . . . Hardt v. City Ice & Fuel Co., 340 Mo. 721, 102 S.W.2d 592, 593 (1937). (Emphasis added.)

From this it certainly seemed legitimate for the court of appeals to conclude that if to the award for 300 weeks had been added an amount for medical costs which was payable at time of judgment to equal a sum over the jurisdictional limit, the supreme court would have accepted jurisdiction.

115. Scannell v. Fulton Iron Works Co., *supra* note 114. In retransferring, the supreme court quoted the description of the award from which the appeal was taken in the *Hardt* case. The language is significant because it emphasises the uncertain nature of the total payments.

116. Mo. Rev. Stat. § 287.240(2) (Supp. 1961).

117. Shroyer v. Missouri Livestock Comm'n, 332 Mo. 1219, 61 S.W.2d 713 (1933) (en banc). This case held that the *computed* value (arithmetic value) of the installment formula was the amount and not the *commuted* value (present worth) because the amount could be commuted only by application of the parties and in the discretion of the commission.

118. *E.g.*, Conley v. Meyers, 304 S.W.2d 9 (Mo. 1957), and cases cited therein.

119. 317 S.W.2d 390 (Mo. 1958) (en banc), *trans'd*, 328 S.W.2d 50 (Ct. App. 1959).

there was "no magic in the words [of the statute] 'single total death benefit.' "[120] The "contingency" in *Snowbarger* was the fact that the claimant's widow might die or remarry, causing the payments to cease. But because a widow might have dependent children whose right to the award would not cease, even upon their deaths, the court quickly limited the decision to cases in which the widow was the sole dependent.[121]

9.023. *Multiple Claims and Appeals*

9.023(a). *Counterclaims*

When a counterclaim is filed, for the purposes of determining jurisdictional "amount in dispute," plaintiff and defendant exchange positions in relation to defendant's claim.[122] By treating the defendant as a "plaintiff" on his counterclaim and applying standard rules, one can generally calculate without difficulty the "amount" in cases involving a single appellant. If one party appeals the other's recovery, the amount of the judgment (in favor of plaintiff on his petition or in favor of defendant on his counterclaim)

For a discussion of this case see Garnett, *Appellate Practice in Missouri,* 24 Mo. L. REV. 421, 422 (1959).

120. 317 S.W.2d at 394.

Snowbarger overruled the past decisions on the specific ground that the *"amount actually in dispute* at the time the appeal was taken" was no more than the accrued payments. The court indicated that *Shroyer* had erroneously concluded that the statutory language "single total death benefit" meant the entire value of the award at a time when some payments had not accrued and were subject to termination. Thus the court's interpretation of the inherent nature of the death award gave it the same effect as an award for temporary disability; in effect, unaccrued payments were subject to a condition precedent, which was the continuation of the widow's dependency status. The court stated:

> [I]t is clear that what the statute really provides is that the employer shall pay an employee's widow who is his sole dependent a sum not to exceed ———dollars (computed in a prescribed manner) at the rate of ——— dollars per week, *such payments to continue until such time as the maximum sum stated shall have been paid or the widow remarries or dies, whichever shall first occur. Id.* at 394. (Emphasis added.)

A comparison of this quotation interpreting the language in the death benefit statute with the statutory language in the temporary disability award section reveals that the court in *Snowbarger,* in effect, *rewrote* the death award statute to make it equivalent to the temporary award formula in order to "be consistent in the application of the criteria by which . . . jurisdiction is determined." *Id.* at 395.

121. Genarri v. Norwood Hills Corp., 322 S.W.2d 718 (Mo. 1959).

122. A party is a "plaintiff" or a "defendant" depending on the claim being considered. In Rivers v. Blom, 78 Mo. App. 142 (1899), *trans'd,* 163 Mo. 442, 63 S.W. 812 (1901), defendant appealed his non-recovery on his counterclaim for $4,511.47. "As to the counterclaim the defendant was a plaintiff and the denial by the circuit court of any right to recover thereon involves the amount claimed to be due under the counterclaims . . . ." *Id.* at 143.

fixes jurisdiction.[123] Or if neither party recovers and the single appellant appeals his non-recovery (on the original petition or on the counterclaim), the "amount" of the petition or counterclaim governs.[124]

Calculation becomes more difficult if the appellant includes as error in his appeal the judgment as it determines the issues of *both* the original claim and the counterclaim. If the appellant (plaintiff on his claim or defendant on his counterclaim) appeals *both* his own non-recovery (or the inadequacy[125] of his recovery) *and* the other party's recovery (whether defendant on his counterclaim or plaintiff on his initial claim), the supreme court has held that the sum or aggregate of both "amounts" determines jurisdiction.[126]

123. For discussion of the standard "defendant's appeal" rule see § 9.015. Whether the defendant appeals plaintiff's recovery on the original claim or plaintiff appeals defendant's recovery on his counterclaim should make no difference. *E.g.*, State *ex rel.* Lingenfelder v. Lewis, 96 Mo. 146, 8 S.W. 770 (1888) (defendant appeals plaintiff's recovery). See generally Annot., 58 A.L.R. 84, 106 (1958). If defendant suffers an adverse verdict on his counterclaim but is granted a new trial and plaintiff appeals, the amount of defendant's counterclaim fixes jurisdiction. Albers Milling Co. v. Carney, 335 S.W.2d 207 (Mo. Ct. App.), *trans'd,* 341 S.W.2d 117 (Mo. 1960).

124. For discussion of the standard "plaintiff's appeal" rule see § 9.015. The "amount" of counterclaim fixes jurisdiction when defendant appeals non-recovery. Conrad v. De Montcourt, 138 Mo. 311, 39 S.W. 805 (1897); Rivers v. Blom, 78 Mo. App. 142 (1899), *trans'd,* 163 Mo. 442, 63 S.W. 812 (1901); Forster Vinegar Co. v. Guggemos, 24 Mo. App. 444 (1887), *trans'd.* The same result obtains if plaintiff also recovers but defendant appeals only his non-recovery. Luft v. Strobel, 322 Mo. 955, 19 S.W.2d 721 (1929). If relief is denied on both claims and only plaintiff appeals his non-recovery, the petition governs. Bowzer v. Singer, 231 S.W.2d 309 (Mo. Ct. App. 1950).

125. The standard rule on inadequacy is to subtract the amount recovered from the total amount claimed. § 9.015, note 37 and accompanying text.

126. The procedure is to calculate separately by use of the standard rules the "amount" for an appellant who appeals only his non-recovery (or inadequacy of recovery) and the "amount" of respondent's recovery from which appeal is also taken; the *total* of the two "amounts" is the *aggregate* "amount in dispute." For example, if plaintiff sued for $20,000 and defendant counterclaimed for the same amount and only defendant recovered $10,000, on plaintiff's appeal—if he appeals *both* his non-recovery and defendant's recovery—the jurisdictional "amount" is $30,000: $20,000 for plaintiff's petition ($20,000 minus recovery if plaintiff alleges inadequacy) *plus* defendant's $10,000 recovery.

In Wilson v. Russler, 162 Mo. 565, 63 S.W. 370 (1901) (en banc), *trans'd,* 91 Mo. App. 275 (1902), the plaintiff appealed defendant's recovery on the counterclaim. The "amount" of the recovery added to the "amount" of the petition on which plaintiff received an adverse verdict totaled over the jurisdictional "amount." In transferring, the supreme court indicated that it would have aggregated the "amounts" of both claims had not the plaintiffs at trial abandoned part of their claim. When next given an opportunity, the court did aggregate. In State *ex rel.* Federal Lead Co. v. Reynolds, 245 Mo. 698, 151 S.W. 85 (1912) (en banc), defendant appealed a $6,817 judgment in favor of the plaintiff. He also insisted that because of his counterclaim the judgment should have been in his favor for $2,656. Holding that $6,817 plus $2,656 was the "amount in dispute," which exceeded the then jurisdictional limit, the court stated:

Take an a, b, c, case to illustrate: If Roe claims one dollar of Doe and the court

When both parties recover but only one party appeals the other's recovery, jurisdiction is based on the respondent's recovery alone, even though the "net effect" of the judgment would be realized by subtracting the amount of appellant's recovery.[127] However, a problem exists in counterclaim cases in which both parties appeal. Since the amount for each appellant is calculated separately (using the same rules as for a single appellant), it is possible that only one of the two appeals by itself involves the requisite "amount." To avoid separate appeals to both appellate courts from the same judgment, the supreme court developed the "consolidation" principle[128] which vests both appeals in the supreme court if either is sufficient for supreme court jurisdiction.[129] Despite the lack of a decision by the supreme court directly in point, analogous authority in cases involving cross appeals suggests that if both parties appealed in a counterclaim situa-

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not only takes that dollar from him but two dollars more and gives them to Doe, evidently he is out of pocket and injured in the sum of three dollars, and, on Roe's appeal, the amount in dispute would be those three dollars. . . . *Id.* at 704-05, 151 S.W. at 87.

Accord, Byers v. Lemay Bank & Trust Co., 365 Mo. 341, 282 S.W.2d 512 (1955) (plaintiff's non-recovery plus defendant's counterclaim recovery); Fulton v. City of Lockwood, 269 S.W.2d 1 (Mo. 1954) (plaintiff's non-recovery plus defendant's counterclaim recovery); Dawson v. Scott, 330 Mo. 185, 49 S.W.2d 87 (1932) (defendant's non-recovery on counterclaim plus plaintiff's recovery); Davis v. Hauschild, 238 S.W.2d 920 (Mo. Ct. App.), *trans'd,* 243 S.W.2d 956 (Mo. 1951) (defendant's non-recovery on counterclaim plus plaintiff's recovery); Schmidt v. Morival Farms, Inc., 232 S.W.2d 215 (Mo. Ct. App. 1950), *trans'd from* supreme court, *retrans'd,* 240 S.W.2d 952 (Mo. 1951) (defendant's non-recovery on counterclaim plus plaintiff's recovery); see Annot., 58 A.L.R.2d. 84, 108 (1958).

127. State *ex rel.* Lingenfelder v. Lewis, 96 Mo. 146, 8 S.W. 770 (1888); *accord,* Federal Cold Storage Co. v. Pupillo, 346 Mo. 136, 139 S.W.2d 996 (1940), *trans'd from* court of appeals.

128. The policy of consolidating separate appeals was first settled in cases involving cross appeals from the same judgment. § 9.023(b).

129. Suppose that plaintiff sued for $20,000 and defendant counterclaimed for the same amount. If both recover $15,000 and plaintiff appeals on the grounds that (1) his verdict is inadequate by $5,000 and (2) on defendant's recovery of $15,000, the "amount in dispute" is $20,000. If defendant also appeals the judgment of plaintiff's recovery for $15,000 (or on the $5,000 inadequacy of his own recovery), the "amount" of his appeal alone would be insufficient for supreme court jurisdiction. However, plaintiff's appeal being sufficient for jurisdiction in the supreme court, the defendants appeal would also be "consolidated" there. *E.g.,* Townsend v. Maplewood Inv. & Loan Co., 351 Mo. 738, 173 S.W.2d 911, *trans'd from* 167 S.W.2d 93 (Ct. App. 1943). In this case the plaintiff appealed non-recovery on his petition for an "amount" over the jurisdictional limit. Defendant also appealed apparently on the inadequacy of his counterclaim recovery. Although the "amount" of defendant's appeal would not have been sufficient for jurisdiction, it was consolidated with plaintiff's appeal in the supreme court. In this situation, if the appeal which is for a sufficient "amount" is subsequently abandoned during the pendency of the appeal, the remaining appeal will be transferred to the court of appeals. Heuer v. Ulmer, 273 S.W.2d 169 (Mo. 1954), discussed *supra* note 71.

tion and the "aggregate" of both appeals was over the jurisdictional limit, the supreme court would have jurisdiction—even though each individual "amount" was below the limit.[130]

The policy of aggregating separate "amounts in dispute"—the principal claim and the counterclaim—is used in all counterclaim situtations without reference to the legal issues involved. However, a line of cases, now apparently overruled, developed in which the "aggregation" principle was held inapplicable.

In 1950 the St. Louis Court of Appeals in *Hoefel v. Hammel*[131] set apart the situation in which the legal issues involved in both parties' claims are "merged." The court defined merger as: claims by the plaintiff and defendant "which could not exist together," so that a finding for one party on his claim *ipso facto* determines the case against the other party's claim.[132] This results when the litigation involves a single issue on which both sides claim damages but only one side can recover. In *Hoefel,* an automobile collision case (at a time when the jurisdictional limit was $7,500), plaintiff sued for $10,800, defendant counterclaimed for $11,800, and defendant recovered $5,000, while the plaintiff recovered nothing. When plaintiff received a new trial on defendant's recovery and his own claim, defendant appealed to the court of appeals. The court recognized that the general "reinstatement" rule which applied when a party appealed a new trial order

130. Assume the same facts hypothesized in note 129 *supra* except that plaintiff appeals only defendant's recovery of $15,000 and defendant appeals only plaintiff's recovery of $15,000. It is clear that *each individual* "amount" is insufficient for supreme court jurisdiction (over $15,000), but when *aggregated* the "amounts" of the two appeals equal $30,000. In this context "aggregation" is used to total the amounts of more than one appeal from the same judgment. The "aggregation" principle is also used to total the "amount" of one appellant when he does not appeal merely his non-recovery *or* the other party's recovery, but appeals *both.* Thus it is possible to use the principle to determine the aggregate "amounts" of each party's appeal and then to aggregate both appeals to determine the *aggregate* "amount in dispute." On the exact facts in note 129 *supra,* plaintiff's aggregate individual appeal was for $20,000. The appeal of defendant (who appealed from only the inadequacy of his recovery) was $5,000. Therefore, the aggregate "amount" of both appeals is $25,000. *Cf.* Douglas v. City of Kansas City, 147 Mo. 428, 48 S.W. 851 (1898). See cases cited § 9.023(b)(2). One explanation why the court has not, in any case found, directly decided this point in a counterclaim context is that when both parties appeal, the individual "amount" of one is generally alone sufficient. The court will normally cut short its jurisdictional statement by noting that one appeal was sufficient (impliedly based on a consolidation idea) without specifically considering aggregation. See Townsend v. Maplewood Inv. & Loan Co., *supra* note 129. However, the court did specifically aggregate in a recent counterclaim case involving a special problem. Cases cited note 146-47.

131. 228 S.W.2d 402 (Mo. Ct. App. 1950); *accord,* Smith v. Rodick, 286 S.W.2d 73 (Mo. Ct. App. 1956).

132. *Id.* at 405.

(reinstatement of defendant's verdict would give an "amount" of $5,000[133]) was modified by the "aggregation" principle because the new trial erased defendant's recovery and put plaintiff's original claim back in issue. Aggregation would clearly have given supreme court jurisdiction.[134] However, the court declined to aggregate and held that because of the merger of issues the only dispute involved (and the only jurisdictional "amount") was the $5,000 verdict defendant sought to have reinstated.

The "merger" doctrine begun by *Hoefel* in a "new trial" context faltered in its inception,[135] but was eventually adopted and expanded by the supreme court in *Jameson v. Fox*.[136] On the authority of *Hoefel,* the court extended the "merger" principle to a defendant's appeal of both plaintiff's recovery ($1,000) and non-recovery on his counterclaim ($25,900), and concluded that it did not have jurisdiction.

The rationale of the two cases—that "aggregation" is inapplicable when only one party can recover—is persuasive. Since both issues are merged into *one* on appeal, the "amount" of the *one dispute* (plaintiff's recovery

133. The general "new trial" rules (§ 9.025) indicate that the "reinstatement" rule makes the jurisdictional "amount" equal to the amount of appellant's verdict erased by the order for new trial. Because the amount of defendant's recovery in *Hoefel* was relatively large, the court's holding that it is the sole jurisdictional "amount" is plausible and may reflect influence of the "reinstatement" principle.

134. The "aggregation" cases cited note 126 *supra,* indicate that the defendant could aggregate the "amount" of his recovery ($5,000) plus the "amount" of plaintiff's petition ($10,800) to yield an "amount" over the $7,500 limit of the court of appeals' jurisdiction. Actually, in this case, the one "amount" being sufficient would permit consolidation. However, in this context the court does not distinguish the principles, and it is unnecessary to do so for analysis. See the explanation in note 157 *infra.*

135. Nickels v. Borgmeyer, 246 S.W.2d 382 (Mo. Ct. App. 1952), *trans'd,* 256 S.W.2d 560 (Mo.), *retrans'd on other grounds,* 258 S.W.2d 267 (Ct. App. 1953), involved a straight appeal by defendant from both a judgment in plaintiffs' favor for $5,150 and on defendant's counterclaims for $4,000. The court of appeals recognized that the case involved "single" or "merged" issues but held that the *Hoefel* holding involved an "entirely different question." *Id.* at 384. Clearly *Hoefel* was directly in point as was stated by the dissenting opinion. Nevertheless, the court of appeals transferred to the supreme court after cogently stating the theory of the "aggregation" principle and apparently having examined the validity of its earlier holding in *Hoefel.* However, the fact that the court transferred on "doubt" did not persuade the supreme court to decide the obviously troublesome issue because it made a summary retransfer based on appellant's failure to file proper post-trial motions. Thus the clear principle enunciated in *Hoefel* was made unclear by both its parent court and the supreme court, and it was not until Jameson v. Fox, 364 Mo. 237, 260 S.W.2d 507 (1953), discussed *infra* note 136, that the situation was clarified.

136. 364 Mo. 237, 260 S.W.2d 507 (1953), *trans'd,* 269 S.W.2d 140 (Ct. App. 1954). The *Jameson* decision expanded the holding in *Hoefel,* because the latter decision involved a "reinstatement" problem. Note that in a later case before *Jameson* was overruled, the supreme court reversed the court of appeals' holding in *Hoefel* that the "merger" principle was applicable in a new trial context. Note 143 *infra.*

which defendant moves to set aside or defendant's counterclaim recovery which plaintiff seeks to expunge) fully represents the issue of non-recovery and it is *unnecessary* to calculate both "amounts." But the rationale is inharmonious with the basic theory of "amount" rules which are designed to reflect the benefit or loss to either party resulting from determination of the issues.[137]

Another problem with the "merger" doctrine is its difficulty of application in several situations. One difficulty would arise in a case in which plaintiff claimed an "amount" over the jurisdictional limit but lost to a defendant who had recovered on a counterclaim for only nominal property damages. A plaintiff accustomed to the value of the petition rule could easily fail to appreciate that defendant's property damage recovery vested jurisdiction in the court of appeals and might appeal directly to the supreme court. In fact this is what happened in the two recent cases in which the supreme court rejected the "merger" doctrine.[138] Furthermore, merger of

137. The rule stated in every case involving non-money relief (§ 9.030) is that jurisdiction is based on the value of the relief to plaintiff or the loss to defendant or vice versa. This is the foundation principle of every jurisdictional "amount" test, and is, therefore, central to the "aggregation" policy.

It is likely that the "merger" policy was adopted to limit the court's jurisdiction. In general, the court has developed rules toward that end although the "aggregation" principle is a notable example of a policy which expands the court's jurisdiction.

