

## CHAPTER ONE

### *"cases involving the construction of the Constitution of the United States or of this state"*

#### 1.010. INTRODUCTION

When a case involves a construction of the state or federal constitution, the appeal must be taken directly to the supreme court.<sup>1</sup> Before considering the cases, a preliminary discussion of the phrase "construction of the constitution" is necessary. "Construction" may be technically distinguished from "interpretation"<sup>2</sup> but in practice the courts use these terms interchangeably.<sup>3</sup> To the courts, "the term [construction] signifies determining the meaning and proper effect of language by a consideration of the subject-matter and attendant circumstances in connection with the words employed."<sup>4</sup> Therefore, the process of construction includes but does not end with the interpretation of the express language of a provision, since the court looks to the accompanying circumstances as well as the express lan-

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1. Mo. CONST. art. V, § 3. A case survey indicates that litigants find this path to the supreme court far from clear. For example, of the thirty-one 1963-1964 appellate opinions considering whether supreme court jurisdiction could be based on a constitutional question, in only twelve was the answer affirmative; two were retained by the supreme court on other grounds; thirteen were transferred from the supreme court to the court of appeals for lack of jurisdiction; and in four others the court of appeals, unconvinced that a constitutional question was involved, retained jurisdiction.

2. See CRAWFORD, *THE CONSTRUCTION OF STATUTES* § 157 (1940): "Construction, however, to be technically correct, is the drawing of conclusions with respect to subjects that are beyond the direct expression of the text, from elements known and given in the text, while interpretation is the process of discovering the true meaning of the language used." Although this statement was made in regard to statutes, it could also be validly applied to constitutional provisions. *Contra*, 2 SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION* § 4506 (3d ed. Horack 1943). In this section, Sutherland contends that the distinction between construction and interpretation is erroneous.

3. *Ibid.*; NUTTING & ELLIOT, *CASES ON LEGISLATION* 232 (2d ed. 1955); see Kelly v. Howard, 233 Mo. App. 474, 123 S.W.2d 584 (1938); First Nat'l Bank v. Foster, 271 S.W. 536 (Mo. Ct. App. 1925).

4. Dorrance v. Dorrance, 242 Mo. 625, 644, 148 S.W. 94, 98 (1912) (en banc). This definition has been consistently followed. *E.g.*, State v. Harris, 321 S.W.2d 468 (Mo. 1959) (en banc) (dissenting opinion), *trans'd from* 313 S.W.2d 219 (Ct. App. 1958), *retrans'd*, 325 S.W.2d 352 (Ct. App. 1959); E. B. Jones Motor Co. v. Industrial Comm'n, 298 S.W.2d 407 (Mo.), *trans'd*, 305 S.W.2d 889 (Ct. App. 1957); Wolf v. Hartford Fire Ins. Co., 304 Mo. 459, 263 S.W. 846 (1924) (en banc), *trans'd*, 219 Mo. App. 307, 269 S.W. 701 (1925); City of Olivette v. Graeler, 329 S.W.2d 275 (Mo. Ct. App. 1959), *trans'd*, 338 S.W.2d 827 (Mo. 1960); Kircher v. Evers, 210 S.W. 917 (Mo. Ct. App. 1919), *trans'd*, 238 S.W. 1086 (Mo. 1922), *retrans'd*, 247 S.W. 251 (Ct. App. 1923).

guage.<sup>5</sup> This subtle distinction has been made in dicta but has never been the basis for a transfer to the court of appeals.<sup>6</sup>

The courts have attempted to distinguish an *application* from a *construction* of the constitution; when the conclusion is reached that only the former is involved, the supreme court has no jurisdiction.<sup>7</sup> "Construction" may be defined as the ascertainment of the meaning attached by the drafters to the provision, while "application" is the determination whether the facts of a case are within the scope of this meaning.<sup>8</sup> However, it is not always easy to distinguish between the ascertainment of the drafters' intent and the application of the constitutional provision.<sup>9</sup>

A problem exists when the meaning of a constitutional provision is disputed but the constitutional provision appears on its face to be clear and unambiguous. The courts, desiring to limit the supreme court's jurisdiction, conclude that no construction of the constitution is involved in this situation. In such cases the courts have overlooked the fact that to ascertain the drafters' meaning, a construction is required, and that without reading and

5. *State v. Harris*, *supra* note 4; *Dorrance v. Dorrance*, *supra* note 4.

6. *Ibid.*

7. *Roseberry v. Crump*, 345 S.W.2d 117 (Mo.), *trans'd*, 353 S.W.2d 825 (Ct. App. 1961); *Swenson v. Swenson*, 299 S.W.2d 523 (Mo. 1957), *trans'd*, 313 S.W.2d 770 (Ct. App. 1958); *E. B. Jones Motor Co. v. Industrial Comm'n*, 298 S.W.2d 407 (Mo.), *trans'd*, 305 S.W.2d 889 (Ct. App. 1957); *Nelson v. Watkinson*, 260 S.W.2d 1 (Mo.), *trans'd*, 262 S.W.2d 872 (Ct. App. 1953); *Communications Workers v. Brown*, 247 S.W.2d 815 (Mo.), *trans'd*, 252 S.W.2d 103 (Ct. App. 1952); *Rourke v. Holmes St. Ry.*, 181 S.W. 77 (Mo. 1915) (en banc) (for full history of this case see "Introduction," note 36); *McClard v. Morrison*, 281 S.W.2d 592 (Mo. Ct. App. 1955), *trans'd from* 273 S.W.2d 225 (Mo. 1954); *Austin W. Road Mach. Co. v. City of New Madrid*, 185 S.W.2d 850 (Mo. Ct. App. 1945); *Kelly v. Howard*, 233 Mo. App. 474, 123 S.W.2d 584 (1938); *Heorath v. Halpin*, 227 Mo. App. 984, 60 S.W.2d. 744 (1933); see cases cited note 11 *infra*.

The first case to suggest the "construction-application" distinction was *State v. Metcalf*, 130 Mo. 505, 32 S.W. 993 (Mo. 1895), *trans'd from* court of appeals, *retrans'd*, an action on an indictment for keeping a common gaming house. The defendants appealed to the court of appeals, which affirmed the conviction. On motion for rehearing, the case was transferred to the supreme court on the ground that a constitutional question was involved as to the boundary line of Missouri. The supreme court, in retransferring, held that:

The fact that the constitution of this state would have to be consulted like any other instrument of writing in order to determine the boundary line of this state or a county thereof, would not involve a constitutional question, any more than would such a question be involved were it to become necessary to consult a statute of this state in reference to such boundary. *Id.* at 506-07, 32 S.W. at 993.

