Chapter Five: “The Title to Real Estate”

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CHAPTER FIVE
"the title to real estate"

5.010. INTRODUCTION

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

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

1. The constitutional provision for appellate jurisdiction is not to be confused with the venue limitation for commencement of actions in circuit court which provides that "suits for the possession of real estate, or whereby the title thereto may be affected . . . shall be brought in the county where such real estate, or some part thereof, is situated." Mo. Rev. Stat. § 508.030 (1959). Title to real estate may be "affected" in a case for trial venue and yet not be "involved" for supreme court appellate jurisdiction. An example is State ex rel. Shiek v. McElhinney, 190 Mo. App. 618, 176 S.W. 292 (1915), in which it was sought to prohibit defendant trial court judge from taking venue of an action to enjoin the violation of building restrictive covenants. The court of appeals had jurisdiction, because the injunction action did not involve the title for supreme court jurisdiction (§ 5.121) even though it did affect title for trial court venue within the situs county—the enforcement of the easement so encumbered the title as to restrict its free use and enjoyment. The case was expressly followed in Wearen v. Woodson, 268 S.W. 648 (Mo. Ct. App. 1924). To the same effect are State ex rel. Kirkwood v. Reynolds, 285 Mo. 88, 175 S.W. 575 (1915) (en banc) (enforcement of lien of special tax bill); State ex rel. Haeussler v. Court of Appeals, 67 Mo. 199 (1877) (seeking to enjoin sale under execution). For a discussion of "effect" on title to real estate within the constitutional language of "involvement" see § 5.171(b).

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

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

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

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

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

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

The basic standard for supreme court jurisdiction over real estate cases is an affirmative appearance from the record that "the judgment sought or rendered" directly affects or operates upon title to real estate so as to determine it adversely to one litigant in favor of another. When the party seeking affirmative relief is the appellant, the court determines what judgment was sought by reference to the petition, not the prayer, of that party. Therefore if the prayer seeks title relief not authorized by the facts pleaded in the petition, jurisdiction is in the court of appeals. On the other hand, when the defendant (or the plaintiff when counter-relief is sought by defendant) appeals, the judgment rendered granting the relief is still authorized in view of the change in parties, arguably a decision on the merits, and that this decision should be made only after jurisdiction is accepted.

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

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

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

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

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

11. Wood v. Gregory, 155 S.W.2d 168 (Mo. 1941), trans'd, 163 S.W.2d 355 (Mo. Ct. App. 1942); Brutcher v. Fitzsimmons, 345 Mo. 547, 122 S.W.2d 881 (1938), trans'd from court of appeals, retrans'd, 130 S.W.2d 206 (Ct. App. 1939); General Theatrical Enterprises, Inc. v. Lyris, 121 S.W.2d 139 (Mo. 1938), trans'd, 131 S.W.2d 874 (Ct. App. 1939); State ex rel. South Mo. Pine Lumber Co. v. Dearing, 180 Mo. 53, 79 S.W. 454 (1904); Briscoe v. Longmire, 148 Mo. App. 594, 128 S.W. 521 (1910), trans'd from supreme court.
The judgment granting affirmative relief controls even if beyond the pleadings and petition and thereby void on its face. (Determination of the validity of the trial court's judgment would be a decision on the merits which the court could not properly render without appellate jurisdiction.)

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

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

13. Albi v. Reed, 281 S.W.2d 882 (Mo. 1955); State ex rel. Brown v. Hughes, 345 Mo. 958, 137 S.W.2d 544 (1940) (en banc); Riley v. La Font, 174 S.W.2d 857 (Mo. 1943); Watts v. Watts, 304 Mo. 361, 253 S.W. 421 (1924); Domyn v. Domín, 348 S.W.2d 360 (Mo. Ct. App. 1961), trans'd, 356 S.W.2d 70 (Mo. 1962); see State ex rel. Place v. Bland, 353 Mo. 639, 183 S.W.2d 878 (en banc), trans'd from 180 S.W.2d 538 (Ct. App. 1944); Herriman v. Creason, 352 Mo. 1176, 181 S.W.2d 502 (1944) (en banc); Brewster v. Terry, 172 S.W.2d 5 (Mo. Ct. App. 1943), trans'd, 352 Mo. 967, 180 S.W.2d 600 (1944).

14. See cases cited supra note 13. In considering . . . our appellate jurisdiction, we will disregard the fact that the land described in the option is located in Texas. If we were to hold that we did not have jurisdiction because the land . . . is not located in Missouri, such would be an adjudication on the merits. Fisher v. Lavelock, 282 S.W.2d 557, 560 (Mo. 1955), trans'd, 290 S.W.2d 635 (Ct. App. 1956).

15. Mo. REV. STAT. §§ 512.020, .160(1) (1959). City of St. Charles v. De Sherlia, 303 S.W.2d 32 (Mo.), trans'd, 308 S.W.2d 456 (Ct. App. 1957) (adverse judgment on defendant's counterclaim for title relief not appealed), discussed in Garnett, Appellate Practice in Missouri—1957, 23 Mo. L. Rev. 401, 402-03 (1958); Reece v. Van Gilder, 272 S.W.2d 177 (Mo.), trans'd from 264 S.W.2d 893 (Ct. App. 1954), retrans'd (part of judgment giving plaintiff life estate conceded by defendant); Stephens v. Anth, 142 S.W.2d 1008 (Mo. 1940), trans'd, 147 S.W.2d 165 (Ct. App. 1941) (failure of trial court to decree specific performance not complained of on appeal); Hayes v. Dunstan, 98 S.W.2d 539 (Mo. 1936), trans'd, 104 S.W.2d 1025 (Ct. App. 1937) (claim allegedly involving title to real estate not appealed). See generally Bennick, Missouri Appellate Practice and Procedure in Civil Cases, 1951 WASH. U.L.Q. 486.
jurisdiction of one of the claims, all issues appealed in the case will be heard in that court. 16

5.020. CLAIMS FOR MONEY DAMAGES

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

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

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

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

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

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

(action for difference between selling price and amount due on mortgage); cases cited note 17 supra. See Hunter v. Hunter, 355 Mo. 599, 197 S.W.2d 299 (1946), trans'd, 202 S.W.2d 101 (Ct. App. 1947); In re Ellis' Estate, 127 S.W.2d 441 (Mo. 1939), trans'd from 110 S.W.2d 864 (Ct. App. 1937), retrans'd; Williams v. Mackey, 331 Mo. 68, 52 S.W.2d 831 (1932), trans'd from 40 S.W.2d 1098 (Ct. App. 1931), retrans'd, 227 Mo. App. 1016, 61 S.W.2d 968 (1933); Salia v. Pillman, 328 Mo. 1212, 43 S.W.2d 1038 (1931), trans'd, 49 S.W.2d 215 (Ct. App. 1932); Lewellen v. Lewellen, 319 Mo. 854, 5 S.W.2d 4 (1928), trans'd, 223 Mo. App. 262, 13 S.W.2d 565 (1929); Wuertenbaecher v. Feik, 36 S.W.2d 913 (Mo.), trans'd, 43 S.W.2d 848 (Ct. App. 1931); State ex rel. Miller v. Board of Educ., 18 S.W.2d 26 (Mo.), trans'd, 224 Mo. App. 120, 21 S.W.2d 645 (1929); Nettleton Bank v. Estate of McGauhey, 318 Mo. 948, 2 S.W.2d 771 (en banc), trans'd, 222 Mo. App. 1084, 11 S.W.2d 1093 (1928); Hydraulic Press Brick Co. v. Lane, 205 S.W. 801 (Mo. 1918), trans'd from 196 Mo. App. 498, 200 S.W. 306 (1918), retrans'd, 211 S.W. 93 (1919).

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

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

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

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

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

5.040. Claims for Dower and Curtesy

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

money, Turner v. Morris, 222 Mo. 21, 121 S.W. 9 (1909), trans'd, 142 Mo. App. 60, 125 S.W. 258 (1910).

Title to real estate is not involved in suits to enjoin a future alleged trespass by defendant. E.g., Sikes v. Turner, 242 S.W. 940 (Mo. 1922), trans'd, 212 Mo. App. 419, 247 S.W. 803 (1923); Hill v. Hopson, 221 Mo. 105, 120 S.W. 29 (1909), trans'd, 150 Mo. App. 611, 131 S.W. 357 (1910); Ozark Land & Lumber Co. v. Robertson, 158 Mo. 322, 59 S.W. 69 (1900), trans'd, 89 Mo. App. 480 (1901). See § 5.150.

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

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

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

24. Mo. Laws 1921, § 1, at 119.
5.041. Dower as an Interest in Real Estate

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

5.042. Dower as "Invoking" Title

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

In addition to the dispute requirement, title must be directly affected to be involved.\(^{31}\) The often-quoted standard for deciding "direct effect" is

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

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

\(^{27}\) E.g., Goforth v. Ellis, 300 S.W.2d 379 (Mo. 1957); Stewart v. Stewart, 269 S.W.2d 49 (Mo. 1954), trans'd, 277 S.W.2d 322 (Ct. App. 1955); Bussen v. Del Commune, 195 S.W.2d 666 (Mo. 1946), trans'd, 239 Mo. App. 859, 199 S.W.2d 13 (1947); Nettleton Bank v. Estate of McGauhey, 318 Mo. 948, 2 S.W.2d 771 (en banc), trans'd from court of appeals, retran'sd, 22 Mo. App. 1084, 11 S.W.2d 1093 (1928); Platt v. Parker-Washington Co., 235 Mo. 467, 139 S.W. 124 (1911), trans'd, 161 Mo. App. 665, 144 S.W. 143 (1912); Krepp v. St. Louis & S.F.R.R., 99 Mo. App. 94, 72 S.W. 479 (1903).