138. Wilson v. Tonsing, 375 S.W.2d 140 (Mo. 1964), was submitted to Division Two in the September Session, 1962. Plaintiff appealed from an adverse verdict on her claim of $16,765 and a judgment in defendant's favor for $164.50. Plaintiff-appellant's jurisdictional statement, Brief for Appellant, pp. 1-2, indicates either that appellant considered the "amount in dispute" to be the aggregate of her petition and defendant's recovery, or only her petition. Either would have given the supreme court jurisdiction (although both violated the merger rule) and the jurisdictional statement is ambiguous as to appellant's theory. It appears that the question of jurisdiction in *Wilson* was raised on oral argument and the case was twice reassigned. While *Wilson* was pending, Endermuehle v. Smith, 372 S.W.2d 464 (Mo. 1963), was submitted in the January Session, 1963 to Division One and transferred en banc. In the *Endermuehle* case, which involved facts parallel to *Wilson,* appellant-respondent's jurisdictional statement clearly indicates that her theory of jurisdiction was that her petition alone was the "amount in dispute." Brief for Appellant, pp. 1-2. This was disputed by respondent who also filed a jurisdictional statement, Brief for Respondent, pp. 1-6, in which the existing authorities were carefully considered and the conclusion drawn that the jurisdictional "amount" was defendant-respondent's $100 judgment. These cases indicate that the merger rule was confusing to the bar—especially in cases in which the amount of the respondent's recovery was so slight that it would have been anomalous to have allowed it to obstruct jurisdiction in the supreme court when respondent's failure to recover at all clearly would have given supreme court jurisdiction. See McDonald v. Logan, 364 Mo. 382, 261 S.W.2d 955 (1953). In Palmer v. Lasswell, 279 S.W.2d 535 (Mo. Ct. App. 1955), *trans'd,* 287 S.W.2d 822 (Mo. 1956), the plaintiff sued for an amount over the court of appeals' limit; defendant counterclaimed for an amount less than the limit. Judgment was for defendant on both claims, but the jury assessed his damages at "nothing." On plaintiff's appeal, the court of appeals properly transferred to the supreme court. The court's discussion of the fact that defendant had abandoned his counterclaim so that it was

issues is difficult to detect in cases other than automobile collision cases—most cases following *Jameson* were of this nature[139] although some were contract cases.[140] As a result, the supreme court found it had jurisdiction of several contract cases which it apparently could have transferred on the merger principle.[141]

Although not specifically overruled, the "merger" doctrine is apparently not the present law. In a 1957 decision which involved facts similar to *Hoefel v. Hammel*[142]—the first "merger" decision in a case in which the

no longer a "live issue" upon which the "merger" principle could be invoked seems unnecessary because it is likely that plaintiff's petition would have controlled even if defendant had kept his counterclaim alive, since he had recovered nothing upon it. See note 143 *infra*.

In Williams v. Kaestner, 332 S.W.2d 21 (Mo. Ct. App. 1960), plaintiff sued for $2,905, defendant counterclaimed for $7,500. Plaintiff was granted a new trial after neither party recovered. On defendant's appeal of the new trial order, the court retained jurisdiction, holding that defendant's counterclaim ($7,500) was the "amount in dispute" because it was "the largest of the two claims." *Id.* at 25.

139. *E.g.*, Wilkerson v. Smith, 366 S.W.2d 511 (Mo. Ct. App. 1963); Stonefield v. Flynn, 347 S.W.2d 472 (Mo. Ct. App. 1961); Williams v. Kaestner, *supra* note 138.

140. Smith v. Rodick, 286 S.W.2d 73 (Mo. Ct. App. 1956) (money had and received); Hamilton Fire Ins. Co. v. Cervantes, 278 S.W.2d 20 (Mo. Ct. App. 1955) (suit on agency contract for commissions and counterclaim for those already paid); Willibald Schaefer Co. v. Blanton, 264 S.W.2d 920 (Mo. Ct. App. 1954) (both sides claimed damages on issue of who caused non-delivery).

141. In Byers v. Lemay Bank & Trust Co., 365 Mo. 341, 282 S.W.2d 512 (1955), the issue was whether plaintiff could plead his infancy to disaffirm a contract. He borrowed money from defendant and paid back $4,450 leaving a balance of $3,780. Plaintiff sued for the amount he paid in an action in which defendant counterclaimed and recovered ($3,780). Plaintiff appealed his non-recovery and defendant's recovery which aggregated ($8,230) over the then jurisdictional limit. The supreme court applied the "aggregation" rule to retain jurisdiction, but the "merger" principle could have been applied since plaintiff would recover all and defendant take nothing or vice versa depending on determination of the disaffirmance issue. Although the fact is not mentioned in the supreme court's opinion, the case was originally filed in the court of appeals which transferred without opinion to the supreme court because appellant's jurisdictional statement indicated that "aggregation" would give supreme court jurisdiction. Brief for Appellant, pp. 1-2 (No. 28,943 filed in the St. Louis Court of Appeals, refiled in the supreme court No. 44,666).

Fulton v. City of Lockwood, 269 S.W.2d 1 (Mo. 1954) (en banc), involved the validity of an employment contract under which plaintiff had been partially paid $2,500. Plaintiff sued to recover the balance of $6,380; defendant contended the contract was void because not lawfully authorized by the city and counterclaimed to recover the $2,500 paid. Defendant was successful on both claims and recovered a judgment for the $2,500, from which plaintiff appealed. The supreme court retained jurisdiction ("amount" was $8,880) specifically invoking the "aggregation" principle, although it recognized that the "main issue is whether plaintiff's contract is ultra vires and void." *Id.* at 3. Because determination of that issue would apparently have "let the winner take all," the "merger" doctrine, although not mentioned, would seem to have been applicable and could have required transfer to the court of appeals.

142. 228 S.W.2d 402 (Mo. Ct. App. 1950), discussed *supra* note 131.

appellant sought to reverse the trial court's granting a new trial—the supreme court held it had jurisdiction without considering *Hoefel.*[143] Then in a 1963 en banc decision, the supreme court reached a result clearly contrary to *Jameson.*

The case was *Endermuehle v. Smith.*[144] The facts of the case—plaintiff-appellant sued for $22,550, defendant counterclaimed and recovered $100—peculiarly pointed up the "merger" doctrine's departure from the policy of "aggregation." Plaintiff's appeal was obviously not designed only to set aside the adverse recovery of $100—the premise of the *Jameson* decision. Rather, she sought a second trial on her claim of $22,550. The decision was that her claim was in dispute, giving the supreme court jurisdiction. It is significant, however, that the court did not rest its decision on the amount of plaintiff's claim.

> [A]ctually the money amounts of the appellate-jurisdictional decisive "deny *and* grant" monetary impact upon appellant of the appealed-from judgment in defendant-respondent's favor and against plaintiff-appellant are in aggregate amount $22,650.[145]

By including both the "amounts" of plaintiff's claim and the defendant's recovery, the court's decision marks a return to the principle of "aggregation" in all counterclaim cases.[146] Although the only case which has followed *Endermuehle* involved parallel facts,[147] aggregation will probably be applied in all counterclaim situations without regard to the type of issue,

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143. Harris v. Rowden, 305 S.W.2d 25 (Mo. 1957). In a suit for approximately $17,940, defendant counterclaimed for $20,000. The verdict was for defendant on plaintiff's claim and also for defendant on his counterclaim with damages set at $5,500. Plaintiff was granted a new trial and defendent appealed. If the court had employed *Hoefel,* the "amount in dispute" would have been the $5,500 verdict, but the court explicitly "aggregated" both plaintiff's claim and defendant's verdict ($23,440). Brief for Appellant, pp. 1-2, indicates that this was the theory of appellant's jurisdictional statement. However, the authority in point cited by both the appellant and the court—McDonald v. Logan, 364 Mo. 382, 261 S.W.2d 955 (1953), discussed *supra* note 138—involved facts similar to *Harris* except that *neither party had recovered,* making the "merger" principle completely inapplicable. It was therefore no authority for the result in *Harris. Harris* was clearly a de facto overruling of the *Hoefel* case, and to that extent contrary to the "merger" doctrine.

144. 372 S.W.2d 464 (Mo. 1963) (en banc), discussed *supra* note 138; *accord,* Wilson v. Tonsing, 375 S.W.2d 140 (Mo. 1964), discussed *supra* note 138.

145. 372 S.W.2d at 466-67. (Emphasis added.) In her jurisdictional statement, appellant advanced the theory that the "amount in dispute" was determined solely by the petition and not the "aggregate" of the petition and defendant's recovery. Brief for Appellant, pp. 1-2.

146. See cases cited note 126 *supra,* especially State *ex rel.* Federal Lead Co. v. Reynolds, 245 Mo. 698, 151 S.W. 85 (1912) (en banc).

147. Wilson v. Tonsing, 375 S.W.2d 140 (Mo. 1964), discussed *supra* note 138.

the motives for the appeal or the relative "amounts" of the individual claims.[148]

9.023(b). *Multiple Amounts*

The "consolidation" and "aggregation" principles illustrated in the previous section are applicable generally. The principles are used to determine jurisdictional "amount" in cases in which a single appeal is filed—involving one or several appellants—and in cases involving cross appeals. When appeals are taken from several consolidated cases the principles are applicable if the appeals are from the same judgment.[149]

9.023(b)(1). *Consolidation*

"Consolidation" is defined as collecting in one appellate court all appeals from the same judgment. Its purpose is to prevent the "fractionalization" which would result if two appellate courts decided appeals from the same

148. Although the two recent decisions are clearly opposite to the "merger" doctrine, they do not expressly overrule the existing "merger" holdings. The extreme facts of the two cases were clearly influential because the results might not have been reached if the defendant's recovery in each case had not been a nominal sum. However, these holdings subject the doctrine to serious question—even in cases similar to those which gave it its start and in which the rationale is quite plausible (*e.g.*, where the "merged" jurisdictional "amount" is larger than merely nominal damages). Noteworthy is the fact that Shepard's MISSOURI CITATOR indicates only that the two cases "distinguish" *Jameson v. Fox*. In this connection, see Storckman, J., dissenting in Feste v. Newman, 368 S.W.2d 713, 719 (Mo. 1963) (en banc), discussing the effect appellate decisions have on jurisdictional confusion.

The motives for filing the counterclaim also play a part in the "merger" rule. The result in the two recent cases would be less compelling in a case in which the defendant had counterclaimed for an amount, which, by itself or aggregated with plaintiff's recovery, was designed to insure supreme court jurisdiction. In a large number of cases, defendants do counterclaim and the result is a potential *carte blanche* jurisdiction in the supreme court. The court can use its rule that colorable or frivolous claims are discounted, but it is difficult for this to be an efficacious sanction in this context because of the customary deference exhibited towards personal injury petitions. This point was made by the dissent in *Endermuehle* in which it was noted that the court's "dockets are crowded with enough cases . . . [having genuine monetary jurisdiction] and should not be burdened with cases wherein the jurisdictional amounts are illusory." 372 S.W.2d at 470. Problems of this kind are illustrated in the Brief for Respondent, pp. 1-9 (supplemental statement on transfer en banc) in the *Endermuehle* case. The respondent criticized the divisional opinion (apparently similar to the opinion later adopted by the court en banc) for its use of the "deny *and* grant" theory since this would allow a "staggering" number of cases to reach the supreme court.

Clearly, there are competing policies within the "merger" rule. Its premise appears logical in some cases, ludicrous in others, such as *Endermuehle*; its application is simple in some cases, difficult in others. While it provides the potential for abuse and a great expansion of the court's jurisdiction, its non-use is contrary to the underlying theory of jurisdictional "amount."

149. § 9.023(b)(3).

judgment.[150] Appeal by a single appellant involves "consolidation" if the basis for the appeal is non-recovery or liability on several counts of a petition and only one count is above the jurisdictional limit.[151] If defendant appeals recovery of three verdicts by three plaintiffs joined in one action and only one verdict is sufficient for the supreme court all the appeals will be consolidated in that court.[152] Similarly, if several plaintiffs in the same action appeal non-recovery on their individual claims and only one claim exceeds the jurisdictional limit the supreme court has jurisdiction of the entire appeal.[153]

The supreme court early held that it would consolidate cross appeals from a judgment when one of the appeals satisfied its "amount" jurisdiction.[154] Typical of "consolidation" in cross appeals are cases in which the plaintiff who sued in several counts, appeals non-recovery on one count while the defendant appeals the plaintiff's recovery entered on the second count and the appeal of only one party is within the jurisdictional "amount."[155] A parallel situation exists when the plaintiff sues two defend-

150. For illustrations of "fractionalization" see Feste v. Newman, 368 S.W.2d 713, 718 (Mo. 1963) (en banc) (dissenting opinion), discussed *supra* note 71; Kitchen v. City of Clinton, 320 Mo. 569, 8 S.W.2d 602 (1928), discussed *infra* note 175. See also Morton v. Southwestern Tel. & Tel. Co., 280 Mo. 360, 217 S.W. 831 (1920), *trans'd from* court of appeals.

151. Hemminghaus v. Ferguson, 358 Mo. 476, 215 S.W.2d 481 (1948) (plaintiff appealed inadequacy of verdict against first defendant and non-recovery against second).

152. *E.g.*, McComb v. Vaughn, 358 Mo. 951, 218 S.W.2d 548 (1949); see Barnard v. Murphy, 365 S.W.2d 614 (Mo. 1963) (defendant appealed judgment in two consolidated actions one of which involved sufficient "amount").

153. *E.g.*, Kungle v. Austin, 380 S.W.2d 354 (Mo. 1964), in which the father sued as next friend for his daughter ($35,000) and in his own name for medical expenses incurred in her treatment ($2,500).

154. The foundation case is Ellis v. Harrison, 104 Mo. 270, 16 S.W. 198 (1891). The "amount" of plaintiff's appeal from non-recovery on three counts of a single cause of action exceeded the jurisdictional limit. Defendant who lost on the fourth count also appealed but his liability was insufficient for supreme court jurisdiction. In holding that the cross appeals were properly "consolidated" for its determination, the supreme court established the policy that currently prevails:

> The entire judgment [when more than one party appeals to the supreme court] is thus brought here for review. In such a state of the case we think the constitution does not contemplate successive hearings in the cause, first of one appeal in this court, and then of the other by the courts of appeals. *Id.* at 280, 16 S.W. at 200.

Accord, Sandusky v. Sandusky, 265 Mo. 219, 177 S.W. 390 (1915); Snoqualmi Realty Co. v. Moynihan, 179 Mo. 629, 78 S.W. 1014 (1904).

155. *E.g.*, Compte v. Blessing, 381 S.W.2d 780 (Mo. 1964); Snoqualmi Realty Co. v. Moynihan, *supra* note 154; Washington Sav. Bank v. Butchers & Drovers Bank, 61 Mo. App. 448 (1895), *trans'd.* Analogous are cases in which plaintiff appeals the inadequacy of his verdict and defendant cross appeals asserting complete non-liability. Consolidation is often necessary in these cases because defendant's cross appeal does not involve an "amount" sufficient for supreme court jurisdiction. *E.g.*, Coonce v. Missouri

ants but recovers against only one. Plaintiff's appeal from the verdict for the first defendant and the appeal by the second defendant from the verdict against him are "consolidated" in the supreme court if one appeal involves the requisite "amount."[156]

9.023(b)(2). *Aggregation*

The principle of "aggregation" which developed from "consolidation,"[157] may be defined in the following way: supreme court jurisdiction is based

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Pac. R.R., 347 S.W.2d 242 (Mo. Ct. App. 1961), *trans'd*, 358 S.W.2d 852 (Mo. 1962); Brown v. Holman, 220 S.W. 687 (Mo. Ct. App. 1920), *trans'd*, 292 Mo. 641, 238 S.W. 1065 (1922).

156. *E.g.*, Brown v. Reorganized Inv. Co., 350 Mo. 407, 166 S.W.2d 476 (1942); Morton v. Southwestern Tel. & Tel. Co., 280 Mo. 360, 217 S.W. 831 (1920), *trans'd from* court of appeals.

Cross claims frequently involve "consolidation" issues in determining jurisdictional "amount." If plaintiff recovers against two defendants who appeal and one defendant also appeals dismissal of his cross claim against the other defendant, jurisdiction of both appeals will be in the supreme court if either plaintiff's recovery or the defendant's cross claim petition is sufficient. Levin v. Caldwell, 285 S.W.2d 655 (Mo. 1956). Similarly, if the suit involves a third party petition, the supreme court will have jurisdiction of appeals by both the defendant (third party plaintiff) from dismissal of his claim for attorney's fees against the third party defendant and by the third party defendant from a verdict (over the jurisdictional limit) on the damage claim in favor of the third party plaintiff. Ward v. City Nat'l Bank & Trust Co., 379 S.W.2d 614 (Mo. 1964). For a careful and accurate statement of the jurisdictional issues in this kind of third party petition case, see Brief for Appellant (Third Party Plaintiff), pp. 1-2, Ward v. City Nat'l Bank & Trust Co., *supra*.

When plaintiff sued two defendants and recovered against one but appeals nonrecovery against the second, the "amount" of plaintiff's appeal is fixed by his original petition even though plaintiff recovered the entire amount of his claim against the first defendant. Brown v. Reorganization Inv. Co., *supra*; see Siemer v. Schuermann Bldg. & Realty Co., 381 S.W.2d 821 (Mo. 1964); Bailey v. Canadian Shield Gen. Ins. Co., 380 S.W.2d 378 (Mo. 1964). If plaintiff recovered the entire amount of his petition against the first defendant, it is apparently not necessary for him to assert that the first defendant is insolvent or that his judgment is uncollectable. See Bailey v. Canadian Shield Ins. Co., *supra*. Note the qualification of Lemonds v. Holmes, 360 Mo. 626, 229 S.W.2d 691 (1950) (en banc), discussed *supra* note 33.

157. The first case to consider "aggregation" was Reichenbach v. United Masonic Benefit Ass'n, 112 Mo. 22, 20 S.W. 317 (1892), *trans'd from* 47 Mo. App. 77 (1891), *retrans'd*, which was transferred to the supreme court on an "aggregation" theory. In the next case, jurisdiction was based on the aggregate of plaintiff's appeal of inadequacy (involving approximately $1,464) and defendant's appeal of plaintiff's recovery ($1,218). Each "amount" was insufficient (the then jurisdictional "amount" was $2,500), but the court totaled the two "amounts" and held the full $2,682 was in dispute. Douglas v. City of Kansas City, 147 Mo. 428, 48 S.W. 851 (1898):

> We hold that when there are cross appeals *in the same case*, and the *aggregate amount in dispute* in both appeals exceeds $2,500, the supreme court has jurisdiction; in other words, that the amount really in controversy *between the parties as the case stands in the appellate court*, and which will be concluded by the judgment to be rendered by such court in disposing of the appeal of both parties,

on the total of several "amounts" whether (1) a single appellant appeals non-recovery or liability in several forms, (2) appeal is taken by several parties as co-plaintiffs or co-defendants, or (3) cross appeals are filed.

The simplest form of "aggregation" is employed when a party appeals a judgment which denies his recovery on several counts or causes of action.[158] The corollary requires "aggregation" when a defendant appeals a judgment for plaintiff giving recovery on several claims.[159]

furnishes the test of appellate jurisdiction. *Id.* at 433, 48 S.W. at 852. (Court's emphasis in part.)

But see State *ex rel.* Commonwealth Trust Co. v. Reynolds, 278 Mo. 695, 213 S.W. 804 (1913) (en banc), in which the court held that because neither cross appeal involved an "amount" over the limit, although the aggregate was over, the court of appeals had original jurisdiction.