8. CRAWFORD, *THE CONSTRUCTION OF STATUTES* § 173 (1940).

9. *Ibid.*; *Thunder Oil Co. v. City of Sunset Hills*, 349 S.W.2d 82 (Mo. 1961) (en banc), illustrates the court's awareness that the distinction is troublesome. The trouble is due to the fact that this "distinction" is not really a distinction; that is, it is impossible to *apply* the "meaning" of the constitutional language to the facts of the case, without first *determining* the "meaning."

seeking to understand the language, it would be impossible to determine whether the provision had more than one meaning or any meaning at all.<sup>10</sup>

When the litigants do not challenge the meaning of the constitutional provision, the appellate courts conclude that only an "application of the constitution is involved."<sup>11</sup> In theory the drafters' meaning can be applied to the facts only after the constitutional provision has been construed to

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10. CRAWFORD, *THE CONSTRUCTION OF STATUTES* § 174 (1940); 2 SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION* § 4502 (3d ed. Horack 1943). The Missouri courts have not adopted this theory, but have held that it is only when a constitutional provision is not clear that resort must be had to construction. *E. B. Jones Motor Co. v. Industrial Comm'n*, 298 S.W.2d 407 (Mo.), *trans'd*, 305 S.W.2d 889 (Ct. App. 1957); *Nelson v. Watkinson*, 260 S.W.2d 1 (Mo.), *trans'd*, 262 S.W.2d 872 (Ct. App. 1953); *City of Olivette v. Graeler*, 329 S.W.2d 275 (Mo. Ct. App. 1959), *trans'd*, 338 S.W.2d 827 (Mo. 1960); *State v. Day-Brite Lighting, Inc.*, 220 S.W.2d 782 (Mo. Ct. App. 1949), *trans'd from supreme court*. This rationale is related to the "debatability" doctrine (§ 1.033), which holds that although the meaning of the constitution is challenged, if the issue has previously been ruled on by the court, it will not be considered as a constitutional issue on which jurisdiction may be predicated. For example, in *Concrete Eng'r Co. v. Grande Bldg. Co.*, 230 Mo. App. 443, 86 S.W.2d 595 (1935), the court held that appellant's constitutional contention was no longer debatable, having previously been fully considered by the supreme court; the court viewed the question as requiring the application and not the construction of the constitution. See generally *State ex rel. Doniphan Tel. Co. v. Public Serv. Comm'n*, 369 S.W.2d 572 (Mo. 1963), *trans'd*, 377 S.W.2d 469 (Ct. App. 1964); *Thunder Oil Co. v. City of Sunset Hills*, *supra* note 9.

11. The courts distinguish a *construction* from an *application* of the full faith and credit clause of the federal constitution. *Roseberry v. Crump*, 345 S.W.2d 117 (Mo.), *trans'd*, 353 S.W.2d 825 (Ct. App. 1961); *Kellogg v. National Protection Ins. Co.*, 347 Mo. 553, 148 S.W.2d 751, *trans'd*, 236 Mo. App. 837, 155 S.W.2d 512 (1941); *Ragsdale v. Brotherhood of Ry. Trainmen*, 147 S.W.2d 601 (Mo.), *trans'd*, 157 S.W.2d 785 (Ct. App. 1941); *Esmar v. Haeussler*, 341 Mo. 33, 106 S.W.2d 412 (1937), *trans'd*, 234 Mo. App. 217, 115 S.W.2d 54 (1938); *Early v. Knights of the Maccabees of the World*, 48 S.W.2d 890 (Mo. 1932), *trans'd*, 57 S.W.2d 748 (Ct. App. 1933); *Zach v. Fidelity & Cas. Co.*, 302 Mo. 1, 257 S.W. 124 (1923), *trans'd*, 272 S.W. 995 (Ct. App. 1925); *Carey v. Schmeltz*, 221 Mo. 132, 119 S.W. 946 (1909), *trans'd*. In *Roseberry v. Crump*, *supra*, the wife filed for divorce in Kansas. The husband, personally served, did not appear at the proceedings. After receiving the Kansas divorce and alimony award, the wife filed a verified petition in Missouri on the foreign judgment, seeking to have a general execution and garnishment process issued against her ex-husband. He filed motions to quash the execution and garnishment and to dismiss the petition, alleging the invalidity of the judgment for lack of jurisdiction over the subject-matter and over his person and for gross fraud in procuring the judgment. The circuit court declared the alimony provision void and invalidated the general execution and garnishment. The ex-wife appealed to the supreme court alleging that the lower court erred in refusing to give full faith and credit to the Kansas judgment. The supreme court, in transferring, held that since there was no dispute or controversy as to the meaning of the full faith and credit clause, a simple application of that clause was involved because once the validity or invalidity of the Kansas judgment was determined, the applicability or inapplicability of the full faith and credit clause followed as a matter of course, without any need for construction. See also § 3.030.

determine that meaning.<sup>12</sup> Therefore, the courts should conclude that the case *does* involve a construction of the constitution, but that the construction was not contested and therefore was not an *issue* on which supreme court jurisdiction could be predicated. Although both conclusions would equally restrict supreme court jurisdiction, the latter would be more informative than the mere statement that the case involves only “an application of the constitution.”

The Missouri Constitution, by enumerating nine categories of original supreme court appellate jurisdiction,<sup>13</sup> has excluded by omission cases involving the construction of a legislative act<sup>14</sup> or constitution of a sister state.<sup>15</sup> Appeals in such cases are heard by the courts of appeals.

The purpose of this chapter is to present a systematic approach to the “cases involving a construction of the constitution.” The analysis divides into a discussion of four requisites for presenting a constitutional question and three discretionary standards by which supreme court jurisdiction is limited. First, the constitutional question must be properly raised by presenting the issue at the first available opportunity, specifying the article and section number of the constitutional provision invoked and stating the facts which support the contention. Second, the trial court must rule upon the constitutional question. Third, this ruling must be adverse to the party appealing; and fourth, the constitutional question must be preserved for appellate review. When these four requirements have been met, there is a *purported* constitutional question for consideration by the supreme court.

If this were all that were necessary for an appeal to lie to the supreme court, all cases could be manipulated by litigants to vest jurisdiction in that court on the strength of a purported constitutional question. Therefore, the appellate courts have developed three discretionary standards to limit supreme court jurisdiction to those cases in which there is an actual constitu-

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12. CRAWFORD, THE CONSTRUCTION OF STATUTES § 174 (1940).