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

\(^{29}\) See note 25 supra.

\(^{30}\) E.g., Sando v. Phillips, 319 S.W.2d 648 (Mo. 1959).

\(^{31}\) E.g., Proffer v. Proffer, 342 Mo. 184, 114 S.W.2d 1035 (1938), trans'd from 106 S.W.2d 51 (Ct. App. 1937); Toothaker v. Pleasant, 315 Mo. 1239, 288 S.W. 38 (1926); Corbett v. Brown, 263 S.W. 233 (Mo.), trans'd, 266 S.W. 996 (Ct. App. 1924); Jenkins
set forth in *Nettleton Bank v. Estate of McGauhey:* 82 "The judgment sought or rendered must be such as will directly *determine* title in some measure or degree adversely to one litigant and in favor of another; or, as some of the cases say, must *take title from one litigant and give it to another." 83 The dower cases reveal a difficulty if the second half of this statement is an independent jurisdictional prerequisite: the judgment assigning dower is only *declaratory* of a prior vesting of title and cannot "take title from one litigant and give it to another." The supreme court, nevertheless, has accepted jurisdiction of dower cases without acknowledging the significance of the second disjunctive in the *Nettleton Bank* statement, indicating that inconsistency exists without causing jurisdictional difficulty.

A judgment which *determines* title binds the parties *res judicata* on the title issue and thereafter serves as evidence of title (much like a deed). 84 Because these are the effects of judgments in suits for assignment 85 or admeasurement 86 of dower, appeals from these judgments lie in the supreme court. But when a widow does not affirmatively seek a judgment establishing her title to dower, but seeks only the money value of the interest in lieu of dower, the court's inquiry into title is only collateral or incidental to the object of the suit; 87 such cases vest jurisdiction in the court of appeals.

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82 32. 318 Mo. 948, 2 S.W.2d 771 (en bane), *trans'd* from court of appeals, *retrans'd*, 222 Mo. App. 1084, 11 S.W.2d 1093 (1928).

83 33. *Id.* at 953, 2 S.W.2d at 774 (Emphasis added.); *accord*, Pearson Drainage Dist. v. Erhardt, 196 S.W.2d 855 (Mo. 1946), *trans'd*, 239 Mo. App. 845, 201 S.W.2d 484 (1947); Devoto v. Devoto, 326 Mo. 511, 31 S.W.2d 805 (1930), *trans'd*, 39 S.W.2d 1083 (Mo. 1931); Stock v. Schloman, 322 Mo. 1209, 18 S.W.2d 428 (1929), *trans'd*, 226 Mo. App. 254, 42 S.W.2d 61 (1930).

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


5.050. Suits to Partition Real Estate

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

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

89. E.g., Goforth v. Ellis, 300 S.W.2d 379 (Mo. 1957).
90. 326 Mo. 511, 31 S.W.2d 805 (1930), trans'd, 39 S.W.2d 1083 (Ct. App. 1931).
91. See Stewart v. Stewart, 269 S.W.2d 49 (Mo. 1954), trans'd, 277 S.W.2d 322 (Ct. App. 1955) (title to real estate not involved when only the method of partition in kind disputed). In Utz v. Dormann, 31 S.W.2d 991 (Mo. 1930), trans'd, 43 S.W.2d 883 (Ct. App. 1931), all the parties admitted their interests and agreed to partition. The only issue was whether a deed of trust on the land, barred by the statute of limitations, had been revived by later payments and was a lien on real estate. Title to real estate was held not involved. See § 5.080.
92. Cunningham v. Cunningham, 325 Mo. 1161, 30 S.W.2d 63 (1930), trans'd, 34 S.W.2d 994 (Ct. App. 1931).
93. In cases in which only the right to partition or the susceptibility of the land to partition in kind is disputed the courts have undergone an evolution to the present position. In Cunningham v. Cunningham, supra note 42, the supreme court said:

In partition actions, the title to real estate has been held (by some of the courts of appeals of this State) to be involved, so as to confer appellate jurisdiction upon this court, . . . where the question whether the real estate is incapable of partition in kind is a controverted issue, or where the right of a party to partition of real estate is denied by some pleading filed in the action. Id. at 1166, 30 S.W.2d at 66. The supreme court failed to note, however, that the court of appeals cases which it cited for this proposition do not authoritatively support the proposition that title is involved. In Hiles v. Rule, 49 Mo. App. 628 (1892), trans'd, 121 Mo. 248, 25 S.W. 959 (1894), the court of appeals had transferred to the supreme court because real estate interests of the parties were in dispute and would be adjudicated. Groes v. Brockman, 246 S.W. 608 (Mo. Ct. App. 1923), trans'd, 307 Mo. 644, 271 S.W. 752 (1925), did support the proposition, but cited as authority cases which are inapplicable. Hull v. McCracken, 1 S.W.2d 205 (Mo. Ct. App. 1928), trans'd, 327 Mo. 957, 39 S.W.2d 351 (1931), retrans'd, 53 S.W.2d 405 (1932), had been ultimately retransferred to the court of appeals for lack of jurisdiction. The supreme court in Cunningham failed to disapprove these court of appeals cases and implied that title would have been involved if either the susceptibility to partition in kind or the right to partition had been disputed. However, since neither was disputed, the case was transferred.

The present rule is that without more than these two issues, the supreme court lacks jurisdiction. In Gebauer v. Gebauer, 163 S.W.2d 944 (Mo.), trans'd, 165 S.W.2d 333.
If a valid sale has previously been made to one not a party to the instant partition action, title cannot be involved even though the previous real estate interests of the parties to the action are in dispute. This is true because the judgment could not affect the title held by the disinterested purchaser. The only recovery in such case would be in the nature of a money judgment.

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

5.060. SUITS TO DECLARE CONSTRUCTIVE OR RESULTING TRUSTS

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

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

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

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

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

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

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

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

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

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

49. The trust arises when operative facts creating a right to trust relief come into existence, not when the court grants relief. Professor Scott states that "the beneficial interest in the property is from the beginning in the person who has been wronged .... It arises when the duty to make restitution arises, not when that duty is subsequently enforced." 4 Scott, Trusts § 462.4, at 3110 (2d ed. 1956). See McConnell v. Deal, 296 Mo. 275, 246 S.W. 594 (1922) (en banc) (express trust): "A court of equity may declare, construe, and administer trusts, but it cannot create one." Id. at 297, 246 S.W. at 598.
The judgment stands as a muniment of the equitable title, which constitutes
"title to real estate." The fact that the petition on its face seeks or concerns a "trust" is not
necessarily sufficient to confer supreme court jurisdiction. In Brannock v. Magoon the petition sought to impress a resulting trust on land held by
defendant, asked that the "trust" be charged "as a first lien on said prop-
erty, and that said property be sold to satisfy and discharge said trust." When defendant's appeal reached the supreme court, the court acknowl-
edged that "in the ordinary action to declare a resulting trust," in which
"the petition asks that by reason of a resulting trust the title to real estate
be decreed out of one person and decreed to be in another," title to real
estate is involved. In holding that it did not have jurisdiction, the court
noted that the judgment appealed only decreed a lien—the precise relief
sought by plaintiff—even though ostensibly the suit was for a declaration of
a "trust." 5

5.070. ACTIONS IN EJECTMENT

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

51. 216 Mo. 722, 116 S.W. 500 (1909), trans'd from court of appeals, retrans'd, 141
Mo. App. 316, 125 S.W. 535 (1910).
52. Id. at 726, 116 S.W. at 502.
1903), trans'd in which the plaintiff appealed a decree declaring that plaintiff had
bought the land at reduced value and that he pay the defendant the loss suffered. The
court of appeals transferred to the supreme court, because "while the decree does not
divest plaintiff of the title to the land in question, it confirms his title thereto, and
charges it within his hands with a resulting trust for the benefit of defendants." Id. at
885-86. This decision is questionable, because the judgment would seem to be in the
nature of a lien, and could have been satisfied by the payment of money.
54. Cf. Mack v. Mack, 281 S.W.2d 672 (Mo. 1955), trans'd, 286 S.W.2d 385 (Ct.
App. 1956).
55. E.g., Sutton v. Dameron, 100 Mo. 141, 13 S.W. 497, 499-500 (1880); Kimmel
v. Benna, 70 Mo. 52 (1879), discussed in SEDGWICK & WAIT, TRIAL OF TITLE TO LAND
§ 511, at 325-26 (1882).
56. Dunn v. Miller, 96 Mo. 324, 334, 9 S.W. 640, 643 (1888), trans'd from 18 Mo.
App. 136 (1885).
57. Even prior to 1936, title was not involved in ejectment when title was not dis-
it was "necessary for the court to determine which party had legal title to the real estate in order to determine which was entitled to possession."

The reasoning of the early ejectment cases was inconsistent with that which had previously lodged trespass appeals in the courts of appeals because the title examination was only "incidental and collateral."

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

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

59. Section 5.020.

The acceptance by the supreme court of ejectment actions regardless of their inconclusive effect on title is undoubtedly due to the extreme importance historically accorded ejectment by the Missouri courts, rather than to technical considerations of "involvement" of title to real estate. Until 1855, a party claiming title could in no way obtain a judgment certain to conclude title. By Mo. Rev. Stat. ch. 128, § 62 (1855), a party in possession of land could force anyone claiming title adverse to his own to show cause why that person should not bring an action to try the alleged title under a penalty of being forever barred from claiming any interest. However, if the suitor's opponent did show cause or did bring an action to try title, the statute then did not act to make the action in the opponent's forced action conclusive, so it is reasonable to assume the action forced would be an inconclusive ejectment action. See Meriwether v. Love, 167 Mo. 514, 519, 67 S.W. 250, 251 (1902). Not until 1897 did the general assembly decide that a party might institute an action certain to conclude the parties on the title issue, when it provided that any person claiming title may cause it to be determined against any adverse claimants. Mo. Laws 1897, at 74 (now Mo. Rev. Stat. § 527.150 (1950), repealing Mo. Rev. Stat. ch. 128, § 62 (1855)). Hudson v. Wright, 204 Mo. 412, 103 S.W. 8 (1907); Meriwether v. Love, supra. Thus, until 1897, ejectment was the only action the purpose of which was to try title. (While title might have been decided in a trespass action, the central purpose of trespass was to recover damages.) This was true even though the ostensible purpose of ejectment was the recovery of possession. The theory of ejectment was unique because the central position of the title was clouded by fictional issues and also because "the issues and proof may be broader than as indicated by the pleadings, unique, also, in that . . . the plaintiff must go beyond the issues so tendered, in the petition." Ballenger v. Windes, supra note 58, at 1045, 93 S.W.2d at 885 (dissenting opinion). After 1897, ejectment no longer had this importance as the only action for the trial of title. But the decisions lodging appeals in the supreme court indi-
erased the inconsistency in 1936 by overruling the early cases. In *Ballenger v. Windes*, the court held that examining and deciding title only for the purpose of adjudicating the right to possession, did not involve title. Two years later in *Gibbany v. Walker*, the supreme court upheld *Ballenger*, stating that a judgment in ejectment was no bar to a second action on the title issue, "which could not be true if ejectment determined title in the modern sense." Of course, if an equitable plea or defense seeking conclusive determination of title is raised, the action becomes a suit in equity and the claim for affirmative title relief may be a basis for supreme court jurisdiction.

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

64. E.g., Luttrell v. Highway Comm'n, 367 S.W.2d 615 (Mo. 1963), trans'd, 379 S.W.2d 137 (Ct. App. 1964); Corbin v. Galloway, 382 S.W.2d 827 (Mo. Ct. App. 1964); Moore v. Rone, 355 S.W.2d 398 (Mo. Ct. App. 1962).
65. 359 Mo. 282, 295, 221 S.W.2d 471, 479 (1949).
68. The court failed to articulate clearly why the two statutes required that the judgment in ejectment be conclusive upon the title issue raised. The following reasons for this conclusiveness may be inferred from the opinion: (1) The intention of the legislature, as reflected by these two statutes, was to avoid relitigation of issues, and this intention, applied to ejectment actions, requires a judgment conclusive on the title issues raised. This application is only implied rather than expressly condoned by the terms of the statutes. (2) If the defendant fails to assert all affirmative title counterclaims and defenses, he will be deemed to have raised them, and they will be deemed to have been conclusively adjudicated. If the second possibility was intended by the court, it would seem that since the statutes discussed pertain only to defendants, the conclusiveness which the court derives should apply not to the action of ejectment itself, but only to the defendants in such actions. That is, neither of the statutes precludes the plaintiff in ejectment from relitigating the title issues in future actions.

The reasoning of Cantrell, if extended somewhat and accepted as valid authority, could have a sweeping effect not only in ejectment actions, but on the general law of appellate jurisdiction based upon title to real estate. If "subject matter" was interpreted to mean the "primary issue" or the "basis of the cause of action" (as in Cantrell, e.g., title was the basis of the non-title action for possession), the reasoning of Cantrell would require that judgments be res judicata in all actions in which the pivotal issue of fact is the title.
Expressing doubts that its view of the matter would accord with the current sentiments of the Missouri Bar, the Cantrell opinion ascribed to its reasoning a "prospective" effect only, and "in justice to appellants" reversed the judgment. The "prospective" reasoning has never been adverted to by the court for the purpose of questioning the jurisdictional premise of Ballenger and Gibbany, but it is a potential threat to that premise.

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

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

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

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


71. St. Ferdinand Sewer Dist. v. Turner, 356 Mo. 804, 203 S.W.2d 731 (1947), trans'd, 208 S.W.2d 85 (Ct. App. 1948) (action to recover delinquent taxes, plaintiff sought lien); Pearson Drainage Dist. v. Ehrhardt, 196 S.W.2d 855 (Mo. 1946), trans'd, 239 Mo. App. 845, 201 S.W.2d 484 (1947) (action to recover drainage taxes); Stumpe v. City of Washington, 328 Mo. 1081, 43 S.W.2d 414 (1931) (en banc), trans'd, 54 S.W.2d 731 (Ct. App. 1932); City of St. Louis v. Dietering, 19 S.W.2d 882 (Mo. 1919), trans'd, 27 S.W.2d 711 (1920); City of Laclede v. Libby, 278 S.W. 372 (Mo. 1925), trans'd, 221 Mo. App. 703, 285 S.W. 178 (1926); Barber Asphalt Paving Co. v. Hezel, 138 Mo. 228, 39 S.W. 781 (1897), trans'd, 76 Mo. App. 135 (1898); Bobb v. Wolf, 105
deed of trust (or mortgage). The courts of appeals also have jurisdiction of appeals from actions to set aside liens other than deeds of trust (or mortgages), to establish priority of liens, or seeking decrees of subrogation to the rights of mortgagees. The supreme court's view that it has no jurisdiction of "lien" cases is based upon two conclusions: (1) a lien is not title to the fee, nor is it real estate, and (2) the judgment itself will not affect title, even though enforcement of the lien in subsequent proceedings might divest title.

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

The enforcement of the lien by execution and sale will divest the title from the present holder. A possible future divestiture, however, will not...
involve title because the judgment does not directly affect title, but only grants or denies the lien sought. Also, many cases have noted that title to real estate is not disputed, and hence not involved, because the party seeking the lien must concede title in the other party if the lien is to attach.

5.090. Actions Relating to Foreclosure, Execution and Sale

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

80. The divestiture is contingent because the lien may be discharged by the payment of money. Hydraulic Press Brick Co. v. Lane, 205 S.W. 801 (Mo. 1918), discussed supra note 70; Lemmon v. Lincoln, 130 Mo. 333, 32 S.W. 662 (1895), discussed supra note 77. If the judgment is not satisfied, a subsequent foreclosure, judicial or execution sale will be necessary for divestiture of title, which is accomplished by delivery of the deed resulting from the sale. State ex rel. Reed v. Elliot, 180 Mo. 658, 79 S.W. 696 (1904), trans'd, 114 Mo. App. 562, 90 S.W. 122 (1905); 1 Patton, Titles § 481 (2d ed. 1957).

81. Stumpe v. City of Washington, 328 Mo. 1081, 43 S.W.2d 414 (1931), trans'd, 54 S.W.2d 731 (Ct. App. 1932); Jones v. Hogan, 211 Mo. 45, 109 S.W. 641 (1908), trans'd, 135 Mo. App. 347, 116 S.W. 21 (1909); Stark v. Martin, 204 Mo. 433, 102 S.W. 1099, trans'd, 126 Mo. App. 575, 105 S.W. 33 (1907); Balz v. Nelson, 171 Mo. 682 (1903), trans'd from 86 Mo. App. 374 (1900). This reasoning presupposes that a lien is not a segment of title to real estate, because the lien interest is disputed. See notes 78-79 supra.

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

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

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

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

5.092. Actions to Enjoin Foreclosure and Sale

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

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

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

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

86. Lawson v. Hammond, 191 Mo. 522, 530, 90 S.W. 431, 433-34 (1905), trans'd from 102 Mo. App. 44, 81 S.W. 656 (1903), rettrans'd, 119 Mo. App. 480, 94 S.W. 313 (1906) (emphasis added.); accord, Snodgrass v. Copple, 203 Mo. 480, 101 S.W. 1090 (1907), discussed supra note 82.

In foreclosure actions, the parties do not seek title “determination,” which means a final, binding effect upon the title issue. Harrel v. Surface, 349 Mo. 370, 160 S.W.2d 756, trans'd, 237 Mo. App. 155, 165 S.W.2d 322 (1942); see § 5.070.
not directly affect title; the decree granting the injunction would be in
personam only and would not run with the land. Similarly, in suits to
enjoin a threatened sale of realty, title to real estate is not involved; title
remains in the debtor, at least for the time being, whether the decree is
granted or denied.

5.093. Proceedings to Set Aside Sales

In Missouri, title is passed not by the sale of land but only by delivery
of the deed, which may or may not occur concomitantly. Therefore, if the
87. Blodgett v. Perry, 97 Mo. 263, 10 S.W. 891 (1888); Leach v. Koenig, 55 Mo.
451 (1874); Patten v. Springfield Fire & Marine Ins. Co., 223 Mo. App. 1070, 25
S.W.2d 1075 (1930).

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

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

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

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

While Missouri courts have not so held, it is possible that the sale would pass to the
purchaser an "equitable title," including the right to have the legal title conveyed to
him upon performance of any unfulfilled conditions of the sale. 2 Patt., Title I § 481
(1957). If this "equitable title" were construed as title for jurisdictional purposes, the
judgment setting aside a sale would divest this.
deed had not been delivered, a suit to set aside a sale would not have the effect of reconveying title. However, the location of title and the possible effect of judgment upon title in a proceeding to set aside the sale are not clearly analyzed by the courts.

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

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

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

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

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

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

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

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

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

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

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

It is reasonable to assume, of course, that if a deed had passed and was attacked, the courts would advert to those facts, so the jurisdictional decisions are probably correct.
on appeal from an action to set aside a sale concerns not the title but only the validity of the sale. As was circuitously stated in *Williams v. Luecke*:

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

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

### 5.094. Actions Seeking Redemption

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

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95. 152 S.W.2d 991, 993 (Mo. Ct. App. 1941).
97. Keith v. Browning, 139 Mo. 190, 40 S.W. 764 (1897); Sturgeon v. Mudd, 190 Mo. 200, 88 S.W. 630 (1905), were suits to redeem real estate sold under power of sale in a mortgage which were decided by the supreme court without discussion of jurisdiction. Two later cases seeking redemption were summarily accepted. Casebolt v. Courtney, 177 Mo. App. 414, 162 S.W. 1045 (1914), *trans'd*, 195 S.W. 746 (Mo. 1917) (court of appeals stated that judgment could divest title and supreme court accepted jurisdiction without comment); House v. Clarke, 171 Mo. App. 242, 156 S.W. 495 (1913), *trans'd*, 187 S.W. 57 (Mo. 1916) (court of appeals followed Casebolt without discussion).
98. Casner v. Schwartz, 276 S.W. 58 (Mo. 1925), *trans'd*, 286 S.W. 401 (Ct. App. 1926), is a transitional decision. Comment, 41 U. Mo. Bull. L. Ser. 30, 36 (1930). The court held that a redemption is effected by the payment of money within a specified time, not by the judgment of the court. White v. Huffman, 301 S.W.2d 824 (Mo. 1957), clearly held that a judgment of redemption does not affect title but only determines plaintiff's right to redeem. The court in the *White* case distinguished the *Casebolt* and *House* cases, supra note 97, as suits to redeem "by setting aside the foreclosure sale." 301 S.W. at 826. By this it is implied that title was considered "involved" if cancellation of the sale was sought. However, in view of the decisions holding that suits to cancel sales do not "involve title to real estate" (§ 5.093), the *Casebolt* and *House* cases are no longer valid authority.
tion in which cancellation of a sheriff's deed or a trustee's deed is sought, title to real estate would be involved.\textsuperscript{99}

5.100. Actions Concerning Muniments of Title

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

5.101. The Muniment as Title to Real Estate

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

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

\textsuperscript{100} BEAUMONT, LAW DICTIONARY 1170 (4th ed. 1951).

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

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

\textsuperscript{103} E.g., Thomas v. Scott, 214 Mo. 450, 113 S.W. 1098 (1908) (en banc) (suit to establish a quitclaim deed, discussed as a muniment of title); Curators of Cent. College v. Shields, 182 S.W.2d 792 (Mo. Ct. App. 1944), trans'd, 354 Mo. 132, 186 S.W.2d 835 (1945).

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

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

\textsuperscript{106} Pelz v. Bollenger, 87 Mo. App. 540 (1901), discussed \textit{supra} note 101.
§ 5.102

TITLE TO REAL ESTATE

559

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

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

5.102. "Involvement" of a Muniment

Actions to set aside, to establish and to reform muniments are examined separately to facilitate discussion of the differentiations made by the courts between the types of action involving muniments, and to illustrate inconsistencies in the jurisdictional results. The courts make these differentiations only when mortgages or deeds of trust are at issue, not when absolute deeds (such as warranty deeds and quitclaim deeds\(^\text{110}\)) are at issue. Absolute

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

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

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

110. An "absolute deed" is here considered as one which conveys an actual interest in land, as opposed to the lien granted by a mortgage or a deed of trust. See BLACK, LAW DICTIONARY 22-23 (4th ed. 1951). As will be later discussed, the term "deed of trust" is perhaps a misnomer because no interest in real estate other than a security interest is passed thereby. Note 108 supra and accompanying text.
deeds, however, cannot be omitted from the discussion because much of the effect analysis is applicable to both absolute deeds and mortgages, and because absolute deeds are necessary for comparison of reasoning.

5.102(a). Actions to Set Aside Muniments

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

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

112. Boesel v. Perry, 262 S.W.2d 636 (Mo. 1953), trans'd to court of appeals (jurisdiction in court of appeals when original validity of deed of trust not attacked); Peters v. Kirkwood Fed. Sav. & Loan Ass'n, 344 Mo. 1067, 130 S.W.2d 507 (1939), trans'd, 136 S.W.2d 369 (Ct. App. 1940); Farrell v. Selig, 19 S.W.2d 648 (Mo. 1929), trans'd, 27 S.W.2d 499 (Ct. App. 1930); Puthoff v. Walker, 299 S.W. 108 (Mo. 1922), trans'd, 213 Mo. App. 228, 248 S.W. 619 (1923). It is important to note here that the distinction according to the time when the deed is alleged to have been invalid is only meaningful when deeds of trust and mortgages are being examined, and has no application to absolute deeds. That is, the means by which a deed becomes invalid, i.e., satisfaction of the debt or merger of the mortgage with the fee, have no application to absolute deeds. (Although it is conceivable that an absolute deed, once valid, could lose its validity by adverse possession of another party, no such cases were found. It is thus possible that the court would apply the jurisdictional distinction to such cases, but no opinion can be given on this possibility.)

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

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

115. Bitzenburg v. Bitzenburg, 360 Mo. 70, 226 S.W.2d 1027 (1950) (deeds of trust); Green v. Wilks, 109 S.W.2d 859 (Mo. 1937) (warranty deeds); Overton v. Overton, 131 Mo. 339, 33 S.W. 1 (1895) (deeds of trust); Tressler v. Whitsett, 280 S.W. 438 (Mo. Ct. App. 1926), trans'd, 321 Mo. 849, 12 S.W.2d 723 (1928) (deed of trust); Soehngen v. Jantzen, 218 S.W. 423 (Mo. Ct. App.), trans'd, 222 S.W. 401 (Mo. 1920) (deed of trust); Schroeder v. Turpin, 138 Mo. App. 320, 122 S.W. 819 (1909); trans'd, 253 Mo. 580, 161 S.W. 716 (1913); Reed v. Colp, 74 S.W. 422 (Mo. Ct. App. 1903), trans'd, 213 Mo. App. 577, 112 S.W. 255 (1908) (deed of trust); Lippin v. Crawford, 92 Mo. App. 453 (1902), trans'd, 186 Mo. 462, 85 S.W. 535 (1905) (deed of trust); Turner v. Overall, 83 Mo. App. 378 (1900), trans'd to supreme court (deed of trust). For jurisdictional purposes, the courts do not distinguish between a deed fraudulently executed and a deed fraudulently induced or procured. They are treated as void ab initio in either case.
ground of forgery or the grantor's mental incapacity, jurisdiction belongs in the supreme court. The supreme court has jurisdiction, even though it is claimed the conveyance is void only as to creditors. If, however, the original validity of a mortgage or deed of trust is not attacked, and a party prays cancellation on the ground that the secured debt has been satisfied, or that rights under the deed of trust have been extinguished by a merger, jurisdiction belongs in the court of appeals.

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

116. Gruetzmacher v. Hainey, 373 S.W.2d 45 (Mo. 1963); Walker v. Thompson, 338 S.W.2d 114 (Mo. 1960).
117. Jones v. Davis, 306 S.W.2d 479 (Mo. 1957), discussed supra note 102 (warranty deed); Garrison v. Schnicke, 354 Mo. 1185, 193 S.W.2d 614 (Mo. 1946) (warranty deed); Belleville Casket Co. v. Brueggeman, 353 Mo. 357, 182 S.W.2d 555 (1944); Herriman v. Creason, 352 Mo. 1176, 181 S.W.2d 502 (1944); Brennecke v. Riemann, 102 S.W.2d 874 (Mo. 1937); Hendrix v. Goldman, 92 S.W.2d 733 (Mo. 1936) (deed of trust). In all these actions it was claimed the conveyances were fraudulent as to creditors, and should be set aside. But cf. Klingelhofer v. Smith, 171 Mo. 455, 71 S.W. 1008 (1903) (en banc), trans'd.
118. Peters v. Kirkwood Fed. Sav. & Loan Ass'n, 344 Mo. 1067, 130 S.W.2d 507 (1939), discussed supra note 112; Farrell v. Seelig, 19 S.W.2d 648 (Mo. 1919), discussed supra note 112; Steffen v. Stahl, 266 S.W. 474 (Mo. 1924), trans'd, 273 S.W. 118 (Ct. App. 1925); Futhoff v. Walker, 239 S.W. 108 (Mo. 1922), discussed supra note 112; Vandeventer v. Florida Sav. Bank, 232 Mo. 618, 135 S.W. 25, trans'd, 162 Mo. App. 34, 141 S.W. 900 (1911); Bonner v. Lisenby, 157 Mo. 165, 57 S.W. 735 (1900), trans'd from 73 Mo. App. 562 (1898), retrans'd, 86 Mo. App. 666 (1901); Vandergrif v. Brock, 158 Mo. 681, 59 S.W. 979 (1900), trans'd from 73 Mo. App. 646 (1898), retrans'd, 89 Mo. App. 411 (1901).
119. Morgan v. York, 337 Mo. 1076, 88 S.W.2d 146 (Mo. 1935), trans'd from 61 S.W.2d 972 (Ct. App. 1933), retrans'd, 91 S.W.2d 244 (Ct. App. 1936) (plaintiff claimed deed of trust extinguished by merger when holder of notes held equitable title to land); accord, Boesel v. Perry, 262 S.W.2d 636 (Mo. 1953), trans'd to court of appeals (plaintiff claimed rights under deed of trust extinguished when its holder executed quit-claim deed to him); Hardwicke v. Barnes, 253 Mo. 6, 161 S.W. 744 (1913), trans'd, 179 Mo. App. 386, 166 S.W. 826 (1914), in which the plaintiff, who executed a deed of trust as surety for the debt of another, claimed the interests under the deed of trust were extinguished when the payment was extended without notice to him.
120. 180 Mo. 568, 79 S.W. 899 (1904).
the plaintiffs concededly owned the land. The court, however, expressed a distinction without a difference: ownership of the land will not be disputed whether the deed of trust is challenged as void \textit{ab initio} or because it has been extinguished by satisfaction of the debt.

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

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

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

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

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

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

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

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

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

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

125. Id. at 234.

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

127. 258 Mo. 197, 167 S.W. 999, trans'd, 184 Mo. App. 361, 171 S. W. 12 (1914); accord, Simmon v. Marion, 358 Mo. 888, 217 S.W.2d 537 (1949) (en banc), trans'd, 227 S.W.2d 127 (Ct. App. 1950).
tablish a lien against the real estate of the defendants."

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

5.102(c). Actions to Reform a Muniment

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

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

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

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

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

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

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

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

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

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

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

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

The current Missouri in rem statutes\textsuperscript{136} provide that in a judgment of specific performance, conveyance or release, the judgment itself shall operate as a conveyance of the record title if the party required to convey should fail to do so.

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

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

5.110. ACTIONS CONCERNING WILLS AND HEIRSHIP

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

In Missouri, title to the land of the decedent vests in either the heirs or the devisees at the moment of death. In actions seeking to contest, the defendant may involve title by an appropriate claim for title relief. In *Green v. Wilks*, 109 S.W.2d 859 (Mo. 1937), the plaintiff sought only to enjoin advertisement of a sheriff's sale, but the court held title was involved by the defendant's cross-bill seeking cancellation of warranty deeds to the plaintiff as fraudulent conveyances. *Conrey v. Pratt*, 248 Mo. 576, 154 S.W. 749 (1913) (defendant sought to cancel plaintiff's deed of trust as fraudulent).

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

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

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

143. Proffer v. Proffer, supra note 142. However, it must affirmatively appear from the record that the will purports to devise real estate. *Hanna v. Sheetz*, 355 Mo. 1215, 200 S.W.2d 335, trans'd, 240 Mo. App. 385, 205 S.W.2d 955 (1947) (record failed to show will devised realty); *Klaus v. Zimmerman*, 174 S.W.2d 365 (Mo. Ct. App. 1943) (will did not devise realty).

144. *Jones v. Nichols*, 280 Mo. 653, 216 S.W. 962 (1919): “It is true... that title to land does not pass by will until the will is probated... But it is equally true that title does pass upon the probating of the will, and relates back and takes effect as of the time of the testator's death.” *Id.* at 665, 216 S.W. at 965. The court did not state where title was posited between death and probate. It would seem more reasonable to say that title vested at death, and was declared by probate. In *Stolle v. Stolle*, 66 S.W.2d 912, 914 (Mo. 1934), the court stated, in connection with a non-jurisdictional issue, that “a will takes effect and transfers title only at and because of the death of the testator.” In *Dickerson v. Dickerson*, 211 Mo. 483, 110 S.W. 700, 704 (1908), it was held that the will becomes effective from and after the death of the testator. See also *Mo. Rev. Stat.* § 473.260 (1959): “When a person dies, his real and personal property...
probate, establish or construe a will, title is affected: the judgment sought determines title in the heir or devisee and finally binds the parties on the title issue. If title under the will is not also disputed, however, and the controversy concerns, for example, the right to partition the real estate, or the establishment of a legacy as a lien upon the land devised, title is not involved and jurisdiction belongs in the court of appeals. If the will has provided that the land be sold, and construction of the will would

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

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

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

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


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


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

151. Hourigan v. McBee, 119 S.W.2d 404 (Mo. 1938), tran'd, 130 S.W.2d 661 (Ct. App. 1939).
be made only to determine interests in the proceeds, title is not affected—thus not involved—because the judgment cannot determine title to be in one of the parties.162

The supreme court has jurisdiction of appeals from suits to establish heirship. "Establishing by court decree that one person is the child or heir of another is in effect establishing a deed of adoption... and that is a muniment of title from a decedent in the absence of a will as effectual as is a will one dying testate or of a grant inter vivos."163

Proceedings by the guardian of a widow seeking the court's direction whether the will should be renounced do not involve title to real estate. The interests of the parties may be disputed and the decision may eventually cause title to be held by one party rather than another, but the judgment itself does not affect these interests. The title will not be finally determined until the option to elect is exercised.164

5.120. Actions Concerning Easements

5.121. Easements in General

An easement is an "interest... carved out" of the principal owner's fee simple; the land in which it exists constitutes a servient tenement.165 Thus, judgments which finally adjudicate the disputed existence of an easement in suits to set aside or establish are appealable to the supreme court.166

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

153. McCary v. McCary, 217 S.W. 547, 549 (Mo. Ct. App. 1920), trans'd, 239 S.W. 846 (Mo. 1922); accord, Love v. White, 150 S.W.2d 494 (Mo. Ct. App.); trans'd, 348 Mo. 640, 154 S.W.2d 759 (1941) (action to establish pretermitted heirship); see Hogane v. Ottersbach, 269 S.W.2d 9 (Mo. 1954) (action seeking decree of equitable adoption).

154. First Nat'l Bank v. Schaake, 355 Mo. 1196, 200 S.W.2d 326, trans'd, 240 Mo. App. 217, 203 S.W.2d 611 (1947); In re Ellis' Estate, 110 S.W.2d 864 (Mo. Ct. App. 1922), trans'd, 127 S.W.2d 441 (Mo. 1939).

155. Pendleton v. Gundaker, 370 S.W.2d 720, 723 (Mo. Ct. App. 1963), trans'd, 381 S.W.2d 849 (Mo. 1964). The factor of actual subtraction from the fee simple distinguishes easements from such interests as liens which only "incumber" or "entangle" the fee title. An easement is an "interest" in the land. Missouri State Oil Co. v. Fusse, 360 Mo. 1022, 232 S.W.2d 501 (1950); Baker v. Squire, 143 Mo. 92, 44 S.W. 792 (1893); Dalton v. Johnson, 319 S.W.2d 66 (Mo. Ct. App. 1958), trans'd, 320 S.W.2d 569 (Mo. 1959); RESTATEMENT, PROPERTY § 450 (1944); Gill, Missouri Titles 55 (1931). But see Smith v. Santarelli, 355 Mo. 1047, 199 S.W.2d 411 (1947), trans'd, 207 S.W.2d 543 (Ct. App. 1948) (action to enjoin violation of easement, not to adjudicate title): "[A]n easement, strictly speaking, does not carry any title to the land over which it is exercised; it is rather a right to use the land for particular purposes." Id. at 1049, 199 S.W.2d at 412.

156. Rosenbloom v. Grossman, 351 S.W.2d 735 (Mo. 1961); Peters v. Platte Pipe Line Co., 305 S.W.2d 413 (Mo. 1957) (dismissal of petition to set aside easements be-
A more difficult problem exists in cases in which the principal ownership cannot be further affected because the existence of the easement is admitted and the controversy concerns only the adverse interests of the litigants in the easement. The supreme court has held that it has jurisdiction of cases disputing ownership of a concededly existent easement. The court also exercised jurisdiction of a case in which the existence of some sort of easement was apparently conceded, and the parties contested only the extent and nature of the easement. In *White v. Bevier Coal Co.*, the grantees of the fee title of a certain tract of land brought suit to determine the title, rights and interests in that tract as between themselves and the defendants. Defendants held an easement under the deed executed by the grantor of the deed to the plaintiff grantees. Plaintiff conceded that the defendants could transport coal taken from the mines on the tract concerned, but contended

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

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

158. 261 S.W.2d 81 (Mo.), *trans'd from* 254 S.W.2d 42 ( Ct. App. 1953).
that the reservation in the deed did not grant them freedom to transport coal across that tract taken from mines surrounding the tract. If the supreme court had viewed the interest actually disputed by the parties as the right to transport coal from adjoining lands across the tract, jurisdiction would have been in the court of appeals. But since "the question of whether the Coal Company owns an easement over the plaintiffs' land is directly in issue," the supreme court accepted appellate jurisdiction.

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

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

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

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

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

162. Kansas City Power & Light Co. v. Riss, 312 S.W.2d 246 (Mo. 1958), discussed supra note 157; Judge v. Durham, 274 S.W.2d 247 (Mo. 1955), trans'd from 265 S.W.2d
in *persona*m only, not running with the land, and the inquiry “into the validity of plaintiff’s claim of an easement over defendants’ land in order to determine whether to grant or withhold the relief prayed [is] . . . purely incidental or collateral.” Although an arguably inconsistent result was reached in *Albrecht v. Highway Comm’n* in 1963, the rule appears to be that for the supreme court to have jurisdiction, an affirmative adjudication of the existence of the easement must be sought in addition to injunctive relief.

437 (Ct. App. 1954), *retrans’d*, 281 S.W.2d 16 (Ct. App. 1955); *Gibson v. Sharp*, 364 Mo. 1007, 270 S.W.2d 721 (1954), *trans’d*, 277 S.W.2d 672 (Ct. App. 1955); *Smith v. Santarelli*, 355 Mo. 1047, 199 S.W.2d 411 (1947), discussed *supra* note 156; *Drainage Dist. No. 28 v. Drainage Dist. No. 23*, 144 S.W.2d 61 (Mo.), *trans’d*, 146 S.W.2d 858 (Ct. App. 1940); *St. Louis-San Francisco Ry. v. Silver King Oil & Gas Co.*, 117 S.W.2d 225 (Mo. 1938), *trans’d*, 234 Mo. App. 589, 127 S.W.2d 31 (1939); *Oliver v. Wilhite*, 329 Mo. 524, 45 S.W.2d 610 (1932), *trans’d from* 41 S.W.2d 825 (Ct. App. 1931), *retrans’d*, 227 Mo. App. 538, 55 S.W.2d 491 (1932); *Wallach v. Stetina*, 20 S.W.2d 663 (Mo. 1929), *trans’d*, 28 S.W.2d 389 (Ct. App. 1930). *Gibson v. Sharp*, *supra*, overruled two cases which had exercised jurisdiction of appeals from injunction actions because an easement was at issue. *Zinser v. Lucks*, 361 Mo. 671, 235 S.W.2d 844 (1951) (defendant’s answer prayed injunction because of easement by prescription); *Dillen v. Edwards*, 263 S.W.2d 433 (Mo.), *trans’d from* 254 S.W.2d 44 (Ct. App. 1953) (defendants’ appeal from granting of plaintiff’s injunction).

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

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

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

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

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

166. Wilson v. Owen, 261 S.W.2d 19 (Mo. 1953) (declaratory judgment action); see Comment, 41 U. Mo. Bull. L. Ser. 30, 37 (1930), and cases cited therein for a discussion of restrictive covenants as equitable easements.
167. 315 Mo. 1239, 288 S.W. 38 (1926).
168. 36 S.W.2d 913 (Mo.), trans'd, 43 S.W.2d 838 (Ct. App. 1931).
169. Id. at 914.
170. For the purpose of discussion of different types of interests as possibly constituting easements (or failing to do so), Wuertenbaecher and Toothaker have been referred to as implying that a restriction on sale is an easement while a restriction on building rights is not. It is probable, however, that the primary object of the court in Wuertenbaecher was to follow the general rule that cases seeking injunctive relief do not properly involve title (§ 5.150). However, in order to do this the court was forced to either overrule Toothaker, or to distinguish it, since both were actions seeking to enjoin violations of restrictive covenants. In deciding to distinguish Toothaker, the court was forced to make the distinction upon the only basis available: the variant types of restrictions concerned. The court probably then, in its desire to follow other injunction cases, made a distinction without substantive difference between the building restriction in Wuertenbaecher and the sale restriction in Toothaker.

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

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

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

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

172. McDermott, LAND TITLES AND LAND LAWS § 25.26 (1954); Nichols, EMINENT DOMAIN § 150 (1917).
173. See § 5.120.
174. State ex rel. Lane v. Pankey, 359 Mo. 118, 221 S.W.2d 195 (1949) (en banc); City of Kirkwood v. Venable, 351 Mo. 460, 173 S.W.2d 8 (1943); St. Louis Housing Authority v. Jower, 267 S.W.2d 344 (Mo. Ct. App. 1954); State ex rel. Highway Comm’n v. Schultz, 241 Mo. App. 570, 243 S.W.2d 808 (1951).
175. State ex rel. Highway Comm’n v. Day, 327 Mo. 122, 35 S.W.2d 37 (1930), (en banc), trans’d, 226 Mo. App. 884, 47 S.W.2d 147 (1932) (dictum):

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

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

176. See § 5.090.
as a whole, holding title involved because the condemnation proceeding affected title.177 Furthermore, in the condemnation cases prior to 1949, the courts did not discuss the dispute requirement. Generally the title of the landowner is conceded, and the condemnor claims no interest in the land prior to the institution of the condemnation proceeding.

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

The reasoning and result of Butler primarily touch actions brought by

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

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

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

179. E.g., State ex rel. Highway Comm'n v. Barbeau, 330 S.W.2d 32 (Mo. 1960); State ex rel. Highway Comm'n v. Hudspeth, 297 S.W.2d 510 (Mo.), trans'd, 303 S.W.2d 703 (Ct. App. 1957); In re Off-Street Parking Facilities, 287 S.W.2d 866 (Mo. 1956); Phillips Pipe Line Co. v. Brandstetter, 363 Mo. 904, 254 S.W.2d 636 (1953), trans'd, 241 Mo. App. 1138, 263 S.W.2d 880 (1954).
corporate bodies but apparently apply similarly to actions brought by
private citizens seeking to create private or public roads. Before 1949 the
cases held that jurisdiction of road cases belonged in the supreme court.\textsuperscript{180} But in \textit{Butler} these actions were treated as condemnation cases and specifi-
cally overruled.\textsuperscript{181} The cases overruled were actions brought pursuant to
statutes\textsuperscript{182} seeking to \textit{create} the interest necessary for the roads; the interests
held by the parties were not disputed at the time of institution of the actions.
\textit{Butler}, however, does not apply to actions seeking to \textit{declare} that the inter-
ests necessary for roads existed \textit{before} the time action is brought. Such in-
terests are created by certain operative facts resulting in ownership by pre-
scription or estoppel in pais.\textsuperscript{183} These cases present the requisite \textit{dispute} of
title to an interest in real estate at the time of institution of the action and
are properly appealed to the supreme court.\textsuperscript{184}

The rule in \textit{Butler} is restricted by its language to appeals that seek only
the court’s adjudication of the validity of the proceedings in the lower court,
the right of the condemnor to appropriate, or the amount of compensation
awarded.\textsuperscript{185} But the injection of a question of \textit{public use}, as distinguished
from the \textit{necessity} of the taking by the condemnor, calls for a judicial deter-
mination and imposes on the courts the additional duty of preventing
the taking of private property for a private or non-public use.\textsuperscript{186} Although
the question of public use has not arisen as often as it did before 1945 (when
\textsuperscript{180} Private roads: Welch v. Shipman, 357 Mo. 838, 210 S.W.2d 1008 (1948);
State \textit{ex rel.} Palmer v. Elliff, 332 Mo. 229, 58 S.W.2d 283 (1933), \textit{trans’d} from 43
S.W.2d 1059 (Ct. App. 1931); Richter v. Rodgers, 327 Mo. 543, 550, 37 S.W.2d 523,
526 (1931). Public roads: Mitchell v. Nichols, 330 Mo. 1233, 52 S.W.2d 885 (1932),
\textit{trans’d} from 20 S.W.2d 554 (Ct. App. 1929); Reeves v. Green, 282 Mo. 521, 222 S.W.
795 (1920), \textit{trans’d} from 165 S.W. 210 (Ct. App. 1916); \textit{In re} Critzer, 189 Mo. App.
61, 175 S.W. 104 (1915), \textit{trans’d}, 275 Mo. 514, 205 S.W. 16 (1918).

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

182. The current statutes are: \textit{private roads}—Mo. REV. STAT. §§ 228.340-480
(1959); \textit{public roads}—Mo. REV. STAT. §§ 228.010-190 (1959).

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

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

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

186. State \textit{ex rel.} Highway Comm’n v. Schultz, 241 Mo. App. 570, 243 S.W.2d 808
(1951).
new constitutional provisions expanded the scope of eminent domain\textsuperscript{187}, a number of decisions have cryptically implied that the existence of a question of "public use" would confer jurisdiction on the supreme court.\textsuperscript{188} These unqualified implications do not advert to the fact that even if the trial court passes on the question of the public nature of the proposed use, its judgment will not necessarily affect title.\textsuperscript{189} If title has not yet passed to the condemnor, the judgment of the trial or appellate court can have no direct \textit{effect} on title, whether it is in favor of the condemnor or the condemnee. The court can only arrest the whole condemnation proceeding or sanction its continuation. If, on the other hand, the title has been appropriated by the condemnor prior to the court’s determination of the public use question, and the judgment has the effect of divesting that title from the condemnor, then it could be said that the \textit{effect} requirement is met.\textsuperscript{190} The

\begin{enumerate}
\item[	extsuperscript{187}] Mo. Const. art. I, § 27 for practical purposes precludes the raising of the public use issue with regard to excess condemnation; Mo. Const. art. VI, § 21 relieves cities and counties engaged in redevelopment projects of many public use challenges. See also Mo. Const. art. IV, § 29 regarding public use and highway access.
\item[	extsuperscript{188}] In State \textit{ex rel.} Highway Comm’n v. Schade, 265 S.W.2d 383, 384 (Mo.), \textit{trans'd}, 271 S.W.2d 196 (1954), it is stated: “Appellant does not question that the land is being taken for public use, therefore, title to real estate is not involved.” \textit{Accord}, Kansas City v. National Eng’r & Mfg. Co., 265 S.W.2d 384, 386 (Mo. 1954), \textit{trans’d}; City of St. Louis v. Butler Co., 358 Mo. 1221, 1224, 219 S.W.2d 372, 374 (1949) (en banc), discussed in text accompanying note 178 \textit{supra}.
\item[	extsuperscript{189}] The implications stem from a statement in State \textit{ex rel.} Highway Comm’n v. Day, 327 Mo. 122, 35 S.W.2d 37 (1930) (en banc), discussed \textit{supra} note 175. In \textit{Day} the supreme court held that the divestiture of title is within the power of the condemnor, \textit{not the courts}; then, in a statement not necessary to the decision, or even to the point it was attempting to establish, the court said: “The only function that the court performs in a condemnation proceeding is the ascertainment of just compensation, \textit{unless the question of public use be drawn into the proceeding}.” \textit{Id.} at 125, 35 S.W.2d at 38. (Emphasis added.) In City of St. Louis v. Butler Co., 358 Mo. 1221, 219 S.W.2d 372 (1949) (en banc), discussed \textit{supra} note 178, the supreme court gave birth to the doctrine conceived in \textit{Day}. In \textit{Butler}, the court interpreted \textit{Day} as stating that a condemnation suit “does not involve the title to real estate except incidentally, \textit{unless} the question of \textit{public use} be drawn into the proceeding.” \textit{Id.} at 1224, 219 S.W.2d at 374. The \textit{Day} case, however, did not hold that an issue of public use would directly involve title to real estate, but said only that such an issue would give the court another duty, \textit{i.e.}, to decide whether the proposed use is public, while the power to affect title yet remained only in the condemnor. This public use “doctrine” of the \textit{Butler} case was reinforced in State \textit{ex rel.} Highway Comm’n v. Schade, \textit{supra} note 188, at 384, in which the supreme court said “appellant does not question that the land is being taken for public use, \textit{therefore}, title to real estate is not involved.” (Emphasis added.) The statement was quoted and followed in a companion case, Kansas City v. National Eng’r & Mfg. Co., 265 S.W.2d 384 (Mo. 1954), \textit{trans’d} (action by city to condemn property for expressway).
\item[	extsuperscript{190}] This possibility is apparently ignored by the court. Even this possibility is precluded, however, if such a judgment would only order the condemnor to divest \textit{itself}
implications in the cases, however, are not conditioned upon the time at which title has passed and thus the cases give an unsatisfactory explanation of why title is involved if a question of public use is raised.

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

5.140. Suits Seeking Specific Performance of Land Contracts

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

Satisfaction of the second requirement, however, is doubtful in specific performance cases. Legal title is conceded to be in the vendor at the
time suit is filed. Nevertheless, supreme court jurisdiction has been uniformly sustained without any discussion of the dispute requirement. The result might be justified by use of the doctrine of equitable conversion—equitable title is held by the vendee as soon as the contract is executed—but no cases were found that rested jurisdiction upon this doctrine.

5.150. SUITS SEEKING INJUNCTIVE RELIEF

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

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195. Rice v. Griffith, 349 Mo. 373, 161 S.W.2d 220 (1942), trans'd from 144 S.W.2d 837 (Ct. App. 1940); Barnes v. Stone, 198 Mo. 471, 95 S.W. 915 (1906); Miller v. St. Louis & K.C. Ry., 162 Mo. 424, 63 S.W. 85 (1901); Tant v. Gee, 236 Mo. App. 133, 146 S.W.2d 61 (1940), trans'd, 348 Mo. 633, 154 S.W.2d 745 (1941); Hawkins v. Hyde, 219 S.W. 974 (Mo. Ct. App.), trans'd, 238 S.W. 1082 (Mo. 1920). Other cases holding title involved in suits for specific performance of a contract to sell but not discussing the effect upon or dispute of title: Rookstool v. Neaf, 377 S.W.2d 402 (Mo. 1964); Price v. New, 373 S.W.2d 59 (Mo. 1963); State ex rel. Highway Comm'n v. Hammel, 372 S.W.2d 852 (Mo. 1963); Cossart v. Reich, 370 S.W.2d 291 (Mo. 1963); Kerrick v. Schoenberg, 328 S.W.2d 595 (Mo. 1959); Barr v. Snyder, 294 S.W.2d 4 (Mo. 1956); Kaufflin v. Turek, 277 S.W.2d 540 (Mo. 1955); Farrow v. Farrow, 277 S.W.2d 532 (Mo. 1955); Drake v. Hicks, 249 S.W.2d 358 (Mo. 1952); McElroy v. Brindlay, 379 S.W.2d 882 (Mo. Ct. App. 1964), trans'd to supreme court; Herzog v. Ross, 192 S.W.2d 23 (Mo. Ct. App.), trans'd, 196 S.W.2d 268 (Mo. 1946) (en banc).

Although divestiture is not discussed, the supreme court has held title involved when an option to purchase is sought to be enforced. Kalivas v. Hauck, 383 Mo. 423, 290 S.W.2d 394 (1956); Beets v. Tyler, 365 Mo. 895, 290 S.W.2d 76 (1956). Title was held involved when the judgment did not grant specific performance, but gave the vendor the option to deliver a deed, subject to certain penalties if he failed to do so. State ex rel. Place v. Bland, 353 Mo. 639, 183 S.W.2d 878 (en banc), trans'd from 180 S.W.2d 538 (Ct. App. 1944). The supreme court here felt that because the "alternative [to the transfer of title by the defendant] was (as it might be) so onerous as to be coercive, in practical effect it [the decree] amounted to enforcing performance." Id. at 647, 183 S.W.2d at 884. This decision indicates a rare judicial willingness to subordinate form to substance. Technically, the "effect" requirement was probably not met because of the contingency of the final effect of the judgment on title.

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

196. E.g., State ex rel. Northside Church of God v. Church of God, 243 S.W.2d 308 (Mo. 1951), trans'd, 247 S.W.2d 542 (Ct. App. 1952); Mueller v. Klingle, 164 S.W.2d 928 (Mo. 1942), trans'd, 167 S.W.2d 670 (Ct. App. 1943); Mexico Refractories Co. v. Roberts, 161 S.W.2d 420 (Mo.), trans'd, 237 Mo. App. 299, 167 S.W.2d 660
may be one of title. Any title investigation is made by the court for the sole purpose of reaching a decision whether to grant the injunction; thus, the injunction operates only in *persona*m and not upon the title. Thus, when the defendant claims the title in an action to enjoin trespass, jurisdiction on appeal is in the court of appeals, even though the trial court must decide who has title to render a judgement.

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

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

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

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

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

\footnote{203. Mo. Rev. Stat. § 527.150 (1959).}

\footnote{204. DeBold v. Leslie, 381 S.W.2d 816 (Mo. 1964); Beauchamp v. Beauchamp, 381 S.W.2d 804 (Mo. 1964); Clemons v. Smith, 379 S.W.2d 532 (Mo. 1964); Buschmeyer v. Elkerman, 378 S.W.2d 468 (Mo. 1964); Wolf v. Miravalle, 372 S.W.2d 28 (Mo. 1963); Lloyd v. Garren, 366 S.W.2d 341 (Mo. 1963); Parrish v. McDaniel, 358 S.W.2d 32 (Mo. 1962); Franck Bros., Inc. v. Rose, 301 S.W.2d 806 (Mo. 1957); Evans v. Buente, 294 S.W.2d 543 (Mo. 1955); Albi v. Reed, 281 S.W.2d 882 (Mo. 1955); Stull v. Johnson, 280 S.W.2d 71 (Mo. 1955); Barker v. Allen, 273 S.W.2d 191 (Mo. 1954); Taylor v. Taylor, 243 S.W.2d 310 (Mo. 1951); Northcutt v. Eager, 132 Mo. 265, 33 S.W. 1125 (1896); Missouri City Coal Co. v. Walker, 183 S.W.2d 350 (Mo. Ct. App. 1944), trans'd, 188 S.W.2d 39 (Mo. 1945); Judef v. Sims, 147 Mo. App. 65, 126 S.W. 251 (1910), trans'd, 258 Mo. 26, 176 S.W.2d 539 (1943).}

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

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

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

\footnote{208. In Fisher v. Lavelock, 282 S.W.2d 557 (Mo. 1955), trans'd, 290 S.W.2d 655 (Ct. App. 1955), the plaintiff sought to cancel an option to purchase. The court held title not involved notwithstanding the plaintiff's prayer that the court declare the defendant have no further right, title, or interest. The real issue was the validity of the option, which in itself transferred no interest in real estate, and jurisdiction over that issue was not determined solely on the prayer for relief. Of course, if the holder of the option had brought suit to enforce it, jurisdiction on appeal would be in the supreme court. Beets v. Tyler, 365 Mo. 895, 290 S.W.2d 76 (1956). See § 5.140, note 195 supra and accompanying text.}
constitute title to real estate. When the full title itself or some interest constituting real estate is disputed, title thereto is "involved" in an action to quiet and determine title to that interest. 209

5.170. CONCLUSION

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

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

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

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

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

209. See, e.g., Tayler v. Tayler, 243 S.W.2d 310 (Mo. 1951) (defendant claimed life estate); Missouri City Coal Co. v. Walker, 183 S.W.2d 350 (Mo. Ct. App.), trans'd, 188 S.W.2d 39 (Mo. 1944) (dispute of the full title claimed by adverse possession).
the muniment is a deed of trust or mortgage an inconsistency has arisen resulting from the view that the mortgage or deed of trust is only a security interest—not title to real estate—in suits to establish, but that it evidences an estate in land in suits to cancel. It would seem desirable that all appeals concerning mortgages and deeds of trust be heard by one or the other of the mutually exclusive appellate courts, a result which could be effected by consistent definition of the interest evidenced by a deed of trust.

5.171(b). “Involvement” of Title to Real Estate

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

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

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

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

210. Under the dictionary meaning of “involvement” as “entanglement” or “complication,” it could be said that any judgment establishing an encumbrance “involves” the fee title. Although this rationale has been rejected by the majority of cases, it was the basis for jurisdiction in Toothaker v. Pleasant, 315 Mo. 1239, 1248, 288 S.W. 38, 42 (1926). The case concerned restrictive covenants which, said the court, “entangled” and “complicated” title. It has also been implied that if a decree purported to remove a cloud from plaintiffs’ title, jurisdiction would be in the supreme court. Superior Press Brick Co. v. City of St. Louis, 152 S.W.2d 178, 183 (Mo.), trans’d, 155 S.W.2d 290 (Ct. App. 1941) (suit to enjoin enforcement of zoning ordinance). Among the cases rejecting this argument are Pendleton v. Gundaker, 370 S.W.2d 720, 723 (Mo. Ct. App. 1963), trans’d, 381 S.W.2d 849 (Mo. 1964) (dictum); Chapman v. Chapman, 165 S.W. 221, 227 (Mo. Ct. App. 1917). In the latter case the court held title was not involved even though “a judgment awarding plaintiff alimony as a special lien . . . fastens a charge upon the husband’s interest in the property.”
dispute which party has title at the time the suit is filed. For example, in suits to quiet title, the parties both claim that title previously vested in them, offer proof of their title, and seek its adjudication. Appeals from judgments in quiet title actions are properly lodged in the supreme court. In condemnation actions, however, supreme court jurisdiction fails because title is conceded to be in the condemnee.

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

5.172. Application of the Nettleton Bank Formula: Suggested Approach

The test for involvement has been often quoted from Nettleton Bank v. Estate of McGauhey: "The judgment sought or rendered must be such as will determine title in some measure or degree adversely to one litigant and in favor of another, or, as some of the cases say, take title from one litigant and give it to another." 211

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

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

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211. § 5.140; McGrory v. Brinckmann, 379 S.W.2d 882 (Mo. 1964).
212. German Evangelical St. Marcus Congregation v. Archambault, 383 S.W.2d 704 (Mo. 1964). Defendants were concededly the owners of burial lots but the trial decree, granting the relief prayed, authorized abandonment of the cemetery. The supreme court had jurisdiction "in view of the object of the relief sought to terminate the interests of burial lot owners in the land in question." Id. at 706.
213. 318 Mo. 948, 953, 2 S.W.2d 771, 774 (en banc), trans'd from court of appeals, retrans'd, 222 Mo. App. 1084, 11 S.W.2d 1093 (1928). (Emphasis added.)
mony, and has in fact caused inconsistent results. In Ashauer v. Peer, the plaintiff sought a judgment determining the dividing line between two adjoining tracts of land, a determination requiring construction of the two deeds that had passed title to the tracts. The supreme court transferred the appeal, holding that the judgment only accomplished the removal of an ambiguity in description and the settling of the controversy as to the location of a boundary line. In effect, the parties disputed and sought adjudication of title to the strip of land between the lines claimed by the adverse parties. When such dispute of prior vesting of title is sought to be finally adjudicated, title is usually considered to be involved, because the judgment will directly “determine the title in some measure or degree adversely to one litigant and in favor of another.” However, in Ashauer the court denied jurisdiction on the basis of the second disjunctive because “the judgment did not take title from plaintiff and give it to [defendant] ... and this because there was never any title in plaintiff except to the land described in her deed, and that title was not molested. ... The only thing the judgment did was to settle the controversy between plaintiff and [defendant] ... as to what land was conveyed by their respective interest.” It is submitted that this is the precise procedure followed in actions to quiet title, which appeals are now accepted by the supreme court.

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

5.173. The Category of “Title to Real Estate”: An Appraisal

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

214. 346 Mo. 218, 139 S.W.2d 991 (1940), trans'd, 147 S.W.2d 144 (Ct. App. 1941).
215. Id. at 222-23, 139 S.W.2d at 992; see City of Marshfield v. Haggard, 300 S.W.2d 419 (Mo.), trans'd, 304 S.W.2d 662 (Ct. App. 1957); Brotherton v. City of Jackson, 385 S.W.2d 836 (Mo. Ct. App. 1965). But see Grimes v. Armstrong, 304 S.W.2d 703 (Mo. 1957).
216. Section 5.160. Garnett, Appellate Practice, Work of the Missouri Supreme Court for 1940, 6 Mo. L. Rev. 390, 394 (1941), indicates “that the court might well have sustained its jurisdiction upon the theory that the substantive effect of the trial court's decree was to quiet the title in accordance with the clarified description; but the court
of original appellate jurisdiction.\textsuperscript{217} By the nature of the categories which they selected—for example, felony rather than misdemeanor, and cases involving sums of money only above a specified “amount”—the drafters manifested an intention to accomplish the division on the basis of importance of cases.

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

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

\textsuperscript{217} See “Introduction,” part I, notes 12-18.

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

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

\textsuperscript{220} In a study commenting on the provision in the Illinois Constitution of 1870 confining jurisdiction of the supreme court to “cases in which a . . . freehold . . . is involved,” it was stated: “Assuming that the categories selected for Supreme Court review accurately reflected the appellate review needs of a predominately agricultural community, it is doubtful that they satisfy contemporary requirements.” \textit{A Study of the Illinois Supreme Court}, 15 U. Chi. L. Rev. 107, 110 (1947).
ment of several hundred dollars value is more important than a question whether a note for a personal debt for $14,000 was properly executed.

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

The cases have exhibited a gradual tendency toward restriction of supreme court jurisdiction. An early case holding title was involved in a trespass action because plaintiff’s right to recover depended on maintenance of his claim of title was expressly overruled two years later because plaintiff’s title could not be affected by the judgment. A line of decisions upholding supreme court jurisdiction of suits to enjoin threatened trespasses were overruled in 1922. The long line of cases holding that the supreme court had jurisdiction of appeals from ejectment actions was overruled in 1936 and affirmed en banc less than two years later. The condemnation cases particularly illustrate the evolution of restrictive application of the “involvement” rule. In 1930, Missouri Power & Light Co. v. Creed overruled the decisions holding that suits to determine only the

221. Fischer v. Johnson, 349 Mo. 443, 41 S.W. 203 (1897), trans'd, overruling Gray v. Worst, 129 Mo. 122, 31 S.W. 585 (1895).
222. Dillard v. Sanderson, 282 Mo. 436, 222 S.W. 766 (1920) (en banc), trans'd from court of appeals, retrans'd, 206 Mo. App. 217, 227 S.W. 658 (1921), overruling Ripkey v. Gresham, 279 Mo. 521, 214 S.W. 851 (1919) (injunction to restrain establishment of public road) and cases cited therein. This holding was reinforced by Oliver v. Wilhite, 329 Mo. 524, 45 S.W.2d 1083 (1932), trans'd from 41 S.W.2d 825 (Ct. App. 1931), retrans'd, 227 Mo. App. 538, 55 S.W.2d 491 (1932), in which the supreme court declined jurisdiction of an appeal from a judgment granting an injunction against enforcement of an easement across plaintiff’s land.
223. Ballenger v. Windes, 338 Mo. 1039, 93 S.W.2d 882, trans'd, 99 S.W.2d 158 (Ct. App. 1936), overruling Williams v. Maxwell, 82 S.W.2d 270 (Mo. 1935); Tooker v. Missouri Power & Light Co., 336 Mo. 592, 80 S.W.2d 691 (1935), trans'd from 63 S.W.2d 217 (Ct. App. 1933).
224. Gibbány v. Walker, 342 Mo. 156, 113 S.W.2d 792 (en banc), trans'd, 233 Mo. App. 489, 121 S.W.2d 517 (1938), upholding Ballenger v. Windes, supra note 223.
225. 325 Mo. 1194, 30 S.W.2d 605 (en banc), trans'd, 32 S.W.2d 783 (Ct. App. 1930).
amount of compensation in condemnation cases were properly appealable to the supreme court. Finally, in *City of St. Louis v. Butler Co.*, 226 in 1949, the supreme court eliminated virtually all condemnation cases from its "title to real estate" docket because of lack of a technical "dispute," notwithstanding that "a condemnation suit does take part (or sometimes all) of the landowner's title and gives it to the condemnor for just compensation." 227

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

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

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