In announcing that the court would use the "aggregation" principle, the court in *Douglas* relied on Ellis v. Harrison, 104 Mo. 270, 16 S.W. 198 (1891), discussed *supra* note 154. *Ellis* held that jurisdiction of one appeal in the supreme court would cause all appeals from the same judgment to vest in the supreme court. By equating the jurisdictional issues in "aggregation" and "consolidation," the court manifested its position that "amount in dispute" is not that which affects either appellant, but the "amount" representing the prospective total effect of the court's decision.

The problem of distinguishing "aggregation" and "consolidation" originates in the failure of the court in *Douglas*, in which neither appeal alone involved a sufficient "amount," to distinguish *Ellis*, in which one of the appeals did lie to the supreme court. In view of the purpose of "consolidation"—to prevent "fractionalization"—the development of the "aggregation" principle does not appear to be a logical necessity; in situations in which "aggregation" applies there is no possibility that two appellate courts will hear appeals from the same lawsuit. In fact, "aggregation" (as opposed to "consolidation") appears to run counter to the court's usual tendency to restrict its jurisdiction.

Admittedly, it is unnecessary in cases in which plaintiff appeals non-recovery on several claims (cases cited note 158 *infra*) to distinguish (the courts do not) between cases in which the total of all amounts must be aggregated to give the jurisdictional "amount" and cases in which one claim is sufficient and the others are not. But in cases involving appeals by multiple parties or cross appeals, in which conflicting authority exists, the distinction is helpful.

158. See, *e.g.*, Farmer v. Arnold, 371 S.W.2d 265 (Mo. 1963) ($15,000 for personal injuries and $1,000 for property damage); Morrow v. Loeffler, 297 S.W.2d 549 (Mo. 1956) (garnishment for collection of judgment and attorney's fees); Berry v. Crouse, 370 S.W.2d 724 (Mo. Ct. App. 1963), *trans'd*, 376 S.W.2d 107 (Mo. 1964) (claim for recovery of payments plus claim for interest). *Compare* Salle v. Holland Furnace Co., 337 S.W.2d 87 (Mo. 1960), *with* Berry v. Crouse, *supra*. Both cases involved appeals from a suit which plaintiff had unsuccessfully prosecuted for two separate claims. In *Salle* one claim was sufficient for supreme court jurisdiction so the "consolidation" principle was applicable. In *Berry* both claims were necessary to yield an "aggregate" amount for supreme court jurisdiction. However, in these cases involving a single appellant it is unnecessary to make this distinction.

159. *E.g.*, Cross v. Gimlin, 256 S.W.2d 812 (Mo. 1953). In this case, as in the cases cited in notes 157-58 *supra*, the court found it unnecessary to distinguish "aggregation" from "consolidation." Also in point are cases in which multiple plaintiffs recover "amounts" which "aggregate" over the jurisdictional limit. Breshears v. Union Elec. Co., 373 S.W.2d 948 (Mo. 1964).

If two plaintiffs appeal non-recovery their appeal "aggregates" the separate "amounts" claimed by each plaintiff.[160] Class actions are very similar. When many parties are permitted to file one action and prosecute their claims so that they may be resolved by one judgment, the "aggregate" of the "amounts" claimed or recovered fixes jurisdiction.[161] In appeals by several defendants from a judgment entered for plaintiffs in a consolidated action, the jurisdictional "amount" is determined by the "aggregate" of the plaintiff's verdict.[162]

"Aggregation" is also used to determine appellate jurisdiction in cases involving cross appeals. Therefore, if both plaintiff and defendant appeal and the total of both appeals is sufficient, jurisdiction is in the supreme court.[163]

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160. See Paisley v. Liebowits, 347 S.W.2d 178 (Mo. 1961), in which infant plaintiff recovered $7,500 personal injury damages and the father recovered slightly more than $3,000 for special damages (the then jurisdictional limit was $7,500).

161. The applicable statute and rules are Mo. REV. STAT. § 507.070 (1959) and Mo. SUP. CT. R. 52.08, .09, which provide that the multiple causes must be so related that a single trial and judgment will determine their rights. *E.g.*, O'Dell v. Division of Employment Sec., 376 S.W.2d 137 (Mo. 1964) (947 employees' claims for unemployment compensation benefits aggregated $218,757); Reis v. Metropolitan St. Louis Sewer Dist., 373 S.W.2d 22 (Mo. 1963) (injunction to restrain sewer construction involving special benefit assessments aggregating $650,000); Barnard v. Murphy, 365 S.W.2d 614 (Mo. 1963) (defendant appealed two consolidated class actions in which aggregate judgment sufficient); Wessler v. City of St. Louis, 242 S.W.2d 289 (Mo. Ct. App. 1951); see Flanigan v. City of Springfield, 360 S.W.2d 700 (Mo. 1962) (nine consolidated actions in which each plaintiff recovered $4,000 and defendant appealed); Aufderheide v. Polar Wave Ice & Fuel Co., 319 Mo. 337, 4 S.W.2d 776 (1928) (en banc) (injunction by several property owners). The leading case involving a large number of consolidated actions in which the supreme court "aggregated" the jurisdictional "amounts" of each party's appeal is City of St. Louis v. Essex Inv. Co., 356 Mo. 1028, 204 S.W.2d 726 (1947).

If the plaintiff purports to represent others similarly situated, the supreme court will reject jurisdiction if it does not appear that the others were made parties to the proceeding and the jurisdiction amount is insufficient without "aggregating" the others' "amounts." Corbett v. Lincoln Sav. & Loan Ass'n, 4 S.W.2d 824 (Mo. 1928), *trans'd*, 223 Mo. App. 329, 17 S.W.2d 275 (1929). *But see* Aufderheide v. Polar Wave Ice & Fuel Co., *supra*.

162. Still v. Travelers Indem. Co., 374 S.W.2d 95 (Mo. 1963) (four insurance company defendants appeal judgments which aggregate slightly over $15,000); Priest v. Deaver, 21 Mo. App. 209 (1886), *trans'd* (aggregation where plaintiff's verdict over jurisdictional limit apportioned among several defendants with each individual "amount" below limit); see Barnard v. Murphy, 365 S.W.2d 614 (Mo. 1963) (in defendant's appeal from two consolidated cases the one which was sufficient was a class action aggregating the "amounts" plaintiffs recovered); Washington Sav. Bank v. Butchers & Drovers Bank, 61 Mo. App. 448, 449 (1895), *trans'd* ("liability of the appealing defendants amounts, in the aggregate, to more than $2,500, although individually each is responsible for less").

163. *E.g.*, Bakelite Co. v. Miller, 372 S.W.2d 867 (Mo. 1963); Darrah v. Foster,

9.023(b)(3). *Applicability*

The problem arises whether the "consolidation" and "aggregation" principles apply when appeals from separate claims involving the same or similar parties or legal issues have been consolidated for trial or tried separately and consolidated for appellate hearing.[164] When the supreme court first considered the problem in *Bradley v. Milwaukee Mechanics Ins. Co.*,[165] it held that "amounts" of appeals from separate suits which had not been consolidated for trial could not be aggregated.[166] In a later case, the court

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355 S.W.2d 24 (Mo. 1962) (both plaintiff and defendant cross claimant appealed); Wilson v. Buchanan County, 318 Mo. 64, 298 S.W. 842 (1927) (plaintiff appeals inadequacy and defendant asserts complete non-liability). In Sandy Hites v. Highway Comm'n, 128 S.W.2d 646 (Mo. Ct. App. 1939), *trans'd*, 347 Mo. 954, 149 S.W.2d 828 (1941), the court of appeals transferred on the theory of aggregation when plaintiff appealed non-recovery on his first two counts and defendant appealed plaintiff's recovery on the last two counts. Its holding is dictum, however, as the court could have transferred on the "consolidation" principle.

Although no mention is made of the basis for jurisdiction in Bakelite Co. v. Miller, *supra*, the court obviously had jurisdiction based on the aggregate "amount in dispute." Brief for Plaintiff-Appellant, pp. 1-2, contains the following basis for jurisdiction:

> The jury found for the plaintiff on count I and gave a verdict for $12,000.00 principal plus $2,618.34 interest. The defendant appealed from this portion of the judgment. The jury found against the plaintiff on count II and the plaintiff appealed from this portion of the judgment. The amount is thus in excess of the sum of $15,000.00, to-wit $20,618.34.

Brief for Defendant-Appellant, p. 1 acquiesced in this statement. Also, it appears from the briefs that the case was transferred from the court of appeals. *But see* Reames v. St. Louis-San Francisco Ry., 359 S.W.2d 230 (Mo. Ct. App. 1962). In this case, plaintiff sued for $25,000 and recovered $12,500. Both plaintiff and defendant appealed. The court did not consider the issue of jurisdiction but it seems clear that the value of each appeal—plaintiff's on inadequacy, defendant's on the liability of the adverse judgment—was $12,500, yielding an aggregate "amount" of $25,000. Interestingly, the court of appeals in holding for defendant because plaintiff had not made a submissible case under the humanitarian doctrine, indicated that "the issue of inadequacy of damages raised by plaintiff . . . is moot if the court finds for defendant . . . . Therefore, we deem it proper to first render judgment in . . . [defendant's appeal]." *Id.* at 235. Although plaintiff's appeal was properly before the court, it may not have been considered in the calculation of "amount" on a theory akin to the "merger of issues" doctrine in counterclaim cases, discussed in text accompanying notes 131-48 *supra*.

164. The circumstances in which "aggregation" and "consolidation" apply are distinct (§§ 9.023(b)(1), .023(b)(2)) but the problem of appeals from separate claims is not *which* principle applies but *whether* either is applicable.

165. 147 Mo. 634, 49 S.W. 867 (1899), *trans'd*, 90 Mo. App. 349 (1901).

166. The same plaintiff had recovered an "amount" below the jurisdictional limit in two suits against separate insurance companies under separate fire policies for damages arising from the same fire. Two appeals were filed in the court of appeals by each insurance company and the judgments in each case were reversed. The *Bradley* case, *supra*, was certified to the supreme court where the plaintiff argued *inter alia* that the court of appeals had no jurisdiction since the two cases which were "as inseparable as the Siamese twins" had "in effect" been consolidated for trial and the aggregate of the

held that two different causes of action by the same plaintiff against the same defendants when consolidated by the trial court become "in contemplation of law . . . one action"[167] upon which a *single judgment* must be rendered.[168] The "single judgment" test has also been employed in cases in which the parties are allowed to join their causes of action in one lawsuit which results in one final judgment, *i.e.*, class actions[169] and joinder of

two judgments was over the jurisdictional limit. (It was stipulated by counsel that the cases were tried together, that the same attorney defended both cases, that witnesses were sworn but once, that the record and bill of exceptions in each case were identical, and it was agreed by counsel that both causes could be considered in the supreme court on the record, statement and brief in the present case.) Appellant's contention was rejected by the court's holding that the test for "aggregation" was whether the two suits had *in fact* been consolidated, not whether the trial court had the power or was authorized by statute to consolidate: "It is plain that a joint judgment could not be rendered against both defendants in either case, and that a satisfaction of either of the separate judgments would not be a satisfaction of the other. There is no privity of liability between the defendants . . . ." *Id.* at 637, 49 S.W. at 868. The court distinguished Ellis v. Harrison, 104 Mo. 270, 16 S.W. 198 (1891), discussed *supra* note 154, as one case including several counts in which there was one judgment as opposed to the instant case in which there were "two distinct suits."

167. State *ex rel.* Owens v. Fraser, 165 Mo. 242, 256, 65 S.W. 569, 571 (1901); *accord*, Aufderheide v. Polar Wave Ice & Fuel Co., 319 Mo. 337, 383, 4 S.W.2d 776, 801 (1928) (en banc). *Fraser* involved two suits on bail bonds of $2,500 each (the then jurisdictional "amount" was $4,500) which were consolidated pursuant to Mo. REV. STAT. § 510.180(1) (1959). See also Mo. SUP. CT. R. 66.01(a).

168. The court analogized this case to one suit "in the first place, with a separate count on each cause of action" in which judgments on all counts are aggregated according to statute in one final judgment. See Ellis v. Harrison, 104 Mo. 270, 16 S.W. 198 (1891), discussed *supra* note 166. The same result obtains if the same defendant is sued by different plaintiffs and the cases are consolidated for trial. Barnard v. Murphy, 365 S.W.2d 614 (Mo. 1963) ("amounts" recovered—$873.89 and $17,654.99—were "consolidated" in a judgment of $18,528.88 which satisfied jurisdictional "amount"); Flanigan v. City of Springfield, 360 S.W.2d 700 (1962) ("aggregate amounts" of separate jury verdict on nine actions consolidated by trial court order). For a definition of "final judgments," see Mo. REV. STAT. § 511.020 (1959) and Mo. SUP. CT. R. 74.01. Until a judgment disposing of all the parties and issues in the case has been entered, there is no final judgment from which an appeal can be taken. Deeds v. Foster, 361 Mo. 916, 235 S.W.2d 262 (Mo. 1951).

169. See, *e.g.*, City of St. Louis v. Essex Inv. Co., 356 Mo. 1028, 204 S.W.2d 726 (1947), citing Rombauer v. Compton Heights Christian Church, 328 Mo. 1, 40 S.W.2d 545 (1931) and Aufderheide v. Polar Wave Ice & Fuel Co., 319 Mo. 37, 4 S.W.2d 776 (1928) (en banc). In *Essex* twenty-two of 165 defendants in a condemnation action joined in a motion for a nunc pro tunc order to require payment of interest allegedly due on the net damages awarded and appealed the overruling of their motion. Although the defendants (plaintiffs on the motion) each sought separate amounts below the jurisdiction limit, the supreme court held that it had jurisdiction by aggregating the claims; the plaintiffs were viewed as seeking *one judgment* to enforce several demands claimed under one common right. An examination of the *Aufderheide* opinion makes clear the reasoning behind aggregation of claims in representative actions, that is, suits by one or more plaintiffs "for themselves and others similarly situated." Where the forty-three parties in

plaintiffs' claims in personal injury actions,[170] including the claim of one spouse for personal injuries and the other for loss of consortium and services[171] or of a minor by his parent as next friend and the parent in his own right.[172]

The "one judgment" test which has been generally applied—although two recent court of appeals' decisions are opposite[173]—poses a potential problem when appeals from separate suits are consolidated for hearing on appeal because of "common questions of fact and law." When jurisdiction

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interest had the right by statute to sue in one action "but one judgment could be rendered in their favor." The court indicated that if the claims had been asserted in separate suits "they could have been consolidated and one single judgment entered for the relief prayed." See Mo. REV. STAT. § 507.070 (1959) and Mo. SUP. CT. R. 52.08.

170. *E.g.*, Darrah v. Foster, 355 S.W.2d 24 (Mo. 1962) ($15,000 claim each by both plaintiff and cross-claimant "aggregated"); McComb v. Vaughn, 358 Mo. 951, 218 S.W.2d 548 (1949). In *McComb* three plaintiffs joined their claims and received three separate judgments on verdicts of $9,000, $750 and $250 which were entered as one final judgment (the jurisdictional "amount" was $7,500). The language of the court indicates that the "amounts" were "consolidated" for supreme court jurisdiction. "The judgment appealed from, for a sum in excess of $7500, in favor of plaintiff Lagatha [who recovered $9,000] vests this court with appellate jurisdiction of the case." *Id.* at 953, 218 S.W.2d at 549.

171. *E.g.*, Bogus v. Birenbaum, 375 S.W.2d 156 (Mo. 1964) ("aggregation" of wife's claim of $15,000 and husband's claim for $3,608.81); Schaetty v. Kimberlin, 374 S.W.2d 70 (Mo. 1964) ("consolidation": wife—$7,500 and husband—$17,500).

By amendment to the Rules of Civil Procedure, effective July 1, 1965, enforcement of causes of action accruing to both spouses because of injury to one or the other must be "in one action brought by both spouses." Mo. SUP. CT. R. 66.01(c), published in *Supreme Court Order of November 16, 1964,* 20 J. Mo. B. 540. For exposition of the practical considerations behind the new rule, see Novak v. Kansas City Transit, Inc., 365 S.W.2d 539, 547 (Mo. 1963) (en banc) (opinion of Eager, J., dissenting from majority holding that wife's action would lie for loss of husband's consortium). See also Shepherd v. Consumer Co-op. Ass'n, 384 S.W.2d 635, 641 (Mo. 1964) (en banc) (separate dissenting opinions of Eager and Storckman, JJ.).

172. *E.g.*, Kungle v. Austin, 380 S.W.2d 354 (Mo. 1964) ("consolidation" of minor's claim for damages ($35,000) and father's claim for medical expenses ($2,500) when both appealed non-recovery); Triller v. Hellwege, 374 S.W.2d 104 (Mo. 1964), *trans'd from* court of appeals ("consolidation": personal injuries of minor—$100,000, loss of earnings and medical expenses of parent—$15,000).

173. Wise v. Towse, 366 S.W.2d 506 (Mo. Ct. App. 1963); Haynes v. Linder, 323 S.W.2d 505 (Mo. Ct. App. 1959). In both cases, the Kansas City Court of Appeals refused to "aggregate" the "amounts" of cases consolidated for trial, which if done would have given the supreme court jurisdiction. The language is particularly perplexing in *Haynes* in which the court states that there were "separate appeals from the separate judgments," and "since each judgment" was less than the jurisdictional "amount," it had jurisdiction. If the "judgment" were in fact on separate verdicts in separate actions which had not been consolidated for trial, the decision would be proper. But when actions are consolidated for trial, as in this case, only one final judgment could be entered—although it may be composed of *several parts*—to resolve all the issues involved in the consolidated actions. See note 168 *supra.*

of only one of such multiple appeals is in the supreme court and the supreme court's decision will necessarily decide both, the court nevertheless has held that it must transfer the appeal not within its jurisdiction,[174] requiring two appellate hearings to decide the same legal issue. (This problem of course could only arise in the standard "consolidation" situation in which one appeal was sufficient for supreme court jurisdiction but the other was not.) However, a contrary policy has been used by the supreme court. This is the "common questions of fact and law" test of "aggregation-consolidation," which had its genesis in *Kitchen v. City of Clinton*.[175] The policy retains vitality because it has not been overruled and *Kitchen* has been cited as authority for "aggregation" in recent supreme court decisions.[176]

9.024. *Ancillary Jurisdiction*

The "consolidation" principle in "amount" jurisdiction which permits one appeal or a part thereof to satisfy the jurisdictional requirements of the supreme court for another appeal or a part thereof is closely related to the concept of ancillary jurisdiction in the federal system.[177] In Missouri, jurisdiction in the supreme court has been asserted on an ancillary basis in two situations: (1) review of orders by the trial court which are a com-

174. *In re* Dean's Estate, 350 Mo. 494, 166 S.W.2d 529 (1942) (en banc). Although not expressly stated by the court, the rule emerges from the case that if the court is unable to find that the appeal is from *one suit* (in the words of the constitution, one "case") over which it has jurisdiction, it must consider the appeals individually or violate the constitution. See Sims v. Sims, 253 S.W.2d 814 (Mo. 1953), which was an appeal from an order allowing alimony and suit money (for an insufficient "amount") pending appeal in the principal case, a divorce action properly before the supreme court. Although noting that "it may seem absurd and unreasonable to some for this court to refuse or be unable to also adjudicate this collateral controversy," the court held that the two causes could not be consolidated because they were "separate and independent proceedings." *But see* Kitchen v. City of Clinton, 320 Mo. 569, 8 S.W.2d 602 (1928) (both appeals from separate judgments ruled on by one opinion when apparently only one "amount" was sufficient).

175. 320 Mo. 569, 8 S.W.2d 602 (1928). There were appeals from two separate judgments: one action was by the assignee of the city to enforce payment of tax bills in seventeen separate suits consolidated for trial and the other was a suit to enjoin assessment of a tax bill. If it were possible to interpret *Kitchen* as holding that *both* appeals involved an "amount" sufficient for supreme court jurisdiction, it could be at least partially reconciled with *In re* Dean's Estate, *supra* note 174. This seems unlikely because of *Kitchen's* articulation of the "common facts and questions of law" criterion.

176. Flanigan v. City of Springfield, 360 S.W.2d 700, 701 (Mo. 1962); Darrah v. Foster, 355 S.W.2d 24, 27 (Mo. 1962).

177. The leading case is Hurn v. Oursler, 289 U.S. 238 (1933). Ancillary jurisdiction is defined as that which "generally involves either proceedings which are concerned with pleadings, processes, records or judgments of court in principal cases or proceedings which affect property already in court's custody." BLACK, LAW DICTIONARY 112 (4th ed. 1951).

ponent part of the judgment pending appeal in the supreme court; (2) jurisdiction to enforce a decision of the supreme court.

The first situation in which jurisdiction is asserted because one appeal is related or ancillary to another appeal which is properly within the supreme court's jurisdiction, involves these facts: an appeal is taken to the supreme court by one party from the trial judgment on the merits of the case; pending appellate determination, one of the parties is granted a monetary allowance, usually taxed as "costs" in the main suit, which is also appealed (frequently the "amount" of the costs is insufficient for supreme court jurisdiction). Because the order granting the costs has been entered after the main appeal, the supreme court may have decided the substantive question when the appeal of the costs order is presented to it. On appeal from the costs order, jurisdiction in the supreme court is asserted because the costs order is ancillary to the principal appeal.

In these cases, the supreme court has held that its jurisdiction exists in some cases and not in others. The determinative point is whether the costs order "modifies" the original judgment or is an independent judgment entered in an independent action. Also a factor influencing the supreme court to accept jurisdiction is the extent to which the appeal of the order involves a consideration of the issue litigated in the main appeal.

The first case to involve these issues was a will construction action in which the heirs appealed the judgment on the merits to the supreme court.[178] After the appeal had been taken, the trial court sustained a motion by the heirs' attorneys allowing $600 as legal fees in their favor and taxed the fees as costs to the estate. The executor who had opposed the order for costs appealed it to the court of appeals which transferred on the ground that the order was a part of the original action then before the supreme court.[179] The gist of the transferring opinion was that since a trial court has no authority to enter an order for costs apart from a final judgment on the merits, the order had to be viewed as a modification of the judgment on the merits. The court further pointed out that whether the cost order was proper could only be determined in conjunction with a consideration of significant legal issues involved in the principal action.

A similar result was reached in a recent case involving costs allowed garnishees pending the appeal to the supreme court by the plaintiffs from the judgment quashing the writs of garnishment.[180] Although an appeal

178. Sandusky v. Routt, 141 S.W. 11 (Mo. Ct. App. 1911), *trans'd*, 265 Mo. 219, 177 S.W. 390 (1915).

179. The opinion on the merits was Sandusky v. Sandusky, 261 Mo. 351, 168 S.W. 1150 (1914).

180. Flynn v. First Nat'l Safe Deposit Co., 284 S.W.2d 593 (Mo. 1955), *trans'd from* 273 S.W.2d 756 (Ct. App. 1954). The order was entered pursuant to Mo. REV. STAT. §

from the costs order had been taken to the court of appeals, the supreme court on transfer held that it had jurisdiction because the allowance order modified the original judgment and therefore "formed an integral and component part of the judgment."[181] However, in cases developing from similar fact patterns the supreme court has rejected jurisdiction advanced on an ancillary basis.

During the pendency of an appeal to the supreme court from the judgment entered in a divorce proceeding, the allowance to the wife by the trial court of attorney's fees, suit money and alimony is not appealable to the supreme court on the ground that the allowance order is "auxiliary" or ancillary to the appeal from the decree in the divorce action.[182]

The distinguishing features in the divorce cases is that the trial court has power to enter a separate order for "alimony and suit money pending the appeal."[183] Thus, although the order for allowance is related to the divorce issue, it is not made until after final judgment in the divorce action and does not alter or modify it, but rather is an independent proceeding.[184]

525.240 (1959) which allows attorney's fees to be recovered by the garnishee if plaintiff fails to recover.

181. *Id.* at 596. The supreme court on the same day handed down the opinion on the appeal challenging the quashing of the writs. Flynn v. Janssen, 284 S.W.2d 421 (Mo. 1955).

In its transferring opinion, the court of appeals made an observation similar to that made in the *Sandusky* case. It noted that it would be necessary to decide whether the trial court had properly quashed the writs in order to determine whether the garnishees were entitled to the allowances. The court stated: "An anomalous situation would be created if we undertook to affirm the orders allowing the fees to the garnishees and the Supreme Court would reverse the orders in the main proceeding." 273 S.W.2d at 760. In an earlier case, the same court of appeals refused to consider a plaintiff's appeal from the failure of the trial court to order its clerk to enter satisfaction of the judgment in defendant's favor on her counterclaim. Defendants had appealed the case to the supreme court but because the "amount" for which plaintiff attempted to satisfy the judgment was below the jurisdictional level, appeal was taken on that point to the court of appeals. It transferred to the supreme court because the appeal was an "essential part of the cause depending in the supreme court on the appeal from the judgment in chief." The court further noted that it would be "incongruous" for it to decide whether a judgment had been satisfied while the supreme court was reviewing the validity of the judgment. Rosenberger v. Jones, 48 Mo. App. 606, 609 (1892), *trans'd.*

182. Sims v. Sims, 253 S.W.2d 814 (Mo. 1953), *trans'd*; Stuart v. Stuart, 320 Mo. 486, 8 S.W.2d 613 (1928), *trans'd*, 14 S.W.2d 524 (Ct. App. 1929); *cf.* Bauer v. City of Berkeley, 278 S.W.2d 772 (Mo.), *trans'd*, 282 S.W.2d 154 (Ct. App. 1955) (action on injunction bond an "independent proceeding").

183. Sims v. Sims, *supra* note 182, at 815-16; Mo. REV. STAT. § 452.070 (1959).

184. See Stine v. Southwest Bank, 98 S.W.2d 539 (Mo. 1936), *trans'd*, 108 S.W.2d 633 (Ct. App. 1937). Plaintiff appealed to the supreme court from the dissolution of a temporary injunction which had issued to forestall foreclosure on plaintiff's property. Pending plaintiff's appeal (which was subsequently dismissed) defendant sought recovery (of an "amount" below the jurisdictional level) on the injunction bond

Supreme court jurisdiction was held lacking in another similar case. This was an action[185] for the appointment of a receiver for a defendant corpora-

against plaintiff and her surety. This action was dismissed but reinstated and plaintiff appealed. Her appeal was to the supreme court on the theory that that court's jurisdiction on the first appeal from the judgment dissolving the injunction gave supreme court jurisdiction of the second appeal. The court held that it lacked jurisdiction of the first appeal because the "amount" was insufficient. It further held that it would have no jurisdiction in any event since the second appeal arose from a new, separate and independent controversy and involved a new party (plaintiff's surety).

An appeal taken from the appointment of a receiver to manage temporarily property would not be within supreme court jurisdiction even though the appointment was ancillary to the decision of a dispute involving an issue within its jurisdiction (suit to quiet title to real estate). Stip v. Bailey, 331 Mo. 374, 53 S.W.2d 872 (1932), *trans'd from* 22 S.W.2d 178 (Ct. App. 1929), *retrans'd*, 62 S.W.2d 482 (Ct. App. 1933). The case must be distinguished because no appeal had been taken which gave supreme court jurisdiction over any part of the dispute. The appeal related to an issue at trial, not one on appeal. This presents the problem of suit in two counts, one involving an issue which, *if appealed,* would confer supreme court jurisdiction but the case is appealed only on the count not involving the jurisdictional issue or it is appealed from some preliminary order *before* the issue having supreme court jurisdiction becomes appealable. In this state of facts, it is clear that supreme court jurisdiction cannot be invoked on the ancillary basis. Hyer v. Baker, 130 S.W.2d 516 (Mo.) (en banc), *trans'd from* 128 S.W.2d 1067 (Ct. App. 1939), *retrans'd*; Stip v. Bailey, *supra.* If the judgment or order disposed of both counts, however, and an appeal was taken from both, supreme court jurisdiction would clearly attach. Missouri City Coal Co. v. Walker, 183 S.W.2d 350 (Mo. Ct. App. 1944), *trans'd,* 188 S.W.2d 39 (Mo. 1945).

Early cases had held that suit on a recognizance was ancillary to the criminal proceeding so that an appeal from the recognizance action would lie to the supreme court if the criminal proceeding was a felony, even though the "amount" of the recognizance was below the jurisdictional limit. *E.g.,* State v. Wilson, 265 Mo. 1, 175 S.W. 603 (1915) (en banc). However, this position was specifically overruled. State v. Gross, 306 Mo. 1, 275 S.W. 769 (1924) (en banc), *trans'd.*

The anchor for the court's holding in *Sims* that the order for suit money was a separate proceeding from which a separate appeal must be taken was its conclusion, based on a review of the applicable law, that the trial court had jurisdiction to enter a decree for the allowances *after final judgment* had been entered in the divorce action and appeal therefrom had been taken. This distinguishes the *Sandusky* and *Flynn* cases where the supreme court had jurisdiction, because in those cases it was carefully set out that the trial court did not have jurisdiction to enter a decree for costs after entry of final judgment. This incapacity of the trial court required the conclusion that the trial court had modified the *original* judgment (even if permitting the assessment was erroneous). Therefore, cases arising on facts similar to those in the cases in this section must depend on whether the substantive law permits the trial court to enter a separate decree for costs. The cases suggest this result: if a separate order for costs may be granted, an appeal from that order must have independent jurisdictional standing to go to the supreme court; if a separate decree may not be entered after final judgment on the merits of the case, then the appeal must go to the supreme court when the trial court assesses "costs" whether or not the assessment was a proper and timely modification of the original judgment.

185. Niedringhaus v. William F. Niedringhaus Inv. Co., 330 Mo. 1089, 52 S.W.2d 395 (en banc), *trans'd,* 54 S.W.2d 79 (Ct. App. 1932).

tion and for other equitable relief. Appeal was taken by plaintiffs to the supreme court from the trial court's order denying relief, made upon the report of a referee appointed by the court to investigate the claims.[186] The judgment dismissing plaintiff's bill did so "at the cost of plaintiffs" but did not rule on the claim by the referee for additional fees.[187] When the trial court later entered an order for additional fees, it was held that an appeal from the order would not lie to the supreme court on the principle that it was related or ancillary to the pending appeal on the merits. Because the original judgment included a provision that the costs were to be taxed to the plaintiffs, the subsequent order fixing the amounts of the costs "did not in the slightest degree change, alter, or amend the decree," but was "purely collateral to it."[188]

The distinction proposed by this case is whether the order for costs "changes or modifies" the original judgment or merely implements it.[189] It is not difficult to grasp the point that the trial court's order only applies the existing judgment. But the relation between an order implementing a judgment, and the judgment is so intimate, that it seems unsatisfactory for supreme court jurisdiction not to attach.[190]

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186. The decision in the principal appeal was Niedringhaus v. William F. Niedringhaus Inv. Co., 329 Mo. 84, 46 S.W.2d 828 (1931).

187. When the referee made his report, he requested an additional fee as full compensation, and stenographer's fees. He had already been allowed some compensation, paid equally by both parties, and his additional request was opposed by plaintiffs who asserted that he had been fully and justly compensated.

188. Niedringhaus v. William F. Niedringhaus Inv. Co., 330 Mo. 1089, 1093, 52 S.W.2d 395, 396 (1932) (en banc).

189. In this connection it should be noted that the court was careful to point out that consideration of the allowances to the referee in no way depended on the legal issues involved in the main appeal. This point is also made by other cases involving analogous fact situations and in which ancillary jurisdiction in the supreme court was rejected, *e.g.*, Sims v. Sims, 253 S.W.2d 814 (Mo. 1953), discussed *supra* note 182. The opposite conclusion was reached in Flynn v. First Nat'l Safe Deposit Co., 284 S.W.2d 593 (Mo. 1955), discussed *supra* note 180; Sandusky v. Routt, 141 S.W. 11 (Mo. Ct. App. 1911), discussed *supra* note 178, in which the supreme court jurisdiction was sustained.

The holding in *Niedringhaus* was possibly applicable in the *Flynn* case, although the latter did not cite the former (in fact *Niedringhaus* apparently has never been cited). In *Flynn,* the motion to quash the writs which was granted and appealed also contained a request for a reasonable attorney's fee. It does not appear from the opinion whether the trial judgment in granting the motion included provision for granting the fees so that its later assessment could, within the holding in *Niedringhaus,* have been considered only an implementation of the existing judgment.

190. Consider the case of Rosenberger v. Jones, 48 Mo. App. 606 (1892), discussed *supra* note 181, in which the court of appeals held "incongruous" its consideration of whether the judgment being appealed to the supreme court had been satisfied. Obviously underpinning the decision by the court of appeals to transfer was the fact that

In *Lang v. Taussig*,[191] the supreme court considered an appeal based on "amount" jurisdiction from a judgment in a will construction case. It ordered the trial court to enter a decree in accordance with its decision, but the decree entered by the trial court was still objectionable to the appellant who again appealed to the supreme court.[192] The basis for the second appeal was that the trial court had failed to follow the supreme court's decision in entering the second decree and had erred in not permitting appellant an allowance for "costs," although the trial court was conceded to have obeyed the supreme court's decision to an extent sufficient to reduce the "amount in dispute" below the jurisdictional level. The supreme court rejected the argument that only it could properly know the meaning of and enforce its prior decision, and transferred, holding that "the mere fact that a prior appeal in the present case was to the supreme court is no ground to support the notion that this second appeal lies to the supreme court."[193]

The *Lang* case permits a supreme court decision to be interpreted and enforced by the court of appeals. This causes "fractionalization" similar to that avoided in cases like *Flynn v. First Nat'l Safe Deposit Co.*,[194] in which jurisdiction was preserved in the supreme court after the trial court modified the original judgment (by assessing "costs") while the judgment was

its decision would impede the supreme court's power to decide how a judgment within its jurisdiction should be enforced. See note 192 *infra* and accompanying text.

The holding in *Niedringhaus* seems to be unfair to the appellant. If the court had entered its order permitting the additional fees contemporaneous to the initial judgment, clearly the appeal on the merits would have placed the issue of the fees before the supreme court. But because the trial court was tardy in ruling on the issue, the appellant was required to have appeals in two different courts. Apparently, he should have protested the inclusion of the provision for assessment of costs on the main appeal.

191. 180 S.W.2d 698 (Mo. 1944).

192. Lang v. Taussig, 354 Mo. 930, 192 S.W.2d 407, *trans'd*, 194 S.W.2d 743 (Ct. App. 1946).

193. *Id.* at 934, 192 S.W.2d at 410. The court relied on Bragg v. Ross, 173 S.W.2d 415 (Mo. 1943), *trans'd*, 177 S.W.2d 543 (Ct. App. 1944), in which a demurrer to the plaintiff's petition in an equity action to redeem an interest in real estate was reversed by the supreme court and, after a second trial on the merits, the plaintiff suffered an adverse verdict. Plaintiff again appealed to the supreme court, where the judgment was reversed and it was held that the plaintiff was entitled to an accounting. Plaintiff excepted to the finding which resulted from a *separate trial* on the issue of accounting and for a third time appealed to the supreme court. Jurisdiction of the third appeal was rejected because the title to real estate issue which had provided jurisdiction in the earlier cases had been settled. The *Bragg* case is distinguishable to some extent from *Lang*, because in *Bragg* the final appeal was from a separate "trial" which the trial court held to determine the accounting, while in *Lang* the final appeal resulted from the trial court's immediate action applying the supreme court's opinion.

194. 284 S.W.2d 593 (Mo. 1955), *trans'd from* 273 S.W.2d 756 (Ct. App. 1954), discussed *supra* note 180; see cases cited notes 178-81 *supra*.

being reviewed in the supreme court. It is arguable that the rationale of the *Flynn* decision and the inherent supervisory power vested in the supreme court,[195] provide authority for a result contrary to *Lang,* even though the second appeal resulted from a new decree.[196]

9.025. *Appeal from New Trial Order*

If a litigant suffers an adverse verdict, but succeeds in getting a new trial ordered, the jurisdictional "amount" on appeal by the other litigant is determined by the value to the appellant of having the new trial order reversed and the original verdict reinstated. To employ the standard rules of "amount" calculation, a rule of thumb which may be used is to determine the "amount" as if the new trial had not been granted and the original adverse verdict had been appealed by the litigant who (because of the actual appeal of the new trial order) becomes the respondent.

9.025(a). *Plaintiff Granted New Trial*

The most frequent appeal from a new trial order is prosecuted by the defendant when a plaintiff who was unsuccessful at the trial has been granted a new trial. In this situation, the "amount in dispute" is the full amount of the plaintiff's original petition because it has been "reinstated" by the new trial order.[197]

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195. See Mo. CONST. art. V, § 4.

196. In Emerson Elec. Mfg. Co. v. City of Ferguson, 359 S.W.2d 225, 227 (Mo. 1962), *trans'd,* 376 S.W.2d 643 (Ct. App. 1964), the court stated that "jurisdiction once established would normally continue, in order to give effect to our judgment."

In Rourke v. Holmes St. Ry., 257 Mo. 555, 166 S.W. 272 (1914) (en banc) (the history of the case and statute involved therein are set out in "Introduction," note 36), the supreme court had to determine the constitutionality of a statute which purported to give the supreme court original appellate jurisdiction of any case then pending in which the court had made a prior ruling or decision. The majority held the statute unconstitutional because it gave the supreme court jurisdiction beyond that delineated in the constitution. The dissenting opinion would have held the act valid under the legislative power to increase or diminish the jurisdictional "amount."

197. *E.g.,* Roberts v. Emerson Elec. Mfg. Co., 362 S.W.2d 579 (Mo. 1962); Harris v. Rowden, 305 S.W.2d 25 (Mo. 1957); Bartlett v. Kansas City Pub. Serv. Co., 349 Mo. 13, 160 S.W.2d 740 (1942); Barrett v. St. Louis Southwestern Ry., 143 S.W.2d 60 (Mo. 1940); Johnson v. Ramming, 340 Mo. 311, 100 S.W.2d 466 (1936); Powell v. St. Joseph Ry., Light, Heat & Power Co., 336 Mo. 1016, 81 S.W.2d 957 (1935); Carnes v. Thompson, 48 S.W.2d 903 (Mo. 1932). If the defendant had counterclaimed and was granted a new trial after failing to recover on his counterclaim, his petition would be reinstated and would determine jurisdictional "amount." McDonald v. Logan, 364 Mo. 382, 261 S.W.2d 955 (1953); Albers Milling Co. v. Carney, 335 S.W.2d 207 (Mo. Ct. App.), *trans'd,* 341 S.W.2d 117 (Mo. 1960). The new trial purges the "amount" of plaintiff's petition of any implied reductions which may have occurred during the first trial. Poe v. Kansas City, C.C. & St. J. Ry., 238 S.W. 1082 (Mo. 1922), *trans'd from* court of appeals.

The calculation is more complex if a plaintiff is granted the new trial because his recovery was inadequate. Although the new trial restores the full "amount" of plaintiff's original petition, the courts have generally held that the amount plaintiff recovered must be substracted from the petition.[198] The reason for the subtraction is that the defendant's appeal is on the theory that the trial court erred in dissolving the plaintiff's recovery by the new trial order. Thus in effect, defendant is conceding liability for the amount recovered so that even though plaintiff's full petition is reinstated, the amount of his initial recovery is removed from the realm of dispute.[199]

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198. *E.g.*, Sofian v. Douglas, 324 Mo. 258, 23 S.W.2d 126 (1929); Craton v. Huntzinger, 187 S.W. 48 (Mo. 1916), *trans'd from* 177 S.W. 816 (Ct. App. 1915); Jones v. Allred, 298 S.W.2d 525 (Mo. Ct. App. 1957), *trans'd*; Harmon v. Foster, 297 S.W.2d 783 (Mo. Ct. App. 1957), *trans'd*; Ford v. K. Jones Motor Co., 115 S.W.2d 3 (Mo. Ct. App. 1938), *trans'd*; see Wessels v. Smith, 362 S.W.2d 577 (Mo. 1962); Mosley v. St. Louis Pub. Serv. Co., 301 S.W.2d 797 (Mo. 1957).

199. This specific reasoning was detailed in Craton v. Huntzinger, *supra* note 198, in the opinions of both the supreme court and the court of appeals. *Accord*, Sofian v. Douglas, *supra* note 198. *Contra*, Stein v. Baskowitz, 157 S.W.2d 807 (Mo. Ct. App. 1942), *trans'd*; *see* McCarty v. St. Louis Transit Co., 192 Mo. 396, 91 S.W. 132 (1905). *McCarty* was cited as authority by the supreme court in Craton v. Huntzinger, *supra*, but it appears to be opposite in result. In *McCarty* plaintiff recovered $500 on a $5,000 claim, had the verdict set aside as inadequate by an order for new trial, and defendant appealed. Because the supreme court had original appellate jurisdiction at that time only if the "amount" exceeded $4,500, it apparently decided the case without jurisdiction. A recent case, because of its peculiar facts, is difficult to assess. In Langhammer v. City of Mexico, 327 S.W.2d 831 (Mo. 1959), plaintiff sued for $10,250, and recovered $4,000. The defendant moved for a directed verdict which was denied but he was granted a new trial. From the new trial order both parties appealed. The supreme court carefully examined the jurisdictional issues and concluded its jurisdiction was established because the new trial reinstated the full amount of plaintiff's original petition, notwithstanding the fact that the plaintiff's verdict was set aside at the behest of defendant. Thus, the case could be interpreted as holding that the effect of a new trial, in any event, is to restore the *entire* petition. However, the fact that cross appeals were filed by both the plaintiff and defendant makes it possible to explain the case by "aggregation"; the "aggregate amount in dispute" equaled $10,250, the full amount of the petition (§ 9.023(b)(2)). On plaintiff's appeal, the verdict set aside—$4,000 was the "amount" disputed. The "amount" of defendant's appeal is more difficult to calculate. Obviously, if a directed verdict rather than a new trial had been ordered, defendant would not have appealed. So the "amount in dispute" must be the value to the defendant of a directed verdict in excess of the new trial's value. A directed verdict would have completely insulated him from liability while the new trial reinstates plaintiff's petition, subjecting defendant to potential future liability of $10,250. However, the fact that defendant may be *liable* for that amount does not necessarily make that amount the *"amount in dispute."* For example, if a plaintiff sues for $10,250 and recovers $4,000 but appeals the inadequacy of that recovery, the "amount in dispute" requires subtraction of the recovery from the petition plaintiff wants reinstated. Cases cited note 37 *supra*. Therefore, the jurisdictional "amount" would be $6,250, even though a successful appeal by the plaintiff would permit him to retry his case for $10,250 and *recover the entire amount.* Logically, in *Langhammer* the fact that the defendant may be *liable* on retrial for

9.025(b). *Defendant Granted New Trial*

In cases in which the defendant is granted a new trial after the plaintiff recovered at trial, and plaintiff appeals, the "amount" for determination

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$10,250 places in *actual dispute* only the "amount" of liability in addition to that of plaintiff's first verdict. Defendant could have completely terminated his liability by paying the $4,000 verdict, and this fact removes the $4,000 from the *realm of "dispute"* in the same way a plaintiff appealing "inadequacy" removes from "dispute" the "amount" of the verdict which he could have accepted but with which he was dissatisfied. Therefore, because of the cross appeals the "aggregate" of the two "amounts" was $10,250 and the supreme court properly held that it had jurisdiction.

200. Reaves v. Rieger, 360 Mo. 1091, 232 S.W.2d 500 (1950), *trans'd*, 241 S.W.2d 389 (Ct. App. 1951); State *ex rel.* Long v. Ellison, 272 Mo. 571, 199 S.W. 984 (1917) (en banc); Williams v. Atchison, T. & S.F. Ry., 233 Mo. 666, 136 S.W. 304 (1911); Culbertson v. Young, 156 Mo. 261, 56 S.W. 893, *trans'd from* court of appeals, *retrans'd*, 86 Mo. App. 277 (1900); Voss v. American Mut. Liab. Ins. Co., 341 S.W.2d 270 (Mo. Ct. App. 1960); Deaver v. St. Louis Pub. Serv. Co., 199 S.W.2d 83 (Mo. Ct. App. 1947; see De Maire v. Thompson, 359 Mo. 457, 222 S.W.2d 93 (1949). If plaintiff recovered a verdict, but it was erased by the granting of a new trial and plaintiff appealed including in his appeal the ground that his recovery was inadequate, it would seem that the entire petition would be restored. His appeal of the granting of a new trial would, by the "reinstatement" principle, place in dispute his verdict set aside by the new trial. In addition, his inclusion of "inadequacy" should place in dispute the unrecovered part of the amount asked for in his petition. (The "inadequacy" rules—note 37 *supra*—would require subtraction of the amount recovered from the amount asked for in the petition, but as the amount recovered was set aside by the granting of a new trial *and plaintiff appealed from this,* the "subtraction" rationale—that plaintiff could have accepted his verdict so that "amount" is not in "dispute"—is inapplicable.) See Vogrin v. Forum Cafeterias of America, Inc., 301 S.W.2d 406 (Mo. Ct. App.), *trans'd*, 308 S.W.2d 617 (Mo. 1957), holding that plaintiff's petition was reinstated on his appeal from the trial court's refusal to grant a new trial on inadequacy after plaintiff had recovered $1,000 on a $20,000 petition. The verdict was set aside by the court's entry of judgment for defendant notwithstanding the plaintiff's verdict. However, the court of appeals applied the standard "inadequacy" rule and substracted the $1,000 from the $20,000 in determining the "amount in dispute," apparently because plaintiff's appeal was predicated on the court's failure to grant a new trial on inadequacy and also did not include as error the setting aside of the $1,000.

201. This was the precise holding of Culbertson v. Young, *supra* note 200 approved *en banc* by the *Long* case, *supra* note 200. It has been challenged on authority of Langhammer v. City of Mexico, 327 S.W.2d 831 (Mo. 1959), discussed *supra* note 199, by the assertion that *Langhammer* stands for the proposition that a new trial reinstates the entire petition *as the "amount in dispute."* However, the latest case to consider the problem has rejected that contention, clearly holding that even though plaintiff's petition is reinstated, the "amount in dispute" is set by the "amount" expunged by the new trial order. Voss v. American Mut. Liab. Ins. Co., *supra* note 200. See Wessels v. Smith 362 S.W.2d 577 (Mo. 1962) (dictum).

202. *E.g.*, Hemminghaus v. Ferguson, 358 Mo. 476, 215 S.W.2d 481 (1948); Gipson v. Fisher Bros. Co., 204 S.W.2d 101 (Mo. Ct. App. 1947); see Hutchinson v. Metropolitan Life Ins. Co., 293 S.W.2d 307 (Mo. 1956); Reaves v. Rieger, 360 Mo. 1091, 232 S.W.2d 500 (1950), *trans'd*, 241 S.W.2d 389 (Ct. App. 1951). A different rule was contended for in the dissenting opinion in the *Gipson* case. In that case, plaintiff sued

of appellate jurisdiction is fixed by plaintiff's recovery which was vitiated by the new trial order.[200] Although the new trial will permit the plaintiff to retry his case, the "amount" of his petition does not control because the purpose of his appeal is to have his recovery restored by the appellate court.[201] The same rationale is applied if the plaintiff's verdict is set aside by a judgment for defendant notwithstanding the verdict.[202]

9.030. Suits Seeking Non-Money Relief

Although the drafters of the 1875 constitution may have intended that the category of "amount in dispute" should include only appeals from suits in which a money judgment was sought or obtained,[203] the Missouri courts have concluded to the contrary. An 1890 statement of the St. Louis Court of Appeals in *Gartside v. Gartside*[204] has been consistently followed:

> We find no analogous case in this state, and cases decided by the supreme court of the United States do not leave the question entirely free from doubt. We *assume* it is settled beyond controversy that, where the right of appeal depends on the value of the matter in dispute, such value must be *estimated* in money.[205]

The directive to *estimate* monetary value[206] acknowledges that complexity and imprecision exist in the non-money jurisdictional tests. It inevitably

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for $25,000 and the court, after overruling defendant's motion for a directed verdict, sent the case to the jury which returned a verdict of $7,500 for plaintiff (the then jurisdictional limit of the court of appeals). Thereafter, on motion by defendant the court set aside the verdict for plaintiff and rendered judgment for defendant. Plaintiff appealed the judgment n.o.v. to the court of appeals where it was held that, because plaintiff's sole objective was to have his recovery reinstated, the amount of the verdict controlled. The dissent contended that a judgment n.o.v., although entered after plaintiff had recovered, was a decision by the trial court that plaintiff was *not entitled to recover at all* so that the plaintiff on appeal stands as though he had recovered nothing.

203. The judiciary committee's majority recommendation for a jurisdictional "amount" category originally included the phrase "amount claimed"; this was changed to "amount in dispute" to conform to federal court terminology. The committee's minority recommendation had proposed that the "amount" category be restricted to cases of debt, damages and possession of personal property, which may indicate that the committee had intended to provide for supreme court jurisdiction based on a monetary dispute only in cases where a specified dollar claim was made. These recommendations are discussed in the "Introduction," note 9 and accompanying text.

204. 42 Mo. App. 513 (1890), *trans'd*, 113 Mo. 348, 20 S.W. 669 (1892).

205. *Id.* at 514. (Emphasis added.)

206. As illustrated by *Gartside*, Missouri courts were originally influenced by federal cases concerning estimation of the "amount in dispute" in suits for non-money judgments. The federal jurisdiction cases decided since *Gartside* indicate that the course chosen by the Missouri judiciary in assuming jurisdiction in non-money cases was correct. *E.g.*, Glenwood Light & Water Co. v. Mutual Light, Heat & Power Co., 239 U. S. 121 (1915); Ronzio v. Denver & R.G.W.R.R., 116 F.2d 604 (10th Cir. 1940).

conflicts with both the supreme court's rule that it may not engage in conjecture and speculation to establish jurisdiction and the requirement that the "amount in dispute" must affirmatively appear from the record. Since *Gartside*, a large number of cases involving suits for non-money judgments have been appealed to the supreme court based on "amount in dispute"; many of these have been transferred to the court of appeals because the monetary value of the appeal was not affirmatively established.

"Amount in dispute" based on some pecuniary effect of the trial court judgment potentially provides for supreme court jurisdiction in almost every appeal filed in this state. However, the supreme court, by restricting the meaning of "amount in dispute," and requiring proof which frequently cannot be shown in the record[207] that the monetary effect will actually result from the litigation, has excluded from its docket many appeals from non-money judgments.

The appellate courts calculate the "amount in dispute" in non-money cases in three stages. First, the court decides whether the value to the plaintiff or the value to the defendant is to be measured. This is the selection of the formula. A second step is to identify a particular referent from the range of effects which the judgment will have. This involves both the constriction of the range of effects of the judgment by excluding its "collateral effects," and the selection, within the resulting narrower range, of one effect which is characterized as the value of the gain or loss which the judgment could have to the chosen party. In the third step, the court gives an exact pecuniary value to the selected referent. This requires it to exclude certain parts of the amount involved and to sift the facts in the record to insure that they affirmatively establish the "amount in dispute."

9.031. *Formulae for Estimating the "Amount in Dispute"*

The initial step in determining the "amount in dispute" in non-money cases was first described in *Evens & Howard Fire Brick Co. v. St. Louis Smelting & Ref. Co.*:[208]

207. The "affirmative appearance" requirement is an extremely effective lever for the exclusion of "collateral effects." Frequently, the facts necessary for precise dollar evaluation are so unrelated to the issues of the suit that they would never be introduced at the trial. See, *e.g.*, Swift & Co. v. Doe, 311 S.W.2d 15 (Mo.), *trans'd*, 315 S.W.2d 465 (Ct. App. 1958). In one case, facts necessary for supreme court jurisdiction were excluded as irrelevant evidence by the trial court and the court of appeals retained the appeal after transfer from the supreme court. Freeman v. De Hart, 303 S.W.2d 217 (Mo. Ct. App. 1957).

Moreover, the kind of relief sought frequently has no monetary value. *E.g.*, American Petroleum Exch. v. Public Serv. Comm'n, 172 S.W.2d 952 (Mo.), *trans'd*, 238 Mo. App. 92, 176 S.W.2d 533 (1943) (no "amount in dispute" from order of public service commission).

208. 48 Mo. App. 634 (1892), *trans'd.*

> When the object of the suit . . . is not to obtain a money judgment, but other relief, the amount involved must be determined by the value in money of the relief to the plaintiff, or of the loss to the defendant should the relief be granted, or *vice versa,* should the relief be denied. If either is necessarily in excess of [the jurisdictional amount] . . . the supreme court has exclusive cognizance of the appeal.[209]

The *vice versa* principle provides four possible formulae for the determination of the "amount in dispute": (1) the value or benefit to plaintiff if the relief is granted, (2) the loss to plaintiff if the relief is denied, (3) the loss to defendant if the relief is granted, and (4) the benefit to defendant of avoiding liability for the relief sought by plaintiff. The selection of one particular measurement is necessary only if any two would produce different results. Usually, the court considers only the benefit to plaintiff or loss to defendant, because the facts in the record support only one of those amounts. Thus the court is seldom required to make a deliberate choice.[210] When the facts in the record do present a choice, the supreme court has ruled that the formula producing the greater "amount" controls.[211]

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209. *Id.* at 635.

210. However, the supreme court considered the application of all four of the formulae in Fred A. H. Garlichs Agency Co. v. Anderson, 284 Mo. 200, 223 S.W. 641 (1920), *trans'd from* 202 S.W. 260 (Ct. App. 1918), *retrans'd,* 226 S.W. 978 (Ct. App. 1920):

> The only matter to be considered in determining jurisdiction is [1] the value which would accrue to the plaintiff should the defendant be restrained from engaging in the insurance business . . . for 5 years, or [2] the loss the plaintiff would sustain by reason of the defendant engaging in such a business. Or if the defendant's gain or loss is to be considered, the question is [3] what would he lose by being prevented from engaging in that business, or [4] what would he gain by continuing in the business during the period of 5 years. *Id.* at 205, 223 S.W. at 642.

The existence of the first three formulae was expressly acknowledged in Ward v. Consolidated School Dist., 320 Mo. 385, 7 S.W.2d 689 (1928) (en banc), *trans'd,* 225 Mo. App. 1139, 16 S.W.2d 598 (1929):

> In the case at bar it makes no difference whether the amount in dispute be tested by [1] the value of the relief asked by appellants, or [2] the damage to accrue to them by its denial or [3] by the damages to be suffered by respondents had the relief sought been granted. There is no evidence in the record to show the value of the relief sought by appellants or the damage accruing to either party by reason of a decision adverse to it. *Id.* at 388, 7 S.W.2d at 690.

211. The plaintiff may stand to gain by his suit, though the relief granted will not be a detriment to the defendant. Long v. Norwood Hills Corp., 360 S.W.2d 593 (Mo. 1962), *trans'd,* 380 S.W.2d 451 (Ct. App. 1964); Ross v. Speed-O Corp. of America, 343 Mo. 504, 121 S.W.2d 865 (1938), *trans'd.* Or, the cost to defendant if the relief is granted may exceed the gain to plaintiff. Fleischaker v. Fleischaker, 338 Mo. 797, 92 S.W.2d 169 (1936); Clotilde v. Lutz's Adm'r, 73 Mo. App. 37 (1898), *trans'd,* 157 Mo. 439, 57 S.W. 1018 (1900). These cases also indicate that in such situations the measure producing the greater "amount" controls.

A problem which has apparently not been considered by the court is the applicability of the "aggregation" principle (§ 9.023(b)(2)) to non-money cases. The result reached by the court in every non-money case supports the conclusion that the "or" in the statement of the *vice versa* rule is purely disjunctive. For a recent statement of the "deny and grant" effect of a money judgment, see Endermuehle v. Smith, 372 S.W.2d 464 (Mo. 1963) (en banc).

The defendant's loss and gain formulae involve peculiar problems because they produce a significant expansion of the supreme court's non-money jurisdiction. This is because they greatly increase the range of a judgment's effect and permit jurisdiction when the record shows that the "amount" of the monetary effect on the plaintiff is incalculable or insufficient or when the record shows that the judgment would have no effect on the plaintiff. Some authority challenges the use of formulae measuring the value to the defendant. However, the two cases[212] which explicitly make this rejection, although not expressly overruled, are clearly inconsistent with the weight of more recent authority.[213]

9.032. *Selection of the Referent*

The second step in the determination of jurisdictional "amount" is the selection of one particular aspect of the judgment's effect on one of the parties. This procedure involves a dual inquiry. One part is to restrict, by applying the "collateral effects" rule, the potentially limitless range of monetary effects which result from estimating the value of a non-money judgment. The court must further choose one precise effect from those within the range circumscribed by the "collateral effects" principle. Although the court primarily considers the assertions of the parties concerning the jurisdictional referent, it may make a selection *sua sponte*.[214] The

212. Steinmetz v. Federal Lead Co., 176 S.W. 1049 (Mo. 1915), *trans'd*; Scheurich v. Southwest Mo. Light Co., 183 Mo. 496, 81 S.W. 1226 (1904), *trans'd from* court of appeals, *retrans'd*, 109 Mo. App. 406, 84 S.W. 1003 (1905). These two cases established a peculiar "relevancy" test; in both the court refused to consider elements of damage to defendant resulting from the granting of an injunction, because the court issuing the injunction would be in no position to award money damages to defendant in the instant litigation. In effect, the court rejected one half of the *vice versa* directive to estimate in the absence of a money judgment. There is, however, some possibility that the recent case of Emerson Elec. Mfg. Co. v. City of Ferguson, 359 S.W.2d 225 (Mo. 1962), discussed in text accompanying note 241 *infra*, may have imposed a serious restriction on the applicability of the defendant's loss and the defendant's gain formulae, thus resurrecting the older "relevancy" cases.

213. *E.g.*, Cooper v. School Dist., 362 Mo. 49, 239 S.W.2d 509 (1951); Fleischaker v. Fleischaker, 338 Mo. 797, 92 S.W.2d 169 (1936); Aufderheide v. Polar Wave Ice & Fuel Co., 319 Mo. 337, 4 S.W.2d 776 (1928) (en banc).

214. The burden is normally on the appellant, in a proper jurisdictional statement in his appellate brief, to establish that an appeal lies to the supreme court; if this is not done, the appeal may be dismissed. (For a discussion of the applicable court rule, see § 9.012.) However, as a practical matter, the court will usually sustain its jurisdiction even though a defective basis of jurisdiction is asserted. For example, in the recent case of Reis v. Metropolitan St. Louis Sewer Dist., 373 S.W.2d 22 (Mo. 1963), the appellant's only statement of jurisdiction was that the appeal lay to the supreme court because of "Article V, Section 3 of the Constitution." Brief for Appellant, p. 1. However, the supreme court retained jurisdiction based on "amount," probably because the *respondent* had made a careful jurisdictional statement. Brief for Respondent, pp. 1-3. Even if the

referent selected must be characterized by the court as the "right" or "value" which represents the monetary effect of the relief sought upon either the defendant or plaintiff.

9.032(a). *Collateral Effects*

The "collateral effects" principle is employed by the courts to insure that the jurisdictional referent selected as representing the value of the suit is chosen from a restricted range of effects. The rule generally stated is that jurisdiction is based on "not what may be *affected* by the result of the case, but what is *directly involved* in the suit."[215]

A large number of the cases which raise a "collateral effects" problem are actually decided on the basis of an application of the "contingency" principle. Although the court uses the language of the two doctrines interchangeably, they can be analytically distinguished. A "contingency"[216] issue is present when the "amount" asserted for jurisdiction is clearly in dispute, but it is impossible to calculate exactly *how much* is in dispute. In a "collateral effects" problem, the exact value of the "amount" asserted for jurisdiction is readily measurable, but it is uncertain whether this "amount" is relevant for jurisdictional consideration. This type of problem is usually presented in an appeal from a judgment which will also determine the defendant's future liability or the plaintiff's future recovery. The

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jurisdictional theories advanced by both parties are ruled invalid, the supreme court will seek another basis for jurisdiction by examining the record. See Dunbar v. Board of Zoning Adjustments, 380 S.W.2d 442 (Mo. 1964), *trans'd.*

It is clear that the court assumes the burden of determining jurisdiction in spite of a countervailing trend to transfer if the facts do not conclusively establish jurisdiction. (See § 9.014.) This is apparently based on the rule that if jurisdiction in fact exists, it is the court's duty to assume jurisdiction even though the basis has not been properly stated by the parties.

215. Emerson Elec. Mfg. Co. v. City of Ferguson, 359 S.W.2d 225, 228 (Mo. 1962), *trans'd*, 376 S.W.2d 643 (Ct. App. 1964).

216. For a discussion of contingencies in suits for a money judgment, see § 9.022(a). The courts use "contingency" language in two situations. The first is a case in which the facts do not permit a finding of the value of the matter in dispute. The court typically rules that if the establishment of any value in dispute would require speculation and conjecture, that amount is contingent. A large number of non-money cases are transferred by the supreme court with an opinion which contains only this type of statement. *E.g.*, Dunbar v. Board of Zoning Adjustment, 380 S.W.2d 442 (Mo. 1964), *trans'd.* This is a contingency of fact. The courts frequently find that an asserted amount has no jurisdictional value by holding that the facts necessary to support the evaluation are insufficient or contingent, rather than holding that the amount, even if established, is not relevant for jurisdictional consideration. The other type of contingency is represented by the installment award cases, in which a condition subsequent may operate to defeat the interest in the award before an amount sufficient for supreme court jurisdiction has been paid under the judgment. See cases cited note 98 *supra.*

"amount" considered a "collateral effect" is not the *direct object* of the litigation from which appeal is taken, but often will result only from separate litigation.[217]

217. The "collateral effects" problem that exists when the result of the litigation will determine future liability or recovery frequently arises in suits for money judgments. It may also arise in non-money cases. In Fred A. H. Garlichs Agency Co. v. Anderson, 223 S.W.2d 641 (Mo. 1920), discussed *supra* note 210, plaintiff sought an injunction to restrain his former employee from engaging in the insurance business. An employment contract had been executed by the parties whereby the defendant was to work for the plaintiff for fifteen years at a monthly salary which totaled, for the period covered, more than the jurisdictional "amount." It was asserted that the supreme court had jurisdiction because the injunction suit would require the court to construe the contract to determine which party was in breach, so that a determination could permit defendant to recover, or the plaintiff to avoid liability, under the contract in a separate action based on the contract. The court held that the amount of future contract damages was collateral, because a judgment for damages could not be given in the injunction action.

It is difficult to distinguish *Garlichs Agency*, in which the "collateral effects" principle was applied, from cases holding that an amount to be recovered in a subsequent action is "contingent." *E.g.*, Cotton v. Iowa Mut. Liab. Ins. Co., 363 Mo. 400, 251 S.W.2d 246 (1952), discussed *supra* note 99. The court held that in a declaratory judgment action to determine the insurance company's liability where the plaintiff had not yet filed a claim in a personal injury action against the insured, the "mere chance of a judgment or settlement exceeding [the jurisdictional limit] does not vest appellate jurisdiction here." *Id.* at 404, 251 S.W.2d at 249; *accord*, National Sur. Corp. v. Burger's Estate, 183 S.W.2d 93 (Mo. 1944) (future liability by surety corporation on bond it sought to cancel was "contingent") (discussed *supra* note 100). In *Cotton* and *Burger's Estate*, the rulings that future liability is not accurately calculable indicates that the decisions rest on the "contingency" principle. If it had been held that the amount, whether or not established as sufficient, was not the jurisdictional referent, the two cases would also involve the application of the "collateral effects" principle. In fact, they probably involve both.

The supreme court has retained analogous cases in which the amount was calculable and sufficient, indicating that *Cotton* and *Burger's Estate* were, at least partially, "contingency" cases. For example, in "release" cases, the issue of the validity of a release pleaded to a personal injury action is tried separately from the question of liability. It is consistently held that an appeal from the ruling of the trial court on the validity of the release vests jurisdiction in the supreme court, even though the issues of the damages and negligence have not been litigated, if the plaintiff's petition is for a sufficient "amount." These cases differ from *Cotton* because in each a suit for personal injuries has been filed; the amount claimed in that suit fixes the "amount" of the dispute. Cases cited note 100 *supra; accord*, Crouch v. Tourtelot, 350 S.W.2d 799 (Mo. 1961) (en banc), discussed *supra* note 100. In *Crouch* the third party plaintiff appealed the dismissal of his petition. This petition was against third party defendent for recovery of any sum for which third party plaintiff might be found liable to the plaintiff. At the time of the appeal, plaintiff's petition was for a sufficient "amount," although the liability of third party plaintiff to plaintiff had not been adjudicated. *Crouch* and the release cases must be distinguished from *Cotton*, however, on the ground that the personal injury petition that was held to satisfy the "amount" requirement was also part of the *same action*, although the issues had been separated.

Thus, it is likely that the *Fred A. H. Garlichs Agency* case, *supra*, stands for the rule that in a case where a determination of liability is not accompanied by a ruling on the amount of damages, supreme court jurisdiction cannot be based on the amount of dam-

The court's use of the "collateral effects" test in non-money cases is illustrated by appeals in which the plaintiff seeks to test the validity of a tax. If the suit advances the right to be free of a specific tax that would be assessed against the plaintiff or the class he represents, the tax is held to be "directly" involved in the appeal. However, it has recently been held that if the restraint of the tax is not the *sole* object of the suit but would be a mere concomitant of the judgment, the tax is not relevant to the calculation of jurisdictional "amount."[218]

Cooper v. School Dist.[219] is the leading case holding that the extent of tax liability is to be included in the calculation of "amount" in non-money cases. The plaintiffs, six voters and taxpayers, sought to enjoin the school district from certifying to the county clerk that the county voters in a special election had approved a property tax increase. The supreme court sustained its "amount" jurisdiction on the loss which the defendant school district would incur ($3,000,000—the full amount of the tax increase[220]) if the injunction were granted.

The court made three important points in its opinion: (1) in a suit to enjoin a tax levy, the value of the prospective taxes may be relevant for purposes of jurisdiction; (2) where it "may not be possible in . . . [a] class action, to accurately estimate in dollars the value of or benefit in tax savings"[221] to the plaintiffs, the "defendant's loss" formula is applicable;[222]

ages assessed in a separate suit, because the amount of liability is collateral. But in spite of the "collateral effects" problem the court may sustain its jurisdiction if the contingency is dispelled. See M.F.A. Mut. Ins. Co. v. Southwest Baptist College, Inc., 381 S.W.2d 797 (Mo. 1964), in which a declaratory judgment was sought to determine if the insurance company was liable on a fire insurance policy. Although the amount of the liability under the policy was not liquidated, the supreme court was apparently satisfied with its amount jurisdiction because the insured building having a value in excess of the jurisdictional "amount" was completely destroyed, and the limits of the policy also exceeded the jurisdictional "amount."

218. Emerson Elec. Mfg. Co. v. City of Ferguson, 359 S.W.2d 225 (Mo. 1962), discussed in text accompanying notes 230-32 *infra*.

219. 362 Mo. 49, 239 S.W.2d 509 (1951).

220. See Brief for Appellant, p. 1, Cooper v. School Dist., *supra* note 219.

221. 362 Mo. at 54, 239 S.W.2d at 511.

222. The leading case employing the "defendant's loss" formula is Aufderheide v. Polar Wave Ice & Fuel Co., 319 Mo. 337, 4 S.W.2d 776 (1928) (en banc). In a suit to enjoin as a nuisance defendant's establishment of an ice plant in a residential neighborhood, the court considered jurisdictional "amount" in a lengthy opinion. A division opinion was filed by a commissioner which partially based jurisdiction on the threatened dimunition of plaintiff's property value. This conclusion was principally reached because the court judicially noticed the impact of the ice plant—depicted by photographs—on the value of plaintiff's property. The divisional opinion was adopted by the court en banc. The shift in emphasis toward "defendant's loss" formula was noted by a concurring opinion which stated that although the consideration of plaintiff's property value was proper, the loss to the defendant if it were forced to dismantle the ice plant was also a

(3) the "amount" of the defendant's loss is estimated as the *full extent* of the disputed taxes.

The situation presented in *Cooper* points up two additional problems which were not specifically handled in the opinion but which have arisen as issues in other cases. These are the use of the value to plaintiff formula to measure the amount of a disputed tax, in cases in which the plaintiffs sue to restrain the imposition of a tax on the community in general, and the question whether a prospective tax may be included in the calculation of "amount" if it is periodic so that its future validity will also be determined by the trial court's decision.

The first question presents the difficult problem of whether one taxpayer has standing to raise the issue of taxation for all taxpayers.[223] The supreme court has not squarely ruled upon this issue in any jurisdiction case because in appeals involving class actions and restraints of general taxes, it has usually based its "amount" jurisdiction on the loss to the defendant taxing authority, using the "defendant's loss" formula. Therefore, with the exception of several cases indirectly involving the problem,[224] it exists without causing serious jurisdictional difficulty.

The second problem is the extent to which the value of annual or periodic taxes may be included in the calculation of "amount." A typical situation is a suit brought by a corporation to avoid payment of both present

reliable basis for jurisdiction. This judge also wrote the majority en banc decision denying a motion for a rehearing, in which opinion the "defendant's loss" formula was adopted as an unimpeachable basis for supreme court jurisdiction.

223. Class actions are discussed in text accompanying note 161 *supra*.

224. Jurisdictional difficulty on this point did occur, however, in two cases. In Bauer v. City of Berkeley, 278 S.W.2d 722 (Mo.), *trans'd*, 282 S.W.2d 154 (Ct. App. 1955), two plaintiffs, as taxpayers, purported to represent all similarly situated taxpayers in an action to enjoin the city from contracting for street improvements to be financed through special tax bills. Because the tax bills had already been issued, the court concluded that they could not be included in the "amount in dispute." In transferring, the court assumed that the total amount of tax bills would otherwise have been in issue and that the plaintiffs would have had standing to raise the issue even though they were not abutting property owners and so would not be affected by the special tax bills.

In Koch v. Board of Regents, 256 S.W.2d 785 (Mo. 1953), *trans'd*, 265 S.W.2d 421 (Ct. App. 1954), the plaintiff, suing as a taxpayer, purported to represent the interests of the taxpaying public. Plaintiff challenged the validity of a contract for repair of school buildings, alleging that the amount specified in the contract was excessive by $29,000. The contractor who was to make the repairs would be paid out of a fund already available to the Board, so there was no issue of restraining a specific tax levy to cover the costs of the repairs. Because there was no loss of prospective revenue to the defendant board, there was lacking the jurisdictional predicate that existed in the *Cooper* case, and the court had no alternative but to refer to the plaintiff's gain or loss. This reference revealed that there was no evidence in the record indicating what plaintiff stood to gain or lose as a taxpayer by the result of the action. The effect on all state taxpayers was not considered.

and future license fees or business taxes; usually, only taxes accrued at the time the suit was filed are recognized as the "amount in dispute."[225] Similarly, jurisdiction in the supreme court on the "amount" of taxes has been established in suits to prevent the levy of a license fee on a business;[226] to obtain a declaration that the plaintiff's sales were not subject to the state sales tax;[227] to review the action of the State Tax Commission increasing the value assessment of plaintiff's property;[228] and to review the action of the Industrial Commission assessing the plaintiff-employer for contributions to the state unemployment compensation fund.[229] In these cases, the full extent of the disputed taxes was levied against the individual plaintiff so that the "amount" was calculated by the "plaintiff's value" formula. Thus the problem of unassessed taxes is generally resolved by including only accrued taxes when the "plaintiff's value" test is used (when an individual or corporation attempts to restrain a specific tax), while in a suit by a class of plaintiffs, the "defendant's loss" measure is used to permit inclusion of the entire amount of future taxes.

The recent case of *Emerson Elec. Mfg. Co. v. City of Ferguson*,[230] raises questions concerning the directness with which a tax levy is involved in non-money cases. The plaintiff sought and obtained an injunction restraining the city from annexing its property and from "levying, assessing or collecting municipal taxes."[231] In the city's appeal to the supreme court, juris-

225. May Dep't Stores Co. v. Tax Comm'n, 308 S.W.2d 748 (Mo. 1958) ("amount" based on increase of property taxes for one year after increase of property valuation); Missouri Ins. Co. v. Morris, 255 S.W.2d 781 (Mo. 1953) (en banc) (disputed 2% premium tax for one year); see Anderson Air Activities, Inc. v. Division of Employment Security, 321 S.W.2d 710 (Mo. 1959) (dispute over rate of contribution to employment compensation fund for one year). It is clear that in these cases the decisions determine more than the tax for one year, since a decision that the taxation was proper, in effect, means that it will be imposed in the future. In no case, however, was it necessary for the plaintiff to include prospective taxes to reach the jurisdictional "amount," so the issues remain undecided by the court. See the discussion of federal authorities in note 252 *infra*.

226. Missouri Ins. Co. v. Morris, *supra* note 225 ("amount" was annual premium tax assessed against plaintiff who sought to restrain its collection); see Fishbach Brewing Co. v. City of St. Louis, 337 Mo. 1044, 87 S.W.2d 648 (1935), *trans'd*, 231 Mo. App. 793, 95 S.W.2d 335 (1936) ("amount" insufficient where plaintiff sought to restrain annual license tax of $1,500 because only one year's license fee was in dispute).

227. Mississippi River Fuel Corp. v. Smith, 350 Mo. 1, 164 S.W.2d 370 (1942) (declaration that plaintiff's natural gas sales not subject to sales tax); *accord*, Laclede Gas Co. v. City of St. Louis, 363 Mo. 842, 253 S.W.2d 832 (1953) (en banc) (declaration as to plaintiff's liability for city's 5% license tax).

228. May Dep't Stores Co. v. Tax Comm'n, 308 S.W.2d 748 (Mo. 1958).

229. Anderson Air Activities, Inc. v. Division of Employment Security, 321 S.W.2d 710 (Mo. 1959).

230. 359 S.W.2d 225 (Mo. 1962), *trans'd*, 376 S.W.2d 643 (Ct. App. 1964).

231. *Id.* at 226.

diction was based on the value of the taxes. The court held that the primary purpose of the plaintiff's suit was to adjudicate the validity of the proposed annexation; the taxes which the city would impose if the annexation were accomplished were incidental, prospective and not *"directly in dispute."*[232]

The *Emerson* case presents a valuable model for analysis of non-money cases, because its holding involves difficult problems in each of the three stages of "amount" calculation. However, because the case has not been cited or explained by the court in a subsequent opinion, and contains alternative bases for the transfer to the court of appeals, it is difficult to ascertain the impact of the court's careful analysis.[233] One thing is clear: *Emerson* is the most fully developed articulation of the "collateral effects" principle in a non-money case. Certainly, it must be considered in any case involving an attempt to invalidate or restrain the levy of taxes.[234]

Emerson delevoped[235] the "single issue" test for "collateral effects." Under this test, the issue presented by plaintiff's theory of action must be the single and primary cause of the monetary effect on which jurisdiction is asserted. Thus in *Cooper,* where plaintiff sought to prohibit enforcement of an adopted tax levy, the tax was *"directly in dispute."*[236] However, when, as in *Emerson,* the plaintiff sought to enjoin annexation, because "annexation involves many things besides taxes," the plaintiff was precluded from characterizing the effect of the annexation as the value of the future taxes.[237]

The "single issue" test applied in *Emerson* requires that the nature and purpose of the plaintiff's theory of action be carefully compared with the

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232. *Id.* at 229.

233. It may be that the court will restrict the *Emerson* holding to the caveat contained in the opinion that an annexation case involves *no* "amount in dispute." In a similar annexation case, the supreme court held that it had jurisdiction based on the presence of a constitutional question. McDonnell Aircraft Corp. v. City of Berkeley, 367 S.W.2d 498 (Mo. 1963).

234. See Nichols v. Reorganized School Dist., 364 S.W.2d 9 (Mo. 1963) (en banc), discussed in text accompanying note 239 *infra.*

235. In a case decided prior to *Emerson,* the court had also considered the "single issue" problem. Gomez v. Gomez, 336 S.W.2d 656, 661 (Mo. 1960) (en banc). The plaintiff appealed the setting aside of an order of divorce, which had included a provision for alimony in gross in an amount which exceeded the jurisdictional limit. The jurisdictional issue prompted a dissent and a transfer to the court en banc. Although the dissent stated that the decree of divorce was the *one issue* involved, and that the matter of alimony was merely collateral, the majority based jurisdiction on the "amount" of the alimony.

236. Emerson Elec. Mfg. Co. v. City of Ferguson, 359 S.W.2d 225 (Mo. 1962), *trans'd,* 376 S.W.2d 643 (Ct. App. 1964).

237. *Id.* at 228.

particular effect of the judgment which is relied upon for jurisdiction. Some cases decided before *Emerson* in which supreme court jurisdiction was sustained appear to be inconsistent with its application of the "single issue test.[238]

Because *Emerson*, by using the "single issue" test, held that prospective taxes were collateral, a special question is presented when the plaintiff seeks to restrain a bond issue. A suit to enjoin a school district from issuing and registering bonds to be retired by future taxes may, under *Emerson*, involve the value of the taxes in only an incidental and secondary way because the taxes would be assessed only after the bonds had been approved and issued. Moreover, the holding in *Cooper*, as interpreted by *Emerson*, using the "single issue" test, indicates that the taxes are directly in dispute only if the injunction is sought directly to restrain their levy.

Nevertheless, a case subsequent to *Emerson* indicates that the supreme court may have "amount" jurisdiction in a suit to restrain a bond issue.[239] It does not appear from the opinion, however, whether the court reasoned that the value of the taxes which would be levied if the bonds were authorized provided the jurisdictional referent, or characterized the loss to the school district as the restraint of its ability to sell the bonds. If the court looked to the value of the taxes using the "defendant's loss" formula, its holding should be considered a limitation of *Emerson's* "single issue" test, while if it held the bonds themselves were the referent, the case indicates that a pecuniary evaluation may be given to a bond issue.[240]

The effect of *Emerson's* application of the "collateral effects" principle to the *vice versa* rule must also be discussed because the opinion failed to consider specifically the loss of the taxes to the defendant city. Since a single corporate plaintiff was before the court, the opinion focused on the plaintiff's interest in the prevention of the annexation; the court was not required to evaluate the defendant's interest to avoid the standing of taxpayers problem encountered in *Cooper*. The court recognized that the *vice versa*

238. The dissenting opinion in one case suggests this limit on divorce cases. See Gomez v. Gomez, 336 S.W.2d 656 (Mo. 1960) (en banc), discussed *supra* note 235.

239. Nichols v. Reorganized School Dist., 364 S.W.2d 9 (Mo. 1963) (en banc).

240. The court has always upheld its jurisdiction based on the loss to the authority attempting to issue the bonds. Reis v. Metropolitan St. Louis Sewer Dist., 373 S.W.2d 22 (Mo. 1963) (class action to enjoin sewer construction to be financed through special assessment against plaintiffs); Frago v. City of Irondale, 364 Mo. 500, 263 S.W.2d 356 (1954) (cancellation of city's tax bills assessed against plaintiff's property for street improvement); Reorganized School Dist. v. Robertson, 262 S.W.2d 847 (Mo. 1953) (school district sought decree validating proposed bond issue of $147,000); see Freed v. Feeny, 374 S.W.2d 75 (Mo. 1964) (part of "amount" was liability of city under declaratory judgment for special tax assessment). In none of these cases, does it appear how the court characterized the loss to the defendant authority.

principle permits reference to *both* sides of a law suit, yet its opinion specifically considered only the plaintiff's side, denying jurisdiction by application of the "collateral effects" principle. The failure to refer to the "defendant's side of the suit has two possible implications: either (1) the "defendant's loss" formula is inapplicable to the calculation of "amount," or (2) the use of the test is qualified by the "collateral effects" principle. Clearly, the former conclusion is unwarranted, because a holding so contrary to existing precedent would probably have been stated more specifically in the court's opinion.[241] If the court applied the "collateral effects" principle to the "defendant's loss" formula, the mechanics of this application do not appear. Apparently the court, having ruled the taxes collateral vis-a-vis the plaintiff, also ruled them collateral for purposes of the "defendant's loss" formula. Although the result is warranted because the value involved by the application of either the "plaintiff's value" or the "defendant's loss" formula was the taxes, the ruling that the taxes were collateral to the plaintiff should not automatically foreclose a showing by the defendant of some other loss.[242]

The use of the "collateral effects" doctrine in cases in which supreme court jurisdiction rests upon the "defendant's loss" seems especially questionable. The obvious purpose of the "defendant's loss" formula is to provide an

241. The *Cooper* case, strong authority for the application of the "defendant's loss" formula, was distinguished but not expressly overruled in *Emerson*. The context in which *Cooper* was considered was a test of the "single issue" by which the court defined the "collateral effects" principle. No mention was made of the significance of *Cooper* regarding the "defendant's loss" formula. 359 S.W.2d 225, 228. Non-use of the "defendant's loss" formula, does, however, have some authority in older cases. See, *e.g.*, Steinmetz v. Federal Lead Co., 176 S.W. 1049 (Mo. 1915), discussed note 212 *supra* and accompanying text. Although *Emerson* did not refer to those cases, its silence on the issue would serve to bolster an argument that the case law has now rejected this formula, were it not true that cases subsequent to *Emerson* have applied the "defendant's loss" formula without any reference to *Emerson*. A recent consideration of this formula is Nichols v. Reorganized School Dist., 364 S.W.2d 9 (Mo. 1963) (en banc).

242. Aquamsi Land Co. v. City of Cape Girardeau, 346 Mo. 524, 142 S.W.2d 332 (1940), provides an interesting illustration by way of analogy. This was an action to enjoin the city from spending for the construction of community facilities funds which had been authorized in a bond issue election. The fact that the "amount" of the bonds exceeded the jurisdictional limit would not alone have given the supreme court jurisdiction because they had already been voted. Bauer v. City of Berkeley, 278 S.W.2d 772 (Mo.), *trans'd*, 282 S.W.2d 154 (1955), discussed *supra* note 224. However, the court approved its "amount" jurisdiction because if the injunction were granted, the city would lose a $32,000 federal grant to aid in the construction of the facilities.

With this case in mind, an additional fact in the *Emerson* situation may be hypothesized. Suppose the City of Ferguson stood to receive a federal grant in excess of the jurisdictional "amount" if it could effect the annexation. Plaintiff's interest in avoiding taxes would bear no relation to the city's interest in receiving the grant, and therefore a ruling that the former was collateral should not automatically preclude the consideration of the latter on the same ground.

alternative measure more flexible than "plaintiff's value," and thus permit supreme court jurisdiction in cases in which the value to the plaintiff is incalculable or insufficient. The restriction of the value which may be asserted under the "defendant's loss" formula to the single and primary issue on which the plaintiff demands relief, ignores the fact that frequently the only loss to the defendant is entirely unrelated to the benefit the plaintiff will derive from the right he seeks to protect, although the granting of the relief to the plaintiff will actually cause defendant's loss.[243] If *Emerson* requires the court to employ the principle of "collateral effects" in all cases in which jurisdiction rests on the loss to the defendant, it is likely that a strict application of the principle (as illustrated in *Emerson*) would foreclose supreme court jurisdiction in a large number of cases.

9.032(b). *Characterization*

After the *vice versa* rule is qualified by an application of the "collateral effects" principle, the court must select one particular effect from the narrowed range of effects which may be given a pecuniary evaluation. This particular effect will be characterized as the positive or negative value of the relief under the previously chosen formula, and so will be the basis for the determination of the "amount in dispute." Only one effect is selected because the courts apparently do not apply the "aggregation" principle to non-money cases; they do not inquire as to the total of all effects upon the party in question.

There are no uniform criteria for the characterization of the jurisdictional referent. Because the court is not required to select the referent accepted in an earlier case involving the same or closely related issues, the referent chosen in most cases is the effect which is best supported by the facts or is the logical result of the judgment.

A hypothetical case illustrates the range of choices which arises in an injunction affecting business and property values (a typical non-money case). Assume that the plaintiff, who owns a house and lot in an area zoned residential, has appealed the denial of an injunction against the board of zoning adjustments to restrain enforcement of a zoning restriction. Assume further that the evidence in the record shows that the property in question has a value of $20,000 as a residence, but that if the injunction is granted,

243. The discussion of Aquamsi Land Co. v. City of Cape Girardeau, *supra* note 242, points up that case as a classic example. It is clear, however, that the judgment *must in fact* cause the benefit or loss. See Nemours v. City of Clayton, 351 Mo. 317, 172 S.W.2d 937, *trans'd*, 237 Mo. App. 497, 175 S.W.2d 60 (Ct. App. 1943) (evidence did not show plaintiff's property value decrease was caused by traffic signals they sought to have removed).

the market value will increase to $40,000 because the plaintiff could sell the property to a prospective buyer for use as a night club. The record also shows that the plaintiff has invested $16,000 in alterations and installations of fixtures, all adding to the value of the property as a night club but having no salvage value should the injunction be denied, and that the anticipated yearly net profits, if plaintiff operated the property as a night club, would be $25,000.

Under these facts, the supreme court could retain "amount" jurisdiction by affirming a characterization of the value of the relief to the plaintiff[244] as (1) the increase in the value of the property[245] (or business if the case in-

244. If the action were brought by one seeking to enjoin the use of the property as a night club, the same result would obtain based on the "loss to the defendant" if the injunction were issued. See Fleming v. Moore Bros. Realty Co., 363 Mo. 305, 251 S.W.2d 8 (1952). This example is intended to illustrate the value to only one party, not to exhaust all values to each of the parties. Nor is it offered as representing the only kind of case in which characterization is crucial. See, *e.g.*, cases cited *supra* notes 239-40.

245. In the following cases the supreme court recognized as the jurisdictional referent the value of property incerase or decease, depending on the party whose value was considered. In each case, the court did not discuss the alternative effects illustrated by the example because they were insufficient, not raised by one of the parties, or the facts in the record would not have supported their pecuniary evaluation. *E.g.*, Veal v. City of St. Louis, 365 Mo. 836, 289 S.W.2d 7 (1956) (jurisdiction based on increase in plaintiff's property value when plaintiff had equipped residential property for operation as a funeral establishment); Scallet v. Stock, 363 Mo. 721, 253 S.W.2d 143 (1952) (jurisdiction based on value of plaintiff's property decrease when defendant desired to operate mortuary contrary to zoning restriction); Hubert v. Magidson, 243 S.W.2d 337 (Mo. 1951) (denial of injunction forcing removal of easement encroachments would damage plaintiff's property value); Cowherd Dev. Co. v. Littick, 361 Mo. 1001, 238 S.W.2d 346 (1951) (evidence showed that removal of restrictions would increase market value by a sufficient "amount"); Rombauer v. Compton Heights Christian Church, 328 Mo. 1, 40 S.W.2d 545 (1931) (market value of restricted property); see Barnes v. Anchor Temple Ass'n, 369 S.W.2d 192 (Mo.), *trans'd*, 369 S.W.2d 893 (Ct. App. 1963) (evidence insufficient to permit jurisdiction based on loss if property could not be used for parking lot although construction of lot had begun).

The court's discussion of the effect of the judgment in a recent case indicates its awareness of the broad range of values arising from the *vice versa* rule. In Dunbar v. Board of Zoning Adjustment, 380 S.W.2d 442 (Mo. 1964), *trans'd*, the respondent had applied for permission to construct a sewage lagoon:

> There is considerable evidence in the record pertaining to the cost of the proposed lagoon . . . the cost and value of the work done under a prior (expired) permit, and the costs of alternate suggested sewage disposal plans. There are statements in evidence to the effect that a denial of the application would do irreparable damage . . . in that it would relegate that land . . . to permanent status as farm land by preventing urban development . . . . *Id.* at 444-45.

Thus the court considered the prior expenses of the respondents, the effect of the denial of relief on the market value of the property, and impliedly, the fact that granting the relief would permit the development of the property as a profitable enterprise. The court next considered the effect of the permit on the appellant's adjoining land; the evidence indicated that a substantial property value depreciation would result. The court declined

volved an existing business[246]); or (2) the loss of prior investments if he were unable to use the property as a night club;[247] or (3) anticipated profits from the operation of the business.[248]

In non-money cases presenting similar facts, decisions indicate that if *any* of these jurisdictional theories were asserted by the parties (or developed by the court itself[249]) and were supported by the facts in the record, the supreme court would hear the appeal. Thus, the court's failure to develop criteria for the choice of one theory or another reveals a non-restrictive application of the "collateral effects" principle.

A problem inherent in the characterization process may arise if one effect produces a value which is insufficient or is not relevant for the calculation of "amount." If the court, considering the range of choice, selects one right or effect which is evaluated as yielding an "amount" insufficient for supreme court jurisdiction, this evaluation would not prevent the court from making a further evaluation; there is no rule that the parties are limited to a consideration of but one effect of the judgment. However, it is likely that if the

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jurisdiction, however, as none of the effects was sufficiently supported by concrete evidence in the record.

246. See Frank Schmidt Planing Mill Co. v. Mueller, 347 Mo. 466, 147 S.W.2d 670, *trans'd*, 154 S.W.2d 610 (Ct. App. 1941), in which the court recognized that an interference with the right to conduct a business involves a property right which can be evaluated: "Also it is generally agreed, we believe, that a going business derives from that status an asset upon which a money value may be placed." *Id.* at 468, 147 S.W.2d at 671. The court transferred the appeal, holding that gross receipts alone could not establish the value of the business. See Marx & Haas Clothing Co. v. Watson, 168 Mo. 133, 67 S.W. 391 (1902) (en banc) (labor boycott would damage plaintiff's business by sufficient "amount").

247. The most illustrative case is State *ex rel.* Public Water Supply Dist. v. Burton, 379 S.W.2d 593 (Mo. 1964), discussed in text accompanying notes 254-58 *infra*; see Missouri Power & Light Co. v. Barnett, 354 S.W.2d 873 (Mo. 1962) (result of easement dispute could force defendant to remove completed house at a cost over the jurisdictional limit); State *ex rel.* Sims v. Eckhardt, 322 S.W.2d 903 (Mo. 1959) (sufficient monetary loss if construction permit were revoked); Fleming v. Moore Bros. Realty Co., 363 Mo. 305, 251 S.W.2d 8 (1952) (injunction would prohibit defendant's erection of apartment and also require removal of completed parts); Cambest v. McComas Hydo Elec. Co., 292 Mo. 570, 239 S.W. 477, *trans'd*, 212 Mo. App. 325, 245 S.W. 598 (1922) (allegations that removal of dam would destroy investment value and involve expense of removal and would impede the business of distributing power not supported by evidence in record).

248. Frank Schmidt Planing Mill Co. v. Mueller, 347 Mo. 466, 147 S.W.2d 670 (1941) (dictum), discussed *supra* note 246, held that the gross receipts must be reduced to net profits. "A proper consideration in arriving at the value of the relief sought would be the loss of the profits reasonably expected from these sales." *Id.* at 468, 147 S.W.2d at 672. State *ex rel.* Lamm v. Mid-State Serum Co., 264 S.W. 878 (1924), *trans'd*, 272 S.W. 99 (Ct. App. 1925) (dictum) (cost of removing serum plant and profits derived from operation of business not shown in the record).

249. See note 214 *supra*.

court reaches such a conclusion, it will transfer the appeal rather than continue its efforts to find a sufficient "amount." Because focus is upon the value specifically considered by the court and the parties, other facts in the record will probably be ignored.

A more serious characterization problem arises if the court rules that one effect of the non-money judgment, even though it can be given a precise evaluation for a sufficient amount, is collateral, and the appellant or the court itself then raises another effect of the judgment and asserts *it* as representing the value to the party. This problem arose in *Emerson Elec. Mfg. Co. v. City of Ferguson.*[250] In this case, the supreme court ruled that the taxes for which plaintiff would be liable if the injunction to prevent the annexation of its property were denied, were collateral and could not be characterized as the value of the judgment to the plaintiff.[251] The supreme court recognized that the evidence clearly supported that a decrease in plaintiff's property value considerably in excess of the jurisdictional minimum would result from the annexation. If the court had characterized the value to plaintiff as the property value decrease if the relief were denied, its power to hear the case would have vested. It refused to do so, but held that the anticipated depreciation in property value would result from the imposition of the taxes, and that the taxes, having been ruled collateral, could not be brought back into the case by characterizing them as a property value decrease.[252]

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250. 359 S.W.2d 225 (Mo. 1962), discused in text accompanying notes 230-37 *supra.*

251. Text accompanying notes 230-32 *supra.*

252. The evidence of property value decrease was based on a capitalization of future taxes. The supreme court's refusal to characterize this as the jurisdictional referent is supported by the result in the analogous United States Supreme Court case of Healy v. Ratta, 292 U.S. 263 (1933).

The problem of characterization is well illustrated by federal cases. *Compare* Healy v. Ratta, *supra, with* Berryman v. Board of Trustees, 222 U.S. 334 (1912). In the *Healy* case, the appellee asserted satisfaction of the federal jurisdictional limit in a suit to contest the annual imposition of a $150 "peddlers" tax. He argued that the matter in controversy was either the tax he would be required to pay which, when capitalized, satisfied the limit, or the value of his business conducted free from the taxes, which value also exceeded the limit. The district court sustained jurisdiction on the capitalized value of the tax. The court of appeals (Healy v. Ratta, 67 F.2d 554 (1st Cir. 1933)) affirmed by characterizing the right to conduct this business free of the tax as the jurisdictional referent. The Supreme Court, in reversing both lower courts, ruled that the taxes could not be capitalized and that the court of appeals had improperly characterized the value which was in dispute. It held that because the entire legal issue turned on the validity of the tax, the effect of this tax on the value of appellee's business was "collateral and incidental." 292 U.S. at 268.

The *Berryman* case involved a contract which, if valid, would have permanently exempted the respondent from taxes sought to be imposed by appellant. While the amount of accrued taxes at the time the dispute arose would not have been sufficient for "amount"

The rule that emerges from the *Emerson* case is that if one effect of the judgment is held to be collateral, the consequences of that effect cannot be used to determine the "amount in dispute."[253] This interpretation, however, was not followed in *State ex rel. Public Water Supply Dist. v. Burton.*[254] On appeal from the refusal of the Public Service Commission to rule that the defendant-respondent was supplying water in an area beyond the boundaries of its certificate of convenience and necessity, the jurisdictional "amount" was identified as the possible monetary affect the Commission's ruling would have on facilities owned by the water company—the cessation of service to the disputed area would cause the water company to lose the value of pipes which it had laid to service the area.[255]

The court acknowledged, but did not rule on, appellant's position that the case involved no "amount in dispute," because the appeal was from a ruling by the Public Service Commision on a certificate of convenience and necessity. This position is well supported by prior holdings of the supreme court.[256] Appellants had developed a jurisdictional theory very similar to *Emerson's* "single issue" test[257] even though they did not cite that case: they

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jurisdiction, the court characterized the "thing in issue" as the "contract right," because if it were valid, it would have permanently exempted the respondent from taxes, and thus brought all prospective taxes into the realm of dispute. 222 U.S. at 345.

253. In effect, this means that if any particular value to a party is declared "collateral," all further attempts to characterize the effect of the judgment will be ineffective. However, if the record in the *Emerson* case had included evidence that the plaintiff would suffer property value decrease because of impending municipal regulations besides taxes—*e.g.*, land use restrictions, noise and smoke provisions—the effect of any of these on the plant's market value might have been ruled a proper referent. *Cf.* cases cited *supra* note 242.

254. 379 S.W.2d 593 (Mo. 1964).

255. Brief for Respondent, p. 3, State *ex rel.* Public Water Supply Dist. v. Burton, *supra* note 254. "Obviously, if Raytown Water is denied the right to use these mains, their *value* has been lost, and the 'loss to *defendant* if the relief be granted' exceeds the jurisdictional amount."

256. This line of cases began with State *ex rel.* Pitcairn v. Public Serv. Comm'n, 338 Mo. 180, 90 S.W.2d 392 (1935), *trans'd*, 100 S.W.2d 635 (Ct. App. 1937), which held that the privilege of operating as a motor carrier for hire could not be given any pecuniary value. *Accord*, American Petroleum Exch. v. Public Serv. Comm'n, 172 S.W.2d 952 (Mo.), *trans'd*, 238 Mo. App. 92, 176 S.W.2d 533 (1943); State *ex rel.* Pitcairn v. Public Serv. Comm'n, 92 S.W.2d 881 (1935), *trans'd.* The *American Petroleum* case held that an appeal from a commission ruling on a railroad's certificate of convenience and necessity did not involve any "amount in dispute"; the railroad's lessee, who would be required to remove his filling station, tanks and pumps could not base jurisdiction on "amount."

257. In *Emerson*, the prospective taxes were ruled a "collateral effect" of the judgment, so the property loss caused by these taxes was likewise collateral. In *Burton*, the requested ruling would have prohibited the water company from servicing the disputed area. Although not expressly stated by the court, it appears from the decision that the ruling on the certificate would involve no monetary amount; this is suggested by

stated that the "*sole* question . . . to be determined is whether or not the Public Service Commission's order dismissing Respondent's complaint . . . was reasonable and lawful,"[258] and that no "amount" was placed in dispute by the ruling, even though it would obviously have some monetary effect on the parties. Therefore, they concluded that it was improper to characterize the loss of the pipes as representing the value of the judgment to defendant. However, the court held that the loss of the pipes' values to the defendant could be characterized as the value of defendant's loss.

9.033. *Monetary Evaluation*

After a "right" or value is selected as representing the object of the relief or the effect of the judgment, this referent must be given a precise monetary value as the third step in the calculation of "amount in dispute" in non-money cases. At this stage the court attempts to reduce the "amount involved" to the "amount in dispute."

9.033(a). *Initial Steps in the Reduction Process*

The first step in the reduction is the exclusion of every property interest or portion thereof that is not owned by any party to the suit. The cases in which the appointment or removal of an administrator is challenged illustrate this practice. Although the value of the whole estate is "involved," the administrator claims only that portion constituting his statutory commission. This commission and the value of the temporary control of the estate constitute the "amount in dispute."[259]

The court will also exclude from consideration the value of any res which is not claimed by one party to the suit adversely to the claims of another

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the cases cited note 256 *supra*. The ruling would *cause* the company the loss of the value of its pipe. However, the question is not the effect of the ruling, but whether the effect involves any "amount in dispute." The *Emerson* decision also has caused a potential characterization problem in suits to restrain a bond issue. See text accompanying notes 239-40 *supra*.

258. Brief for Appellant, p. 3, State *ex rel.* Public Water Supply Dist. v. Burton, 379 S.W.2d 593 (Mo. 1964).

259. Minzi v. White, 360 Mo. 319, 228 S.W.2d 700 (1950); Fields v. Luck, 327 Mo. 113, 34 S.W.2d 710 (1931), *trans'd*, 226 Mo. App. 1203, 50 S.W.2d 156 (1932); *In re* Wilson's Estate, 320 Mo. 975, 8 S.W.2d 973 (1928), *trans'd*, 16 S.W.2d 737 (Ct. App. 1929); *In re* Bennett's Estate, 243 S.W. 769 (Mo. 1922), *trans'd*, 249 S.W. 685 (Ct. App. 1923); State *ex rel.* Mitchell v. Guinotte, 180 Mo. 115, 79 S.W. 166 (1904) (en banc), *trans'd*, 113 Mo. App. 399, 86 S.W. 884 (1905); Wimberly v. McElroy, 295 S.W.2d 597 (Mo. Ct. App. 1956); *In re* Jackson's Will, 291 S.W.2d 214 (Mo. Ct. App. 1956); *In re* Christian Brinkop Real Estate Co., 215 S.W.2d 70 (Mo. Ct. App. 148); *cf.* City of Doniphan v. Cantley, 330 Mo. 639, 50 S.W.2d 658 (en banc), *trans'd*, 52 S.W.2d 417 (Ct. App. 1932) (in suit to have claim declared preferred, value of having it a preferred claim).

party. In *Strothkamp v. St. John's Community Bank, Inc.*,[260] plaintiff sued the bank in replevin to recover possession of a bag worth $50 which contained a sum of money in excess of the jurisdictional "amount." The bag was returned by the sheriff to the plaintiff, who removed the money from the bag. After he failed to comply with court orders concerning the posting of bonds, plaintiff's suit was dismissed. The court ordered that the instruments into which the money had been converted be delivered to the court to be held for the use and benefit of the persons lawfully entitled to them. Because the bank claimed no ownership of the instruments, and the sole issue was their possession, plaintiff's appeal was transferred by the supreme court. The value of the instruments could not serve as the "amount in dispute," and the value of possession was insufficient to meet the jurisdictional requirement.

Consideration of the four formulae discussed in section 9.031 is usually involved in this reduction process. In *Long v. Norwood Hills Corp.*,[261] a minority stockholder sued to dissolve the corporation and have its assets sold by a receiver and the proceeds distributed. The appellant's contention that the value of the total assets of the defendant corporation fixed the jurisdictional "amount" was rejected by the court. Because nothing appeared in the record to indicate that the proposed liquidation would result in either a monetary gain or loss to the corporation, the court could not use either the "defendant's gain" or "defendant's loss" formula; any "amount in dispute" had to be measured by the plaintiff's gain or loss. This choice of formula reduced the amount involved—the total assets to be liquidated—to the disputed "amount" of plaintiff's interest in the liquidation if relief were granted or denied.

9.033(b). *Net Value*

The jurisdictional referent must be given a monetary evaluation in terms of "net value" in order to identify the "amount in dispute."[262] This rule was developed in cases that involved the value of a decedent's estate, frequently actions for will construction or will contest,[263] which refer to the

260. 329 S.W.2d 718 (Mo. 1959), *trans'd*; *accord*, Bowles v. Troll, 262 Mo. 377, 171 S.W. 326 (1914), *trans'd from* 172 Mo. App. 102, 154 S.W. 871 (1913), *retrans'd*, 190 Mo. App. 108, 175 S.W. 324 (1915). In *Bowles*, a resident and a non-resident guardian of an insane person were disputing the right to custody of a fund belonging to the estate. The sum was held not to be the "amount" because neither party claimed ownership of the fund in his own right.

261. 360 S.W.2d 593 (Mo. 1962), *trans'd*, 380 S.W.2d 451 (Ct. App. 1964).

262. A related rule exists in suits for a money judgment in which the plaintiff would be entitled in any event to part of the amount he claims § 9.021(a)(2).

263. The rule has also been applied in a suit based on services rendered by the plaintiff to the decedent during the latter's lifetime when the decedent allegedly agreed to pay

value of the estate for "amount" calculation. The record in these cases must affirmatively indicate that the estate has a net value in excess of the jurisdictional limit before supreme court jurisdiction will attach. This requires the record to show that the assets comprising the estate will not be reduced independently of the court's decision. Thus the "net value" of the estate is not the appraised value:[264] rather, it is the value after all debts and claims have been paid.[265] Furthermore, if the period for filing claims against the estate had not expired when the case was tried, it is impossible for the record[266] to indicate "net value," and the supreme court will transfer the appeal after taking judicial notice that further claims may be filed which *could* reduce the value of the estate below the limit of its jurisdiction.[267] The record must also show that the costs of administration have been subtracted from the estate's value if a transfer is to be prevented.[268]

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to plaintiff the entire amount of his estate. Whitworth v. Monahan's Estate, 339 Mo. 1123, 100 S.W.2d 460 (1936), *trans'd*, 111 S.W.2d 931 (Ct. App. 1938); *cf.* Smith v. Oliver, 148 S.W.2d 795 (Mo.), *trans'd*, 157 S.W.2d 558 (Ct. App. 1941) (suit for decree that plaintiff was decedent's adopted son and heir).

264. Early cases had assumed the opposite. Meyers v. Drake, 324 Mo. 612, 24 S.W.2d 116 (1929); Fowler v. Fowler, 318 Mo. 1078, 2 S.W.2d 707 (1928). These were specifically overruled by Fleischaker v. Fleischaker, 338 Mo. 797, 92 S.W.2d 169 (1936), *trans'd from* 228 Mo. App. 98, 70 S.W.2d 104 (1934), *retrans'd*.

265. The leading case is Fleischaker v. Fleischaker, *supra* note 264; *accord*, Pasternak v. Mashak, 383 S.W.2d 760 (Mo. 1964), *trans'd*; Bostian v. Milens, 354 Mo. 153, 188 S.W.2d 945 (1945), *trans'd*, 239 Mo. App. 555, 193 S.W.2d 797 (1946) (action to cancel bankrupt's renunciation of interest in decedent's estate); Gee v. Bess, 171 S.W.2d 672 (Mo.), *trans'd*, 176 S.W.2d 516 (Ct. App. 1943); Smith v. Oliver, 148 S.W.2d 795 (Mo.), *trans'd*, 157 S.W.2d 558 (Ct. App. 1941); Higgins v. Smith, 346 Mo. 1044, 144 S.W.2d 149 (1940) (en banc), *trans'd*, 150 S.W.2d 539 (Ct. App. 1941); Aurien v. Security Nat'l Bank Sav. & Trust Co., 129 S.W.2d 1047 (Mo. 1939), *trans'd*, 137 S.W.2d 679 (Ct. App. 1940); *In re* Ellis' Estate, 127 S.W.2d 441 (Mo. 1939), *trans'd from* 110 S.W.2d 864 (Ct. App. 1937), *retrans'd* (action by guardian of testator's widow to determine whether to take under will); Nies v. Stone, 108 S.W.2d 349 (Mo. 1937), *trans'd* (action to compel executor to pay plaintiff one half decedent's estate); Freeman v. De Hart, 303 S.W.2d 217 (Mo. Ct. App. 1957); see McGrail v. Rhoades, 323 S.W.2d 815 (Mo. 1959) (amount appeared affirmatively if inferentially when parties during trial assumed the winner would take entire estate).

266. The record can, of course, only document the value of the estate as of the time judgment was entered. Although the appellant might be able to show by affidavits attached to his brief that the value of the estate has been established at a "net value" over the limit, the court has consistenty held that facts appearing outside the record will not be considered to calculate jurisdictional "amount." *E.g.*, Nemours v. City of Clayton, 351 Mo. 317, 172 S.W.2d 937, *trans'd*, 237 Mo. App. 497, 175 S.W.2d 60 (1943) (reply briefs); Hohlstein v. St. Louis Roofing Co., 328 Mo. 899, 42 S.W.2d 573 (1931), *trans'd*, 49 S.W.2d 226 (Ct. App. 1932) (reply brief); McGregory v. Gaskill, 317 Mo. 122, 296 S.W. 123, *trans'd*, 296 S.W. 833 (Ct. App. 1927) (affidavits).

267. Nies v. Stone, 108 S.W.2d 349 (Mo. 1937), *trans'd*.

268. See Higgins v. Smith, 346 Mo. 1044, 144 S.W.2d 149 (1940) (en banc), *trans'd*, 150 S.W.2d 539 (Ct. App. 1941). The court uses a hypothetical test when the record

The "net value" requirement has been similarly applied in other types of cases. In one case, the referent selected for monetary estimation was appellant's right to pursue his business free from a labor boycott which he sought to enjoin.[269] The evaluation asserted was the value of plaintiff's anticipated loss of business receipts if the injunction were denied, which receipts were in excess of the supreme court's jurisdictional minimum. The appeal was transferred because the record did not affirmatively show that the anticipated loss reflected plaintiff's *net* profits. Net profits refer to more than the difference between sales receipts and the amount paid a supplier; the record must also account for "operating costs, such as rent, insurance, salaries for clerks, etc."[270]

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does not show that all debts and costs of administration have been paid. If any claim could be filed, it makes the value of the estate "contingent" regardless of the size of the appraised value.

269. Frank Schmidt Planing Mill Co. v. Mueller, 347 Mo. 466, 147 S.W.2d 670, *trans'd*, 154 S.W.2d 610 (Ct. App. 1941). *But see* State *ex rel.* Missouri Water Co. v. Public Serv. Comm'n, 308 S.W.2d 704 (Mo. 1957) (jurisdiction based on "amount" of gross annual revenue from rate increase); *cf.* State *ex rel.* Missouri, Kan. & Tex. R.R. v. Public Serv. Comm'n, 378 S.W.2d 459 (Mo. 1964) (dictum), *trans'd*.

270. Bell v. Wagner, 169 S.W.2d 374, 375 (Mo. 1943), *trans'd*, 238 Mo. App. 152, 178 S.W.2d 813 (1944). This was a suit for a money judgment based on loss of profits. The court held that the evidence did not support plaintiff's claim for profits because the factors reducing the gross profits to net profits were not contained in the record. This conclusion is further supported by Ingle v. City of Fulton, 260 S.W.2d 666 (Mo. 1953), *trans'd*, 268 S.W.2d 600 (Ct. App. 1954), in which plaintiffs sought to base jurisdiction on the value of clay they wished to mine. They had been prevented from mining because of the operation of a city ordinance, the enforcement of which they sought to enjoin. Although the market value of the clay was $35,000, the court transferred the appeal because there was no affirmative showing of the profits plaintiff would make in the mining operations and because it was felt that "the money value in gross of the fire clay on the land could not . . . represent the (net) money value of the right" to mine the clay. *Id.* at 668. What the plaintiffs apparently would have been required to show in the record was that the cost of the mining operations did not reduce the $35,000 anticipated revenue below the jurisdictional "amount." There is analogous dictum in Koch v. Board of Regents, 256 S.W.2d 785 (Mo. 1953), *trans'd*, 265 S.W.2d 421 (Ct. App. 1954), in which the plaintiffs sought to void a construction contract between the Board and a private contractor. The court assumed arguendo that plaintiff's prayer for relief included a request that the Board be required to contract with them at the price of the challenged contract and stated that "plaintiffs allege no facts showing how much of the $173,616 [contract price] was for materials, labor, supervising costs and *profit*." *Id.* at 787.

It appears logical that if the court requires a plaintiff, who seeks to establish "amount" jurisdiction on the value of anticipated profits, to reduce them to net value, then a defendant asserting jurisdiction on the value of a loss which plaintiff's relief will occasion should also be required to demonstrate that the loss is net. Although the courts do not thus characterize their jurisdictional consideration, this is the usual result. A recent case illustrates, however, that the "net value" principle is possibly inapplicable to the "defendant's loss" formula. In State *ex rel.* Public Water Supply Dist. v. Burton, 379 S.W.2d 593 (Mo. 1964), the plaintiff sought to have the Public Service

Although the "net value" principle has not caused a great number of jurisdictional transfers,[271] its rationale appears to be applicable in cases in which it has not been specifically used. For example, when the relief would increase the value of the plaintiff's property by removal of a use restriction, the court has held that the full value of the increase as shown on the record is the "amount in dispute."[272] It has also held that the entire increase in

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Commission rule that the defendant was supplying water in an area for which it had no certificate. Jurisdictional "amount" was based on the loss to be suffered by the water company if the relief were granted (the loss of water mains installed to service the area, the value of which was considerably over the jurisdictional limit). The respondent water company in its brief, (Brief for Respondent, pp. 1-4), apparently feared that the court might conclude that the full amount of its investment would not be lost if permission were withdrawn to use the facilities in question, for it noted that the *"salvage value . . .* is only about one *half* the cost of construction." *Id.* at 4. (Emphasis added.) It is difficult to see why this statement, which was not mentioned in the opinion's jurisdictional statement, did not persuade the court to employ that "net value" principle in its plenary form. For instance, the salvage value of the pipes was not the only possible reduction factor. The investment in the pipe had, no doubt, been amortized over the period of time the pipes had been used. It is not too remote to speculate that the company was selling water at a considerable loss in the disputed area (not impossible if it were an outlying area and the company maintained the service merely to retain its certificate of convenience and necessity). In fact, attention to this kind of intangible benefit, speculative as it is, appears to be commanded by the case of Emerson Elec. Mfg. Co. v. City of Ferguson, 359 S.W.2d 225 (Mo. 1962), discussed in text accompanying notes 276-78 *infra.*

271. Recently, however, the "net value" rule caused a transfer by the supreme court in a case which, on its facts, resembles the decedent's estate cases. In Long v. Norwood Hills Corp., 360 S.W.2d 593 (Mo. 1962), *trans'd,* 380 S.W.2d 451 (Ct. App. 1964), the plaintiff was a minority stockholder in the corporation which he sought to have dissolved and whose assets he sought to have distributed. The court held that the total value of the corporation's assets was not the "amount in dispute" and that there was no "amount" produced by application of the "defendant's loss" formula. The court acknowledged, however, that plaintiff would realize some benefit if the corporation were liquidated, and held that the excess of the liquidation value over the market value of plaintiff's stock was the jurisdictional "amount." In sifting the evidence, the court found that the book value of the corporate stock, when liquidated, was such that the plaintiff would receive a sum sufficient for its jurisdiction. It denied jurisdiction, however, because the book value would not be the "net amount that would be available for distribution." *Id.* at 597. This conclusion was based on the failure of the record to show the costs of selling the corporation's property, its liability for taxes, and other debts of the corporation.

272. *E.g.,* Hall v. Koehler, 347 Mo. 658, 148 S.W.2d 489 (1941), in which plaintiff sued to enjoin violation of covenants restricting the use of land to residential purposes. The court found that the evidence established that removal of the restrictions would enhance the value of plaintiff's property by an amount sufficient for its jurisdiction. Apparently, plaintiff would not have to put the property to the different use or sell the property in order to realize the amount of increase for jurisdictional purposes. If plaintiff had been required to do so, the court would not have taken jurisdiction under the net value rule unless the record had established the costs of selling the property or

plaintiff's property value resulting if relief were granted and the land were put to a certain use is the "amount in dispute."[273] This result was reached in a case in which the court expressly noted that the value of the property "*equipped* as a funeral establishment is approximately" $1,000 in excess of the then jurisdictional "amount."[274] No mention was made of the cost of equipping the establishment. To the extent that the value increase reflected an expenditure by plaintiff to equip the property as a funeral establishment, the "net value" of the relief derived from a removal of the use restriction would be lowered.[275]

The greatest uncertainty caused by the application of the "net value" qualification derives from the case of *Emerson Elec. Mfg. Co. v. City of Ferguson.*[276] The court applied the "net value" principle to bolster its opinion to transfer an appeal in which the plaintiff had asserted jurisdiction on the increased tax burden which it would bear if relief were denied and the city were allowed to annex plaintiff's property. Against the loss which the plaintiff would incur based on the tax liability (which the court also held was *not* the jurisdictional referent) the court ruled that to establish "net value" the record must show a "balance [of] all possible prospective benefits. . . . tangible or intangible."[277] This language would seem to be a mandate to exclude almost any non-money case from the supreme court's docket, because any evaluation based on a gain or loss to either party *potentially* involves some offsetting gain or loss, whether tangible or intangible. The result reached in almost all non-money cases, however, does not support this extreme interpretation of *Emerson.*

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adapting it to the different use. See Long v. Norwood Hills Corp., *supra* note 271; Veal v. City of St. Louis, 365 Mo. 839, 289 S.W.2d 7 (1956).

273. Veal v. City of St. Louis, *supra* note 272.

274. *Id.* at 839, 289 S.W.2d at 9.

275. The cases involving the requirement that profits derived from an investment be expressed in terms of "net value" appear to be most nearly in point. See cases cited notes 271-72 *supra. But cf.* State *ex rel.* Public Water Supply Dist. v. Burton, 379 S.W.2d 593 (Mo. 1964), discussed *supra* note 255. *Burton* would suggest the amount expended would be net only if it had no salvage or alternative value.

276. 359 S.W.2d 225 (Mo. 1962), discussed in text accompanying notes 230-32 *supra.*

277. *Id.* at 229. Consider, for example, the application of *Emerson* to State *ex rel.* Public Water Supply Dist. v. Burton, 379 S.W.2d 593 (Mo. 1964), discussed *supra* note 270.