13. MO. CONST. art. V, § 3.

14. The courts of appeals have jurisdiction to construe statutes whenever necessary to the decision of an appeal within their jurisdiction. State *ex rel.* Markwell v. Colt, 355 Mo. 55, 194 S.W.2d 1021 (1946), *trans'd*, 199 S.W.2d 412 (Ct. App. 1947); Jacoby v. Missouri Valley Drainage Dist., 349 Mo. 818, 163 S.W.2d 930 (1942) (en banc); Fischbach Brewing Co. v. City of St. Louis, 337 Mo. 1044, 87 S.W.2d 648 (1935), *trans'd*, 231 Mo. App. 793, 95 S.W.2d 335 (1936); Mellon v. Stockton & Lampkin, 326 Mo. 129, 30 S.W.2d 974 (1930), *trans'd from* court of appeals, *retrans'd*, 225 Mo. App. 122, 35 S.W.2d 612 (1931); Stock v. Schloman, 322 Mo. 1209, 18 S.W.2d 428 (1929), *trans'd*, 226 Mo. App. 234, 42 S.W.2d 61 (1930). Therefore, something more than the construction of a statute is required before the supreme court may hear a case not otherwise within its jurisdiction. State *ex rel.* Highway Comm'n v. McDowell, 236 Mo. App. 304, 152 S.W.2d 223 (1941).

15. Miller v. Kansas City W. Ry., 180 Mo. App. 371, 168 S.W. 336 (1914).

tional issue open for consideration. The first standard requires the litigant who raised the purported constitutional question to have had standing to do so in the trial court. The second requires that the constitutional question be real and substantial and not merely colorable. The third requires that the constitutional question be open for debate and not a settled issue. When the four requirements for presentment have been satisfied and the purported constitutional contention has not been excluded from supreme court jurisdiction by one of the three discretionary standards, an appellate court will conclude that the case involves a construction of the constitution.

Cases involving a construction of the constitution fall into two recurring patterns: those in which a statute, ordinance or city charter is alleged to contravene the constitution; and those in which the appellant claims that his constitutional rights or privileges have been infringed by an official act or omission. Cases of the first type may be illustrated by *Gem Stores, Inc. v. O'Brien*,<sup>16</sup> an action for a declaratory judgment to determine the validity of a Sunday sales law. In his petition, the plaintiff contended that the Missouri statute violated the fourteenth amendment of the United States Constitution and article I, sections two and ten of the Missouri Constitution in that:

‘The act denies to appellants due process of law and equal rights and opportunity under the law because it bears no valid relationship to the only constitutional basis for the exercise of the police power to regulate the Sunday activity of a lawful and harmless business, that is, the state’s objective to achieve a day of rest and tranquility for the general good of mankind.’<sup>17</sup>

After the trial court had construed these provisions to determine the constitutionality of the sales law, the plaintiff appealed to the supreme court, claiming that the trial court erred in upholding the statute.

Cases of the second pattern, in which an official act or omission is claimed to invade a party’s constitutional rights, may be illustrated by *State v. Harris*,<sup>18</sup> a criminal prosecution for possession of lottery tickets. Before trial, Harris filed a motion to suppress the tickets which were to be offered as evidence on the ground that they were obtained by an unlawful search and seizure, in violation of his rights guaranteed by article I, sections fifteen and nineteen of the Missouri Constitution. The trial court, in overruling Harris’ motion to suppress, construed the constitutional provisions in order

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16. 374 S.W.2d 109 (Mo. 1963) (en banc).

17. *Id.* at 113.

18. 313 S.W.2d 219 (Mo. Ct. App. 1958), *trans’d*, 321 S.W.2d 468 (Mo.) (en banc), *retrans’d*, 325 S.W.2d 352 (Ct. App. 1959). This case was retransferred because the issue was held to be no longer debatable (see § 1.033).

to determine whether the search and seizure was indeed illegal. Upon conviction, the defendant appealed to the court of appeals, alleging that the trial court incorrectly construed the provisions. That court transferred the case to the supreme court.

Although the cases can be categorized into two identifiable patterns, they all raise the issue of the correctness of a trial court's construction of the constitution. Therefore, they all must satisfy the same basic requirements and are subject to the same discretionary standards.

#### 1.020. REQUIREMENTS FOR PRESENTING A CONSTITUTIONAL QUESTION

The appellate court can ascertain its jurisdiction only after a study of the trial record.<sup>19</sup> Therefore, the focus of this section is on the record, to determine when a constitutional question was properly raised in the trial court, passed on adversely to the party appealing and properly preserved for appellate review. When these requirements have been satisfied, a purported constitutional question is held to exist.<sup>20</sup>

#### 1.021. *The Constitutional Question Must Be Properly Raised*

Before the supreme court will exercise original appellate jurisdiction based on a constitutional issue, the meaning of some constitutional provision must be disputed. To properly raise this issue, a party must present the constitutional question at the first available opportunity, specify the provision of the constitution allegedly violated and state the facts which require a construction of the constitution.

19. *E.g.*, Record Newspaper Co. v. Industrial Comm'n, 340 S.W.2d 613 (Mo. 1960), *trans'd*; Aufderheide v. Polar Wave Ice & Fuel Co., 319 Mo. 337, 4 S.W.2d 776 (1928) (en banc); Taylor v. St. Louis Merchants' Bridge Terminal Ry., 207 Mo. 495, 105 S.W. 740 (1907); Holland v. Depriest, 130 Mo. 89, 31 S.W. 928 (1895), *trans'd from* 56 Mo. App. 513 (1894), *retrans'd*, 65 Mo. App. 329 (1896); Bennet v. Missouri Pac. Ry., 105 Mo. 642, 16 S.W. 947 (1891), *trans'd*; City of St. Louis v. Stenson, 333 S.W.2d 529 (Mo. Ct. App. 1960).

20. See Luttrell v. Highway Comm'n, 367 S.W.2d 615 (Mo. 1963), *trans'd*, 379 S.W.2d 137 (Ct. App. 1964); Taylor v. St. Louis Merchants' Bridge Terminal Ry., *supra* note 19; Callahan v. Connecticut Gen. Life Ins. Co., 201 S.W.2d 406 (Mo. Ct. App.), *trans'd*, 357 Mo. 187, 207 S.W.2d 279 (1947); Fetter v. City of Richmond, 132 S.W.2d 671 (Mo. Ct. App. 1939), *trans'd*, 346 Mo. 431, 142 S.W.2d 6 (1940); Rechow v. Bankers' Life Co., 58 S.W.2d 1099 (Mo. Ct. App. 1933), *trans'd*, 335 Mo. 668, 73 S.W.2d 794 (1934); State v. Lee, 7 S.W.2d 385 (Mo. Ct. App.), *trans'd*, 11 S.W.2d 1044 (Mo. 1928); State v. Sillyman, 2 S.W.2d 139 (Mo. Ct. App.), *trans'd*, 7 S.W.2d 256 (Mo. 1928); Berry v. Majestic Milling Co., 202 S.W. 622 (Mo. Ct. App. 1918), *trans'd*, 284 Mo. 182, 223 S.W. 738 (1920); Parsons v. Harvey, 194 S.W. 530 (Mo. Ct. App. 1917), *trans'd*, 281 Mo. 413, 221 S.W. 21 (1920); Mulrooney v. Irish-American Sav. & Bldg. Ass'n, 145 Mo. App. 673, 123 S.W. 546 (1909), *trans'd*, 249 Mo. 629, 155 S.W. 804 (1913); Emery v. St. Louis & S.F. Ry., 135 Mo. App. 623, 116 S.W. 491 (1909), *trans'd*; Creve Coeur Lake Ice Co. v. Tamm, 59 Mo. App. 57 (1894), *trans'd*, 138 Mo. 385, 39 S.W. 791 (1897).

1.021(a). *The Constitutional Question Must Be Raised at the First Available Opportunity*

If the constitutional question is not raised in the trial court at the first opportunity presented by good pleading and orderly practice, it is deemed waived, and cannot later provide a basis for supreme court jurisdiction.<sup>21</sup> There are three stages in the trial court proceedings at which the question may be raised: (1) pre-trial—in the pleadings or preliminary motions; (2) trial—in a request for court rulings or for instructions; and (3) post-trial—in a motion for new trial or judgment notwithstanding the verdict.<sup>22</sup>

1.021(a)(1). *Pre-trial*

In a civil case when the plaintiff's cause of action is based on a statute, ordinance or city charter, the defendant must challenge the constitutionality of the legislation by motion to dismiss,<sup>23</sup> motion to strike<sup>24</sup> or answer to the

21. See, e.g., *State v. Brookshire*, 325 S.W.2d 497 (Mo.), *trans'd*, 329 S.W.2d 252 (Ct. App. 1959); *Schimmelpfenning v. Wells*, 24 S.W.2d 154 (Mo. 1929); *State v. Tatman*, 312 Mo. 134, 278 S.W. 713 (1925), *trans'd*, 291 S.W. 151 (Ct. App. 1927); *Strother v. Atchison, T. & S.F. Ry.*, 274 Mo. 272, 203 S.W. 207 (1918), *trans'd*, 212 S.W. 404 (Ct. App. 1919); *Dudley v. Wabash R.R.*, 238 Mo. 184, 142 S.W. 338 (1911) (en banc), *trans'd*, 167 Mo. App. 647, 150 S.W. 737 (1912); *Lohmeyer v. St. Louis Cordage Co.*, 214 Mo. 685, 113 S.W. 1108 (1908), *trans'd*, 137 Mo. App. 624, 119 S.W. 49 (1909); *Ash v. City of Independence*, 169 Mo. 77, 68 S.W. 888 (1902), *trans'd*, 103 Mo. App. 299, 77 S.W. 104 (1903); *Turley v. Barnes*, 131 Mo. 548, 33 S.W. 172 (1895), *trans'd*, 67 Mo. App. 237 (1896); *Bennet v. Missouri Pac. Ry.*, 105 Mo. 642, 16 S.W. 947 (1891), *trans'd from court of appeals, retrans'd*; *State v. Arnett*, 370 S.W.2d 169 (Mo. Ct. App. 1963); *Smith v. Citizens Bank*, 232 Mo. App. 906, 106 S.W.2d 45 (1937).

An exceptional situation was presented in *State v. Campbell*, 325 Mo. 561, 32 S.W.2d 69 (1930), where an informal summary proceeding had been held under the Juvenile Act. From a decision adjudging a child to be neglected, the mother appealed to the supreme court. The court retained jurisdiction on the ground that since the Act did not require formal pleading, the record *could not* reveal whether a constitutional question had been raised in the juvenile court; therefore, the requirement was held to be inapplicable.

Under certain circumstances, a constitutional question cannot be raised in the circuit court. For example, a case on appeal from a probate court to a circuit court must be tried anew on the same theory used in the probate court. Therefore, a party cannot raise a constitutional question in the circuit court which would change the theory of the case. *State ex rel. Nolte v. McQuillin*, 246 Mo. 586, 151 S.W. 444 (1912) (en banc); *In re Strom's Estate*, 213 Mo. 1, 111 S.W. 534, *trans'd*, 134 Mo. App. 340, 114 S.W. 581 (1908).

22. *Strother v. Atchison, T. & S.F. Ry.*, 274 Mo. 272, 203 S.W. 207 (1918), *trans'd*, 212 S.W. 404 (Ct. App. 1919).

23. *Record Newspaper Co. v. Industrial Comm'n*, 340 S.W.2d 613 (Mo. 1960), *trans'd*; *McClard v. Morrison*, 273 S.W.2d 225 (Mo. 1954), *trans'd*, 281 S.W.2d 592 (Ct. App. 1955); *Harris v. Bates*, 364 Mo. 1023, 270 S.W.2d 763 (1954). Prior to the promulgation of Mo. SUP. CR. R. 55.29, a constitutional question could be raised in a demurrer to a petition. *Marczuk v. St. Louis Pub. Serv. Co.*, 355 Mo. 536, 196 S.W.2d 1000 (1946); *Colley v. Jasper County*, 337 Mo. 503, 85 S.W.2d 57 (1935); *Nickell v. Kansas City, St. L. & C.R.R.*, 326 Mo. 338, 32 S.W.2d 79 (1930), *trans'd*, 226 Mo.

petition.<sup>25</sup> In a criminal case the prosecution is based on a statute or or-

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App. 302, 41 S.W.2d 595 (1931); *Burns v. Prudential Ins. Co. of America*, 295 Mo. 680, 247 S.W. 159 (1922), *trans'd*, 253 S.W. 81 (Ct. App. 1923); *Lavelle v. Metropolitan Life Ins. Co.*, 231 S.W. 616 (Mo. 1921), *trans'd*, 209 Mo. App. 330, 238 S.W. 504 (1922); *Hydraulic Press Brick Co. v. Lane*, 205 S.W. 801 (Mo. 1918), *trans'd*, 211 S.W. 93 (Ct. App. 1919); *Dubowsky v. Binggeli*, 258 Mo. 197, 167 S.W. 999, *trans'd*, 184 Mo. App. 361, 171 S.W. 12 (1914). Mo. SUP. CT. R. 55.31 now provides that such an issue shall be raised by a motion to dismiss.

24. *Record Newspaper Co. v. Industrial Comm'n*, *supra* note 23; *Strother v. Atchison, T. & S.F. Ry.*, 274 Mo. 272, 203 S.W. 207 (1918), *trans'd*, 212 S.W. 404 (Ct. App. 1919).

25. *Barnes v. Anchor Temple Ass'n*, 369 S.W.2d 192 (Mo.), *trans'd*, 369 S.W.2d 893 (Ct. App. 1963); *McClard v. Morrison*, 273 S.W.2d 225 (Mo. 1954), *trans'd*, 281 S.W.2d 592 (Ct. App. 1955); *Marczuk v. St. Louis Pub. Serv. Co.*, 355 Mo. 536, 196 S.W.2d 1000 (1946); *Colley v. Jasper County*, 337 Mo. 503, 85 S.W.2d 57 (1935); *Walter L. Lacy Co. v. National Fin. Corp.*, 73 S.W.2d 747 (Mo. 1934), *trans'd*, 79 S.W.2d 1078 (Ct. App. 1935); *Carney v. Chicago, R.I. & Pac. Ry.*, 323 Mo. 470, 23 S.W.2d 993 (1929); *Joe Dan Market, Inc. v. Wentz*, 321 Mo. 943, 13 S.W.2d 641 (1928), *trans'd*, 223 Mo. App. 772, 20 S.W.2d 567 (1929); *State ex rel. Chaney v. Grinstead*, 314 Mo. 55, 282 S.W. 715 (1926) (en banc); *Magill v. Boatmen's Bank*, 250 S.W. 41 (Mo. 1923); *Severson v. Dickinson*, 248 S.W. 595 (Mo. 1923), *trans'd*, 216 Mo. App. 572, 259 S.W. 518 (1924); *State ex rel. Tadlock v. Mooneyham*, 296 Mo. 421, 247 S.W. 163 (1922), *trans'd*, 212 Mo. App. 573, 253 S.W. 1098 (1923); *Hamm v. Chicago, B. & Q. Ry.*, 235 S.W. 1046 (Mo. 1921), *trans'd*, 211 Mo. App. 460, 245 S.W. 1109 (1922); *Mike Berniger Moving Co. v. O'Brien*, 234 S.W. 807 (Mo. 1921), *trans'd*, 240 S.W. 481 (Ct. App. 1922); *Lavelle v. Metropolitan Life Ins. Co.*, 231 S.W. 616 (Mo. 1921), *trans'd*, 209 Mo. App. 330, 238 S.W. 504 (1922); *Chapman v. Adams*, 230 S.W. 80 (Mo. 1921), *trans'd*, 210 Mo. App. 680, 243 S.W. 401 (1922); *Meredith v. Claycomb*, 212 S.W. 861 (Mo.), *trans'd*, 216 S.W. 794 (Ct. App. 1919); *Hydraulic Press Brick Co. v. Lane*, 205 S.W. 801 (Mo. 1918), *trans'd*, 211 S.W. 93 (Ct. App. 1919); *Roper v. Greenspon*, 272 Mo. 288, 198 S.W. 1107 (en banc), *trans'd from* 192 S.W. 149 (Ct. App. 1917); *Mercantile Trust Co. v. Lyon*, 195 S.W. 1032 (Mo. 1917), *trans'd*; *Deiner v. Sutermeister*, 266 Mo. 505, 178 S.W. 757 (1915); *Speer v. Southwest Mo. R.R.*, 264 Mo. 265, 174 S.W. 381, *trans'd*, 190 Mo. App. 328, 177 S.W. 329 (1915); *Dubowsky v. Binggeli*, 258 Mo. 197, 167 S.W. 999, *trans'd*, 184 Mo. App. 361, 171 S.W. 12 (1914); *George v. Quincy, O. & K.C.R.R.*, 249 Mo. 197, 155 S.W. 453 (1913), *trans'd*, 179 Mo. App. 283, 167 S.W. 153 (1914); *Hartzler v. Metropolitan St. Ry.*, 218 Mo. 562, 117 S.W. 1124 (1909), *trans'd*, 140 Mo. App. 665, 126 S.W. 760 (1910); *Lohmeyer v. St. Louis Cordage Co.*, 214 Mo. 685, 113 S.W. 1108 (1908), *trans'd*, 137 Mo. App. 624, 119 S.W. 49 (1909); *Sheets v. Thomann*, 336 S.W.2d 701 (Mo. Ct. App. 1960); *Commerce Trust Co. v. Syndicate Lot Co.*, 208 Mo. App. 261, 235 S.W. 150 (1921); *accord*, *Pruellage v. De Seaton Corp.*, 380 S.W.2d 403 (Mo. 1964), *trans'd* (answer to writ of scire facias); *Ivey v. Ayers*, 301 S.W.2d 790 (Mo. 1957) (answer under Uniform Support of Dependents Laws).

When events subsequent to the filing of the original answer reveal that the plaintiff is relying on a legislative act which was not specified in the petition, the first available opportunity for the defendant to raise a constitutional question is in an amended answer. *Butler v. Board of Educ.*, 16 S.W.2d 44 (Mo. 1929) (en banc). However, when a case has been remanded for a new trial, a constitutional question cannot be raised for the first time by the answer in the second trial if it could have been raised by the answer in the



dinance, so the defendant must challenge the constitutionality of the legislation by motion to dismiss the information or indictment.<sup>26</sup>

In a civil action the plaintiff's first opportunity to raise the constitutional question will be in his petition if his cause of action is based on the conten-

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first trial. *Ash v. City of Independence*, 169 Mo. 77, 68 S.W. 888 (1902), *trans'd*, 103 Mo. App. 299, 77 S.W. 104 (1903).

The court of appeals in *Lieber v. Heil*, 220 Mo. App. 896, 296 S.W. 200 (1927), *trans'd*, 325 Mo. 1148, 30 S.W.2d 143, *retrans'd*, 32 S.W.2d 792 (Ct. App. 1930), adverted to the general rule that when the petition is based on a legislative act the constitutionality of the act must be challenged in the answer, but attempted to establish an exception. The case was transferred to the supreme court on the ground that the issue of the constitutionality of the legislative act was "inherent." The supreme court rejected this theory and retransferred on the ground that the raising of the constitutional question was not timely. For a complete discussion of the "inherency" doctrine see § 1.022(d); *cf. Brown v. Missouri, Kan. & Tex. Ry.*, 175 Mo. 185, 74 S.W. 973 (1903), *trans'd from court of appeals, retrans'd*, 104 Mo. App. 691, 78 S.W. 273 (1904).

Mo. SUP. CT. R. 55.43 provides that "If a responsive pleading is required all defenses or objections not raised therein are waived, except (1) failure to state a claim upon which relief can be granted . . ." This would apparently allow a party to question, for the first time on appeal, the constitutionality of the legislative act on which the cause of action is predicated; however, 55.43 has not been applied to an attempt to raise a constitutional issue for supreme court jurisdiction. Although the failure to state a claim on which relief can be granted may be raised at any time, this issue will not be one on which original supreme court appellate jurisdiction can be based unless raised at the first available opportunity.

Prior to the promulgation of Mo. SUP. CT. R. 55.29, which abolished pleas in abatement, a constitutional question could be raised by this type of plea. *Dudley v. Wabash R.R.*, 238 Mo. 184, 142 S.W. 338 (1911) (en banc), *trans'd*, 167 Mo. App. 647, 150 S.W. 737 (1912). Those matters which could have been raised by pleas in abatement may now be raised by motion as provided in Mo. SUP. CT. R. 55.31.

26. Mo. SUP. CT. R. 25.05 provides that:

Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty or guilty. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these Rules.

Prior to the adoption of this rule, the courts held that the constitutionality of the legislative act on which the information was based must be challenged (1) by a motion to quash: *State v. Mackey*, 259 S.W. 430 (Mo.), *trans'd*, 267 S.W. 5 (Ct. App. 1924) (information); *State v. Bright*, 256 S.W. 741 (Mo. 1923), *trans'd*, 263 S.W. 559 (Ct. App. 1924) (indictment); *State v. Timeus*, 233 Mo. 308, 135 S.W. 28, *trans'd from court of appeals, retrans'd*, 160 Mo. App. 510, 140 S.W. 931 (1911) (information); *State v. Becker*, 268 S.W.2d 51 (Mo. Ct. App.), *trans'd*, 364 Mo. 1079, 272 S.W.2d 283 (1954) (information); or (2) by demurrer: *State v. Swift & Co.*, 270 Mo. 694, 195 S.W. 996, *trans'd*, 198 S.W. 457 (Ct. App. 1917) (information). *But cf. Town of Canton v. McDaniel*, 188 Mo. 207, 86 S.W. 1092 (1905) (en banc), *trans'd from 91 Mo. App. 626* (1902). In *McDaniel* the information charged the defendant with engaging in business as a merchant without obtaining a license. The supreme court retained the case on the ground that the constitutionality of the ordinance involved was challenged in the instructions to the jury. It appears, however, that this constitutional question could have been raised by a motion to quash the information.

tion that legislation is unconstitutional,<sup>27</sup> or in his reply to the defendant's answer if the latter is predicated on the legislative act.<sup>28</sup>

When an official act or omission allegedly infringes on a party's constitutional rights, he may raise the constitutional question in a motion to quash a search warrant<sup>29</sup> or motion to suppress evidence.<sup>30</sup> In *State v. Cox*<sup>31</sup> the defendant appealed his conviction of a liquor offense to the supreme court, contending that the trial court erred in admitting as evidence intoxicating liquor obtained through an allegedly illegal search and seizure. The court transferred the case on the ground that the defendant had not moved for the suppression of the evidence during the pre-trial stage but waited until it was introduced at the trial.

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27. *Nemours v. City of Clayton*, 351 Mo. 317, 172 S.W.2d 937, *trans'd*, 237 Mo. App. 497, 175 S.W.2d 60 (1943); *State ex rel. Jacobsmeyer v. Thatcher*, 337 Mo. 1225, 88 S.W.2d 187 (1935), *trans'd*, 338 Mo. 622, 92 S.W.2d 640 (1936) (en banc); *Village of Grandview v. McElroy*, 318 Mo. 135, 298 S.W. 760 (1927), *trans'd*; *City of St. Joseph v. Cox*, 226 S.W. 871 (Mo. 1920), *trans'd*, 208 Mo. App. 109, 232 S.W. 256 (1921); *Troeger v. Roberts*, 284 Mo. 363, 223 S.W. 796 (1920).

When the legislative act is injected into the case by the appellate court, sua sponte, and is the reason for remand, the constitutional question may be raised in an amended petition filed before the second trial. *Massey-Harris Harvester Co. v. Federal Reserve Bank*, 340 Mo. 1133, 104 S.W.2d 385 (1937).

28. *McGrath v. Meyers*, 341 Mo. 412, 107 S.W.2d 792 (1937); *Roper v. Greenspon*, 272 Mo. 288, 198 S.W. 1107 (en banc), *trans'd from* 192 S.W. 149 (Ct. App. 1917); *Dahnke-Walker Milling Co. v. Blake*, 242 Mo. 23, 145 S.W. 438 (1912); *Hanks v. Hanks*, 218 Mo. 670, 117 S.W. 1101 (1909); *Lohmeyer v. St. Louis Cordage Co.*, 214 Mo. 685, 113 S.W. 1108 (1908), *trans'd*, 137 Mo. App. 624, 119 S.W. 49 (1909).

A reply need be filed only under certain circumstances. Mo. SUP. CT. R. 55.01 requires a reply if the answer contains a counterclaim or if the court orders a reply to an answer. See *Frank v. Wabash R.R.*, 295 S.W.2d 16 (Mo. 1956) (first opportunity was in permissive reply or motion to strike defendant's pleadings).

29. *State v. Barrelli*, 317 Mo. 461, 296 S.W. 413 (1927); *State v. Luna*, 259 S.W. 797 (Mo.), *trans'd*, 266 S.W. 755 (Ct. App. 1924); *State v. Tunnell*, 302 Mo. 433, 259 S.W. 128 (1924) (en banc).

The defendant may also raise a constitutional question in a motion to quash or dismiss the charge before a city court. In *City of St. Louis v. Page*, 259 S.W.2d 98 (Mo. Ct. App. 1953), the litigation was originated in city court by way of a police report charging defendant with a breach of the peace. Upon conviction, defendant appealed to the circuit court where he moved to dismiss the charge on the ground that he was denied due process because the charge had not been made by an information or indictment. The circuit court affirmed the police court and defendant appealed to the court of appeals which held that the first opportunity to raise the constitutional question was presented in the city court and not the circuit court.

30. *State v. Cox*, 259 S.W. 1041 (Mo.), *trans'd*, 266 S.W. 734 (Ct. App. 1924); *State v. Bray*, 278 S.W.2d 49 (Mo. Ct. App. 1955); *State v. Egan*, 272 S.W.2d 719 (Mo. Ct. App. 1954). The opportunity to suppress evidence may occur at a pre-trial hearing. *Appeal of Mac Sales Co.*, 256 S.W.2d 783 (Mo. 1953), *trans'd*, 263 S.W.2d 860 (Ct. App. 1954).

31. 259 S.W. 1041 (Mo.), *trans'd*, 266 S.W. 734 (Ct. App. 1924).

Whether the contention is that the constitution was violated by a legislative act or by some official conduct, if it could have been but was not mentioned in the pre-trial stage, any subsequent attempt to raise it will not be considered timely.<sup>32</sup>

### 1.021(a)(2). *Trial*

The first opportunity to raise a constitutional question may arise during the trial when that issue could not have been raised in the pre-trial pleadings. A constitutional question may be raised at the trial in a challenge to the admission of evidence<sup>33</sup> or to a jury instruction.<sup>34</sup> In *Suess v. Imperial Life Ins. Co.*,<sup>35</sup> an action to recover premiums paid on a life insurance policy, the petition alleged that the premiums had been paid in accordance with the terms of the contract but that the insurance company had wrongfully declared the policy lapsed for nonpayment. The defendant insurer denied that the final premium had been paid within the time specified in the contract. At the trial the plaintiff offered evidence tending to prove a waiver of his breach of prompt payment, contrary to the theory of his original petition. The defendant objected that to admit the evidence and make an insurance company an exception to the rule that a party suing for a breach of a contract cannot be allowed to recover when the waiver theory had not been pleaded, would deny it due process and the equal protection of the laws. The objection was overruled and judgment was rendered for the plaintiff. The court of appeals transferred the appeal to the supreme court which

32. *Nall v. Wabash, St. L. & Pac. Ry.*, 97 Mo. 68, 10 S.W. 610 (1889), *trans'd from* court of appeals, *retrans'd*; *City of Frankford v. Davis*, 348 S.W.2d 553 (Mo. Ct. App. 1961); see cases cited notes 23-31 *supra*. In *Veal v. Leimkuehler*, 249 S.W.2d 491 (Mo. Ct. App. 1952), plaintiffs' application for certiorari for review of a board of zoning adjustment order, which had revoked an alteration permit, was granted by the circuit court. After the order was affirmed, plaintiffs appealed to the court of appeals. The issue of whether the appellants had been deprived of their property without due process for lack of notice of the board hearing at which their permit was revoked was first raised in their appellate brief. The court held that the constitutional question should have been raised in the application for the writ of certiorari.

33. *Suess v. Imperial Life Ins. Co.*, 193 Mo. 564, 91 S.W. 1041 (1906), *trans'd from* court of appeals; see *State ex rel. Simmons v. American Sur. Co.*, 210 S.W. 428 (Mo. 1919), *trans'd*, 217 S.W. 855 (Ct. App. 1920).

34. *Sheets v. Iowa State Ins. Co.*, 226 Mo. 613, 126 S.W. 413 (1910), *trans'd*, 153 Mo. App. 620, 135 S.W. 80 (1911); *Wooley v. Mears*, 226 Mo. 41, 125 S.W. 1112 (1910); *Haag v. Ward*, 186 Mo. 325, 85 S.W. 391 (1904). The opportunity for defendant to demand a trial by jury arises when plaintiff attempts to waive the jury. *Securities Acceptance Corp. v. Hill*, 326 S.W.2d 65 (Mo. 1959), *trans'd*, 331 S.W.2d 158 (Ct. App. 1960); see *Meadowbrook County Club v. Davis*, 384 S.W.2d 611 (Mo. 1964), *trans'd*.

35. 193 Mo. 564, 91 S.W. 1041 (1906), *trans'd from* court of appeals.

retained jurisdiction because the objection to the evidence was the first opportunity for the defendant to raise the constitutional question.

### 1.021(a)(3). *Post-trial*

While the "first available opportunity" is usually presented at either the pre-trial or trial stage, a constitutional question may sometimes be raised in the post-trial proceedings by a motion for a new trial<sup>36</sup> or by a motion to vacate a circuit court judgment.<sup>37</sup> In the early case of *Davidson v. Hartford Life Ins. Co.*,<sup>38</sup> the defendant moved for a new trial after the trial

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36. *Kristanik v. Chevrolet Motor Co.*, 335 Mo. 60, 70 S.W.2d 890 (1934) (en banc); *Woodling v. Westport Hotel Operating Co.*, 331 Mo. 812, 55 S.W.2d 477 (1932), *trans'd*, 227 Mo. App. 1231, 63 S.W.2d 207 (1933); *Wabash R.R. v. Flannigan*, 218 Mo. 566, 117 S.W. 722 (1909), *trans'd from* 118 Mo. App. 124, 100 S.W. 661 (1906), *retrans'd*; *Logan v. Field*, 192 Mo. 54, 90 S.W. 127 (1905), *trans'd from* court of appeals; *Barber Asphalt Paving Co. v. Ridge*, 169 Mo. 376, 68 S.W. 1043 (1902); *Marx v. Hart*, 166 Mo. 503, 66 S.W. 260 (1901); *Saxton Nat'l Bank v. Bennett*, 138 Mo. 494, 40 S.W. 97 (1897); *Davidson v. Hartford Life Ins. Co.*, 151 Mo. App. 561, 132 S.W. 291 (1910).

In the following illustrative cases, attempts to raise a constitutional question were made in the motion for new trial but were insufficient to vest supreme court jurisdiction because the question could have been raised before or during the trial by (1) an answer: *Deiner v. Sutermeister*, 266 Mo. 505, 178 S.W. 757 (1915); *Lohmeyer v. St. Louis Cordage Co.*, 214 Mo. 685, 113 S.W. 1108, *trans'd*, 137 Mo. App. 624, 119 S.W. 49 (1909); (2) an objection to the admission of evidence: *Barber Asphalt Paving Co. v. O'Brien*, 128 Mo. App. 267, 107 S.W. 25 (1908); see *State ex rel. Simmons v. American Sur. Co.*, 210 S.W. 428 (Mo. 1919), *trans'd*, 217 S.W. 855 (Ct. App. 1920); (3) an objection to instructions to the jury: *Sheets v. Iowa State Ins. Co.*, 226 Mo. 613, 126 S.W. 413 (1910), *trans'd*, 153 Mo. App. 620, 135 S.W. 80 (1911); (4) an answer to the motion for judgment: *Merchants' Sav. & Loan Ass'n v. Ancona Realty Co.*, 335 Mo. 386, 72 S.W.2d 797 (1934), *trans'd*, 229 Mo. App. 714, 78 S.W.2d 470 (1935); see *Lawson v. Capital City Contracting Co.*, 329 Mo. 19, 43 S.W.2d 775 (1931), *trans'd*, 227 Mo. App. 256, 52 S.W.2d 421 (1932); *Whitsett v. City of Carthage*, 184 S.W. 1185 (Mo. Ct. App. 1916), *trans'd*, 270 Mo. 269, 193 S.W. 21 (1917); *Paul v. Western Union Tel. Co.*, 164 Mo. App. 233, 145 S.W. 99 (1912).

Prior to Mo. Sup. Ct. R. 27.21, 81.01, which abolished motions in arrest of judgment in criminal and in civil cases, respectively, several attempts were made to raise a constitutional question by this motion. *Cox v. Frank L. Schaab Stove & Furniture Co.*, 332 Mo. 492, 58 S.W.2d 700 (1933), *trans'd*, 67 S.W.2d 790 (Ct. App. 1934); *State v. Hull*, 273 S.W. 1039 (Mo. 1925), *trans'd*, 279 S.W. 221 (Ct. App. 1926); *State v. Gamma*, 215 Mo. 100, 114 S.W. 619 (1908), *trans'd*, 149 Mo. App. 694, 129 S.W. 734 (1910); *Browning v. Powers*, 142 Mo. 322, 44 S.W. 224 (1898), *trans'd*. In these cases the supreme court held that the constitutional question was not raised at the first available opportunity. All rights which could have been saved in a motion in arrest may now be saved in a motion for new trial.

37. *State ex rel. Highway Comm'n v. Paul*, 360 S.W.2d 395 (Mo. Ct. App. 1962), *trans'd*, 368 S.W.2d 419 (Mo. 1963) (en banc); *Mesenbrink v. Boudreau*, 171 S.W.2d 728 (Mo. Ct. App. 1943), *trans'd*; cf. *State v. Knight*, 351 S.W.2d 802 (Mo. Ct. App. 1961) (motion to vacate sentence).

38. 151 Mo. App. 561, 132 S.W. 291 (1910).

court had directed a verdict for the plaintiff. The defendant alleged that the judgment deprived him of his property without due process of law by denying his right to trial by jury. The court of appeals ruled that since the issue did not arise until the verdict was actually rendered, the motion for new trial was the first available opportunity to raise the constitutional question. It declined to transfer, however, because it ruled that the "trial by jury" argument was colorable.<sup>39</sup>

Since original supreme court appellate jurisdiction attaches to a case because of the presence of a constitutional issue, this issue must have been present at the time the appeal was taken. "A party may not wait till he has lost the case and then in contravention of a statute and the Constitution itself and to the cluttering up and confusion of the courts, pick and choose his appellate forum by a belated constitutional question dragged by its very heels into the case."<sup>40</sup> Therefore, a constitutional question cannot, for the purpose of vesting jurisdiction in the supreme court, be injected into a case in appellate proceedings by argument or brief of counsel,<sup>41</sup> by motion for rehearing<sup>42</sup> or by motion to transfer.<sup>43</sup>

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39. See § 1.032. In *Logan v. Field*, 192 Mo. 54, 90 S.W. 127 (1905), *trans'd* from court of appeals, the verdict for the defendant was rendered by nine jurors, as authorized by an instruction given by the court on its own motion. The plaintiff, in his motion for new trial, insisted that this verdict was error because it was not authorized by the state constitution. The supreme court held that the constitutional question was properly raised.

Although in *Davidson* the motion for new trial was clearly the first available opportunity to raise the constitutional question, in cases like *Logan v. Field*, *supra*, it appears that the constitutional question could have been raised before the motion for new trial, in an objection to the jury instruction. This conclusion is suggested by *Boling v. St. Louis & S.F.R.R.*, 94 Mo. App. 67, 67 S.W. 937 (1902), *trans'd*, 189 Mo. 219, 88 S.W. 35 (1905), in which the defendant objected to the instruction that a verdict could be returned by nine jurors. "The objection to the charge was reasserted in the motion for a new trial . . ." *Id.* at 69, 67 S.W. at 938. (Emphasis added.) This statement made by the transferring court of appeals implies that the constitutional question was first raised in the objection and preserved in the motion for new trial.

40. *Deiner v. Sutermeister*, 266 Mo. 505, 514-15, 178 S.W. 757, 759 (1915); see, e.g., *Joe Dan Market, Inc. v. Wentz*, 321 Mo. 943, 13 S.W.2d 641 (1928), *trans'd*, 223 Mo. App. 772, 20 S.W.2d 567 (1929); *Goodwin & Jean v. American Ry. Express Co.*, 280 S.W. 1043 (Mo. 1926), *trans'd*, 220 Mo. App. 695, 294 S.W. 100 (1927); *Schmidt v. Supreme Court, United Order of Foresters*, 259 Mo. 491, 168 S.W. 626 (1914), *trans'd*, 191 Mo. App. 415, 177 S.W. 706 (1915); *Lang v. Callaway*, 134 Mo. 491, 35 S.W. 1138 (1896), *trans'd* from court of appeals, *retrans'd*, 68 Mo. App. 393 (1897); *Barber Asphalt Paving Co. v. O'Brien*, 128 Mo. App. 267, 107 S.W. 25 (1908).

41. *Marshall v. City of Gladstone*, 380 S.W.2d 312 (Mo. 1964), *trans'd*; *Feste v. Newman*, 368 S.W.2d 713 (Mo. 1963) (en banc), *trans'd*; *City of St. Louis v. Gruss*, 263 S.W.2d 387 (Mo. 1954); *State ex rel. