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CHAPTER TWO

"the validity of a treaty or statute of the United States, or any authority exercised under the laws of the United States"

2.010. Introduction

Historically, the phrases "construction of the Constitution of the United States" appearing in clause one and "validity of a treaty or statute . . . or any authority exercised under the laws of the United States" appearing in clause two of article V, section three of the Missouri Constitution[1] can be traced to the language of the Federal Judiciary Act of 1789.[2] Functionally, both pertain to the jurisdictional concept of federal question.[3] However, the term "federal question" does not apply to Missouri Supreme Court appellate jurisdiction in the precise way it applies to federal court jurisdiction. Clauses one and two of article V, section three of the Missouri Constitution collectively circumscribe a narrower scope of jurisdiction than that invested in the federal courts.[4]

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1. Mo. Const. art. VI, § 12 (1875), as amended, § 5 (1884) which was the predecessor to Mo. Const. art. V, § 3, provided that the supreme court shall have exclusive appellate jurisdiction "in cases where the validity of a treaty or statute of or authority exercised under the United States is drawn in question . . . ." No case was found which indicated that the addition of the words "laws of" has had any effect on jurisdiction. See "Introduction," note 29 and accompanying text for a discussion of the history of this wording change.

2. Judiciary Act § 25, 1 Stat. 73, 85 (1789) provided:

> That a final judgment or decree in any suit, in the highest court of law or equity of a state in which a decision in the suit could be had, where is drawn in question the *validity of a treaty or statute of, or an authority exercised under the United States,* and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of such their validity; or where is drawn in question the *construction of any clause of the constitution,* or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the supreme court of the United States upon a writ of error . . . . (Emphasis added.)

3. The following cases indicate that "validity" language in the Missouri jurisdictional section was derived from the Federal Judiciary Act. United States *ex rel.* First Nat'l Bank v. Lufcy, 329 Mo. 1224, 49 S.W.2d 8 (1932); Beekman Lumber Co. v. Acme Harvester Co., 215 Mo. 221, 114 S.W. 1087 (1908) (en banc); Mitchell v. Joplin Nat'l Bank, 184 Mo. App. 483, 170 S.W. 674 (1914), *trans'd,* 201 S.W. 903 (Mo.), *retrans'd,* 200 Mo. App. 243, 204 S.W. 1125 (1918). See generally Hart & Wechsler, The Federal Courts and the Federal System 400 (1953).

4. McAllister v. St. Louis Merchants' Bridge Terminal Ry., 324 Mo. 1005, 25 S.W.2d 791 (1929); Mitchell v. Joplin Nat'l Bank, 201 S.W. 903 (Mo. 1918), *trans'd from*

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Article III, section two of the United States Constitution provides: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ." "Cases arising under" includes cases in which construction of the federal constitution, statutes or treaties is involved. Cases involving *construction* of the federal constitution are included in Missouri Supreme Court appellate jurisdiction by virtue of clause one of article V, section three.[5] But cases involving merely the construction of federal statutes or treaties are not included because clause two requires that the *validity* of the statutes or treaties be questioned. It has been suggested that inclusion of the word "validity" instead of "construction" in clause two cannot be regarded as accidental.[6] Therefore, clauses one and two of article V, section three give the Missouri Supreme Court original appellate jurisdiction over only the "federal questions" of construction of the federal constitution and the validity of federal treaties or statutes or any authority exercised under the laws of the United States.[7] This chapter, which discusses cases in clause two, is closely related to Chapter One, which discusses cases in clause one. For convenience, therefore, clause two cases will be termed "validity" and clause one cases will be termed "constitutional question."

2.020. Requirements for Presenting a Validity Question

To establish the existence of the "validity" issue on appeal, the appellate court will refer to the record of the trial court.[8] The record must show that

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184 Mo. App. 483, 170 S.W. 674 (1914), *retrans'd,* 200 Mo. App. 243, 204 S.W. 1125 (1918); Chastain v. Missouri, Kan. & Tex. Ry., 226 Mo. 94, 125 S.W. 1099 (1910), *trans'd,* 152 Mo. App. 478, 133 S.W. 853 (1911).

5. See Chapter One for a complete discussion of Missouri appellate jurisdiction in cases involving a construction of the state or federal constitution.

6. Whirlwind v. Von der Ahe, 67 Mo. App. 628 (1896), *trans'd, retrans'd by* supreme court, 73 Mo. App. 509 (1898).

7. Ackerman v. Globe-Democrat Publishing Co., 368 S.W.2d 469 (Mo. 1963); Irwin v. Globe-Democrat Co., 368 S.W.2d 452 (Mo. 1963); McAllister v. St. Louis Merchants' Bridge Terminal Ry., 324 Mo. 1005, 25 S.W.2d 791 (1929); Shewalter v. Missouri Pac. Ry., 152 Mo. 544, 54 S.W. 224 (1899) (en banc), *trans'd from* court of appeals, *retrans'd,* 84 Mo. App. 589 (1900); Vaughn v. Wabash R.R., 145 Mo. 57, 46 S.W. 952 (1898) (en banc), *trans'd,* 78 Mo. App. 639 (1899).

8. City of Louisiana v. Lang, 251 Mo. 664, 158 S.W. 1 (1913), *trans'd,* 181 Mo. App. 670, 164 S.W. 641 (1914); Missouri, Kan. & Tex. Ry. v. Smith, 154 Mo. 300, 55 S.W. 470 (1899) (en banc); Shewalter v. Missouri Pac. Ry., *supra* note 7; State *ex rel.* Pickwick Stage Lines, Inc. v. Barton, 222 Mo. App. 1236, 4 S.W.2d 852 (1928). For a complete discussion of the requirement that a constitutional question must affirmatively appear in the record, see § 1.020.

the issue was properly raised in the trial court,[9] that the trial court passed upon the issue[10] adversely to the party appealing[11] and that the issue has been preserved as error for review.[12] When these requirements are satisfied, the appellate court can conclude that the case involves a purported issue of the validity of a treaty, or federal statute or authority exercised under the laws of the United States.

2.030. Discretionary Standards for Limiting Supreme Court Jurisdiction

After the requirements have been satisfied, it must also be considered whether the supreme court will exercise jurisdiction over the particular issue raised. In "constitutional question" cases the court has required that the party raising the issue have standing to do so in the first instance,[13] and that the issue be substantial (not merely colorable[14]) and debatable.[15] Two early "validity" cases, *First Nat'l Bank v. Missouri Glass Co.*,[16] and *Fish v. Chicago, R.I. & P. Ry.*,[17] referred to the debatability standard developed

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9. City of Louisiana v. Lang, *supra* note 8; Shewalter v. Missouri Pac. Ry., *supra* note 7. It has also been held in accordance with the rule announced for constitutional questions (see § 1.021(a)) that issues not submitted in the original brief cannot be raised for the first time in a motion for rehearing after the opinion is handed down. Ackerman v. Globe-Democrat Publishing Co., 368 S.W.2d 469 (Mo. 1963); Irwin v. Globe-Democrat Publishing Co., 368 S.W.2d 452 (Mo. 1963).

10. Shewalter v. Missouri Pac. Ry., *supra* note 7; State *ex rel.* Pickwick Stage Lines, Inc. v. Barton, 222 Mo. App. 291, 4 S.W.2d 852 (1928). For a complete discussion of the requirement that the trial court must pass upon the constitutional question, see § 1.022.

11. Shewalter v. Missouri Pac. Ry., *supra* note 7. For a complete discussion of the requirement of a ruling adverse to appellant on the constitutional question, see § 1.023.

12. City of Louisiana v. Lang, 251 Mo. 664, 158 S.W. 1 (1913), *trans'd*, 181 Mo. App. 670, 164 S.W. 641 (1914); Missouri, Kan. & Tex. Ry. v. Smith, 154 Mo. 300, 55 S.W. 470 (1899) (en banc) (validity issue must be briefed on appeal); Gregory Bus Line, Inc. v. Stephans, 223 Mo. App. 1036, 15 S.W.2d 910 (1929) (validity issue omitted from motion for new trial). For a complete discussion of the requirement of preservation of a constitutional question, see § 1.024.

13. See § 1.031.

14. See § 1.032.

15. See § 1.033.

16. 243 Mo. 409, 147 S.W. 1030, *trans'd from* court of appeals, *retrans'd*, 169 Mo. App. 374, 152 S.W. 378 (1912) (validity of federal anti-trust law conclusively settled by United States Supreme Court).

17. 263 Mo. 106, 172 S.W. 340 (1914) (en banc). The defendant's answer questioned the constitutionality of the FELA amendment. The supreme court stated that this issue had been conclusively settled in a prior case and was therefore no longer debatable. However, the supreme court retained the appeal under an exception to the debatability doctrine; *i.e.*, the *Fish* appeal was pending when the issue of the constitutionality of the FELA amendment was conclusively settled. For a complete discussion of debatability, see § 1.033.

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in "constitutional question" cases. In debatability, an issue previously considered to the satisfaction of the court will no longer be a sufficient basis for supreme court jurisdiction. Although debatability has been the only standard borrowed from "constitutional question," there appears to be no obstacle to borrowing the standing and colorability standards for "validity" cases.[18]

2.040. THE VALIDITY-CONSTRUCTION DISTINCTION

2.041. *Validity of a Treaty*

To vest supreme court jurisdiction, the *validity* and not merely the *construction* of a treaty, must be in issue. In *Wyers v. Arnold*,[19] the issue was whether a treaty should be construed to supersede a Missouri statute fixing the time within which a will could be admitted to probate. Since the validity of the treaty was *conceded* by the parties, the supreme court had no "validity" jurisdiction.[20]

No Missouri case was found in which validity of a treaty was the basis for original appellate jurisdiction. Relatively few challenges to the validity of treaties are made in any forum, and those which are made would more likely be brought in federal than in state court. An illustration of the result if a treaty were challenged in Missouri courts is provided by *Missouri v. Holland*.[21] The state brought a bill in equity in federal court to prevent a federal game warden from enforcing the Migratory Bird Treaty Act and the regulations made by the Secretary of Agriculture pursuant to the act. The issue was whether the treaty and statute were void as an infringement of the rights reserved to the states by the tenth amendment. If *Holland* had been brought in a Missouri state court, the trial court would have construed that amendment to determine the validity of the treaty. An appeal might then have been taken to the supreme court on the basis of either clause one or clause two of article V, section three.

2.042. *Validity of a Statute of the United States*

To vest supreme court jurisdiction under the phrase "involve the validity of a statute of the United States," the *validity,* and not merely the *construc-*

18. In cases articulating jurisdictional difficulties, constitutional question cases outnumber validity cases 15 to 1. This disproportion may show that both the need and the opportunity to limit jurisdiction are more compelling in constitutional question cases than in validity cases. This may be the reason why the "standing" and "colorability" standards have not been used in validity cases.

19. 347 Mo. 413, 147 S.W.2d 644 (1941).

20. Supreme court jurisdiction, however, was based on the "amount in dispute."

21. 252 U.S. 416 (1920).

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tion of the statute, must be in issue.[22] In *Mitchell v. Joplin Nat'l Bank,*[23] an

22. If a case involves the *construction* and not the *validity* of the federal statute, the court of appeals has jurisdiction. Salzwedel v. Vassil, 347 S.W.2d 218 (Mo.), *trans'd,* 351 S.W.2d 829 (Ct. App. 1961) (contention that trial court abused discretion under federal statute); Service Purchasing Co. v. Brennan, 32 S.W.2d 81 (Mo. 1930), *trans'd,* 226 Mo. App. 110, 42 S.W.2d 39 (1931); Huckleberry v. Missouri Pac. R.R., 324 Mo. 1025, 26 S.W.2d 980 (1930) (issue whether violation of ICC regulations affords cause of action to anyone not engaged in interstate commerce); State v. Chicago, M. & St. P. Ry., 272 Mo. 520, 199 S.W. 121 (1917), *trans'd* (federal statute supplanting state statute); Kemper Mill & Elevator Co. v. Missouri Pac. Ry., 178 S.W. 502 (Mo. 1915), *trans'd,* 193 Mo. App. 466, 186 S.W. 8 (1916); Miller v. Connor, 250 Mo. 677, 157 S.W. 81, *trans'd from* court of appeals, *retrans'd,* 177 Mo. App. 630, 160 S.W. 582 (1913); Kettelhake v. American Car & Foundry Co., 243 Mo. 412, 147 S.W. 479 (1912), *trans'd,* 171 Mo. App. 528, 153 S.W. 552 (1913); Westmoreland Specialty Co. v. Missouri Glass Co., 243 Mo. 356, 147 S.W. 482, *trans'd,* 169 Mo. App. 368, 152 S.W. 387 (1912) (defense that plaintiff could not maintain suit because he violated Sherman anti-trust statute); Schwyhart v. Barrett, 223 Mo. 497, 122 S.W. 1049 (1909), *trans'd,* 145 Mo. App. 332, 130 S.W. 388 (1910); Robert C. White Live-Stock Comm'n v. Chicago, M. & St. P. Ry., 157 Mo. 518, 57 S.W. 1070 (1900), *trans'd from* court of appeals, *retrans'd,* 87 Mo. App. 330 (1901); Sound Inv. & Realty Co. v. Griffin, 205 S.W.2d 257 (Mo. Ct. App. 1947); Emory v. St. James Distillery, Inc., 143 S.W.2d 318 (Mo. Ct. App. 1940), *trans'd from* supreme court; State *ex rel.* Pickwick Stage Lines, Inc. v. Barton, 222 Mo. App. 1236, 4 S.W.2d 852 (1928); Miller v. Kansas City W.R.R., 180 Mo. App. 371, 168 S.W. 336 (1914); Applegate v. Travelers' Ins. Co., 153 Mo. App. 63, 132 S.W. 2 (1910); Bowman v. Strother, 144 Mo. App. 100, 128 S.W. 848 (1910), *trans'd from* supreme court; Lail v. Pacific Express Co., 81 Mo. App. 232 (1899); Whirlwind v. Von der Ahe, 67 Mo. App. 628 (1896), *trans'd, retrans'd by* supreme court, 73 Mo. App. 509 (1898) (historically, *Whirlwind* appears to be the first case to make the "construction validity" distinction).

The supreme court will transfer on the ground that only a *construction* is involved when an attempt is made to inject the issue of the *validity* of a statute by the use of an "if" contention. An example is Service Purchasing Co. v. Brennan, *supra,* in which the contention was that *if* the Bankruptcy Act was construed to hold conversion tantamount to wilful and malicious injury of property, then it was unconstitutional. For a complete discussion of analogous contentions concerning constitutional question, see § 1.022(c).

Construction and interpretation, although technically distinguishable, are used interchangeably by the courts. See § 1.010. If a case involves the *interpretation* and not the *validity* of the federal statute, the court of appeals has jurisdiction. Kansas City Terminal Ry. v. Manion, 290 S.W.2d 63 (Mo.), *trans'd,* 297 S.W.2d 31 (Ct. App. 1956); Chastain v. Missouri, Kan. & Tex. Ry., 226 Mo. 94, 125 S.W. 1099 (1910), *trans'd,* 152 Mo. App. 478, 133 S.W. 853 (1911).

Although application may be distinguished from construction (see § 1.010), the court of appeals still has jurisdiction when a case involves the *application* and not the *validity* of a federal statute. Adams Dairy Co. v. Dairy Employees Union, 339 S.W.2d 811 (Mo. 1960); Swift & Co. v. Doe, 311 S.W.2d 15 (Mo.), *trans'd,* 315 S.W.2d 465 (Ct. App. 1958); Pashea v. Terminal R.R. Ass'n, 350 Mo. 132, 165 S.W.2d 691 (1942); McAllister v. St. Louis Merchants' Bridge Terminal Ry., 324 Mo. 1005, 25 S.W.2d 791 (1929); Mitchell v. Joplin Nat'l Bank, 201 S.W. 903 (Mo. 1918), *trans'd from* 184 Mo. App. 483, 170 S.W. 674 (1914), *retrans'd,* 200 Mo. App. 243, 204 S.W. 1125 (1918); Carlisle v. Missouri Pac. Ry., 168 Mo. 652, 68 S.W. 898 (1902), *trans'd,* 97 Mo. App. 571, 71 S.W. 475 (1903); Vaughn v. Wabash R.R., 145 Mo. 57, 46 S.W. 952 (1898)

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action against a bank to recover double the amount alleged to have been collected as usurious interest, the petition was based on two federal statutes. On appeal, the bank's assignments of error were that the evidence did not warrant a finding (as required by statute) that it had knowingly collected usurious interest, and furthermore, that recovery was barred by the statute of limitations. Because these issues did not question the validity of the statutes but required only their construction and application to the facts of the case, the supreme court had no jurisdiction.

If the bank had contended that the federal statutes violated the federal constitution, the trial court would have had to construe both the statutes and the constitution. An appeal could then have been taken to the supreme court on either of two theories: "validity" or "constitutional question."[24]

2.043. *Validity of Authority Exercised Under the Laws of the United States*

To vest jurisdiction under the phrase "validity of any authority exercised under the laws of the United States" three requirements must be fulfilled. First, the authority must have been exercised.[25] In *Kansas City Terminal Ry. v. Manion*[26] a labor union threatened to strike against the railroad.

(en banc), *trans'd,* 78 Mo. App. 639 (1899). If the statute's validity is challenged, the appeal lies to the supreme court. Fish v. Chicago, R.I. & P. Ry., 263 Mo. 106, 172 S.W. 340 (1914) (en banc).

Although the jurisdictional distinction between validity and construction is well settled, the early case of Central Nat'l Bank v. Haseltine, 73 Mo. App. 60 (1898), *trans'd,* 155 Mo. 58, 55 S.W. 1015 (1900), shows confusion. In an action on a note, the defense was that the note provided for usurious interest contrary to a federal statute. The court of appeals transferred the case to the supreme court on the ground that this question involved a construction of a federal statute. Clearly, jurisdiction of this case was in the court of appeals if the construction and not the validity of a federal statute was in issue. Although the supreme court erred in stating that the court of appeals had transferred the case because an authority exercised under the United States was drawn into question, it properly retained jurisdiction because this issue was, in fact, present. See § 2.043.

23. 201 S.W. 903 (Mo. 1918), *trans'd from* 184 Mo. App. 483, 170 S.W. 674 (1914), *retrans'd,* 200 Mo. App. 243, 204 S.W. 1125 (1918).

24. See Service Purchasing Co. v. Brennan, 32 S.W.2d 81 (Mo. 1930), *trans'd,* 226 Mo. App. 110, 42 S.W.2d 39 (1931); Fish v. Chicago, R.I. & P. Ry., 263 Mo. 106, 172 S.W. 340 (1914) (en banc).

25. Salzwedel v. Vassil, 347 S.W.2d 218 (Mo.), *trans'd,* 351 S.W.2d 829 (Ct. App. 1961); Kansas City Terminal Ry. v. Manion, 290 S.W.2d 63 (Mo.), *trans'd,* 297 S.W.2d 31 (Ct. App. 1956); Kettelhake v. American Car & Foundry Co., 243 Mo. 412, 147 S.W. 479 (1912), *trans'd,* 171 Mo. App. 528, 153 S.W. 552 (1913); Vaughn v. Wabash R.R., 145 Mo. 57, 46 S.W. 952 (1898) (en banc), *trans'd,* 78 Mo. App. 639 (1899); Sound Inv. & Realty Co. v. Griffin, 205 S.W.2d 257 (Mo. Ct. App. 1947).

26. 290 S.W.2d 63 (Mo.), *trans'd,* 297 S.W.2d 31 (Ct. App. 1956).

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Under the Railroad Labor Act, the National Mediation Board was consulted, but before it could act the railroad procured an injunction in state court to prevent the strike. The union appealed the granting of the injunction to the supreme court, which transferred the case because the Board had not had an opportunity to act on the dispute.[27]

The second requirement—that the act in question must have been performed by "an officer or other agent of the United States"[28]—has caused no jurisdictional problems. The issue of whether that act was in fact performed by an agent of the federal government has not been raised simply because the "validity" cases generally involve acts of courts or agencies clearly federal in character. The cases which have articulated the presence of such a requirement have been resolved on other grounds.[29]

Third, the *validity* of the exercised authority[30] and not merely its *effect* must be questioned. In *Beekman Lumber Co. v. Acme Harvester Co.*,[31] a federal court in a bankruptcy proceeding had enjoined Beekman from prosecuting its claim in another court. Beekman, nevertheless, proceeded with its state court suit and Acme unsuccessfully pleaded the injunction as a defense. The Missouri Supreme Court held that it had jurisdiction over the appeal on the ground that the *validity* of the federal court injunction was in issue.[32]

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27. A striking similarity exists between the necessity for the exercise of authority and the colorability standard applied to cases involving a constitutional question; if one applies colorability to "validity of authority," the facts must rationally connect to the contested validity of authority before the supreme court can exercise jurisdiction. Therefore, in a case like Kansas City Terminal Ry. v. Manion, *supra* note 26, in which the undisputed facts show that the National Mediation Board did not even attempt to exercise authority, it would be impossible to question the validity of authority. For a complete discussion of colorability, see § 1.032.

28. Sound Inv. & Realty Co. v. Griffin, 205 S.W.2d 257, 260 (Mo. Ct. App. 1947).

29. Salzwedel v. Vassil, 347 S.W.2d 218 (Mo.), *trans'd,* 351 S.W.2d 829 (Ct. App. 1961) (invocation of act protecting military personnel from suit did not involve exercise of authority); Kettelhake v. American Car & Foundry Co., 243 Mo. 412, 147 S.W. 479 (1912), *trans'd,* 171 Mo. App. 528, 153 S.W. 552 (1913) (denial of removal by federal court a non-exercise of authority); Sound Inv. & Realty Co. v. Griffin, *supra* note 28 (issue was construction of statute which delegated to price administrator the authority to regulate rent).

30. See, *e.g.,* Adams Dairy Co. v. Dairy Employees Union, 339 S.W.2d 811 (Mo. 1960); Swift & Co. v. Doe, 311 S.W.2d 15 (Mo.), *trans'd,* 315 S.W.2d 465 (Ct. App. 1958); Pashea v. Terminal R.R. Ass'n, 350 Mo. 132, 165 S.W.2d 691 (1942); McAllister v. St. Louis Merchants' Bridge Terminal Ry., 324 Mo. 1005, 25 S.W.2d 791 (1930); Schwyhart v. Barrett, 223 Mo. 497, 122 S.W. 1049 (1909), *trans'd,* 145 Mo. App. 332, 130 S.W. 388 (1910).

31. 215 Mo. 221, 114 S.W. 1087 (1908) (en banc).

32. *Accord,* United States *ex rel.* First Nat'l Bank v. Lufcy, 329 Mo. 1224, 49 S.W.2d 8 (1932).

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In *Bostian v. Milens,*[33] Eichenberg had made a purported renunciation of all interest in the estate of her deceased brother. A few months later Eichenberg was declared bankrupt and the referee held the renunciation void. This holding was reversed by the Eighth Circuit, which held that the validity of the renunciation was a question of state law which could not be determined by a bankruptcy court in a summary proceeding.[34] Thereafter the trustee in bankruptcy for Eichenberg successfully sued in state court to cancel the renunciation. Several defendants appealed from the cancellation, including some who had not been parties to the previous appeal in the Eighth Circuit. The respondent trustee contended that the Eighth Circuit's holding had been ineffective to those parties not participating in the appeal and they therefore remained bound by the decision of the referee. The *effect* of the Eighth Circuit's decision on some of the parties was at issue. But because no one questioned the jurisdiction or authority of the Eighth Circuit, nor the *validity* of its decision, the case was transferred.[35]

While the supreme court normally does not have jurisdiction if the only issue is the *construction* of a statute, if the case involves the "validity of authority" it will have jurisdiction even though the "validity" issue requires

33. 352 Mo. 153, 188 S.W.2d 945 (1945), *trans'd,* 239 Mo. App. 555, 193 S.W.2d 797 (1946).

34. Milens v. Bostian, 139 F.2d 282 (8th Cir. 1943). The Eighth Circuit had held that the court of bankruptcy *lacked summary jurisdiction* to hold the renunciation void, but expressly reversed the judgment only *"in so far* as it affect[ed] the appellants."

35. Some of the parties in the state proceeding were not among the appellants before the Eighth Circuit; presumably it was therefore arguable that the Eighth Circuit holding was not binding as to these parties, which is apparently just what the trustee contended at some point in the state proceeding. If this argument were made, it would allow these parties to raise in state courts a question of jurisdiction or authority of the bankruptcy court. This would involve the validity of authority exercised by the federal court and this issue, if raised in the trial court and preserved for appeal, would have vested jurisdiction in the supreme court. However, the supreme court did not say whether the trustee had made this contention in the trial court, and if so, whether the defendants in response challenged the authority of the bankruptcy court, or whether the trustee made the contention only on appeal in connection with the issue of the supreme court's jurisdiction.

The supreme court's holding, in so far as it refers to the significance of the Eighth Circuit's holding appears to establish a logical distinction between "effect" and "validity." However, the court's analysis is incomplete because of its failure to decide whether the issue of the jurisdiction of the bankruptcy court was raised in the trial court.

Bostian v. Milens, 352 Mo. 153, 188 S.W.2d 945 (1945), *trans'd,* 239 Mo. App. 555, 193 S.W.2d 797 (1946), distinguished Beekman Lumber Co. v. Acme Harvester Co., 215 Mo. 221, 114 S.W. 1087 (1908) (en banc), and United States *ex rel.* First Nat'l Bank v. Lufcy, 329 Mo. 1224, 49 S.W.2d 8 (1932), by saying that the supreme court's jurisdiction in those cases was based on the issues of the *validity* of the federal court's decision while the only issue in *Bostian* was the *effect* to be given to exercised federal authority.

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only the construction of a statute. In *First Nat'l Bank v. American Nat'l Bank*,[36] the question was whether the National Banking Act granted a bank the power to bind itself to a third person to pay a draft on one of the bank's customers. Supreme court jurisdiction was based on the issue of validity of the authority exercised under the Banking Act, although solution of this issue required only a construction of the act.[37]

2.050. CONCLUSION

Supreme court jurisdiction has never been expressly based on validity of a treaty. However, if a treaty were challenged in state court as a violation of the federal constitution, the case could probably be appealed to the supreme court on either of two theories: "constitutional question" or "validity."[38]

"Validity" of a federal statute has been the source of a large number of transfers, principally because of the "validity-construction" distinction. In all cases expressly adopting "validity" as the basis for jurisdiction, the validity of the federal statute has been challenged because of an alleged violation of the federal constitution. Jurisdiction in these cases could probably have been also based on "constitutional question."

Hypothetically there still remain situations in which a case may involve the validity of a federal statute without involving the construction of the federal constitution. When a party seeks relief on the basis of a federal statute, and his opponent responds that the statute has been impliedly repealed by subsequent legislation, the issue requires no more than a construction of the statutes. It is unclear whether the supreme court would consider this as an issue of the "validity" of the earlier statute and retain jurisdiction; if it did, its jurisdiction would be expanded beyond the base of "constitutional question." There is also a remote possibility that the validity of a statute will be challenged in state court by alleging defects in the formal enactment of the statute, which issue might not involve a construction of constitutional prescriptions.[39] However, until one of these possibilities material-

36. 173 Mo. 153, 72 S.W. 1059 (1903), *trans'd from* courts of appeals.

37. *Accord*, Central Nat'l Bank v. Haseltine, 155 Mo. 58, 55 S.W. 1015 (1900), *trans'd from* 73 Mo. App. 60 (1898).

38. The treaty might also be challenged on the ground of an alleged defect in the process of ratification, but the possibility that this would come up in state court is even more remote than that of a challenge of unconstitutionality. For a discussion of federal jurisdiction based on treaties, see generally Annot., 14 A.L.R.2d 992 (1950).

39. Eber Bros. Wine & Liquor Corp. v. United States, 337 F.2d 624 (Ct. Cl. 1964), raised an issue as to the formalities by which bills are passed. However, resolution of the issue necessitated construction of the constitutional provisions relating to exercise of the president's veto power, which indicates further the improbability of a case in state court concerning the passage of legislation arising without involvement of a constitutional question.

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izes, the phrase "validity of a federal statute" will not increase the supreme court's jurisdiction beyond the scope of jurisdiction already vested under "constitutional question."

Of the three bases in clause two for supreme court appellate jurisdiction, "validity of authority" appears to be the only one that has given the supreme court jurisdiction of any cases it could not have heard on the basis of "constitutional question." It is also the most complicated of the three bases, and has seldom been successfully employed. Its inclusion in the 1875 constitution was designed to provide maximum protection for federal officers or agents;[40] if in fact there was some reason in the post-Civil War period why the exercise of supreme court jurisdiction was better adapted to this purpose, it is doubtful that this reason exists today.

The net effect of clause two is far from satisfying. "Validity" of a treaty has never been used. "Validity" of a federal statute has led to many transfers and even if "validity" is correctly challenged, most appeals could be taken to the supreme court under "constitutional question." Under "validity" of authority the determination of jurisdiction is more complicated than deciding the case on its merits.[41] In total, any gain contemplated by the inclusion of the "validity" clause in the constitution has been overshadowed by the jurisdictional problems which it has created.

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40. Kettelhake v. American Car & Foundry Co., 243 Mo. 412, 147 S.W. 479 (1912), *trans'd*, 171 Mo. App. 528, 153 S.W. 552 (1913).

41. A proposal which would have deleted this phrase from clause two was rejected at the constitutional convention. PROP. No. 274, § 4, PROPOSALS OF THE MISSOURI CONSTITUTIONAL CONVENTION 1943-1944.

https://openscholarship.wustl.edu/law_lawreview/vol1964/iss4/4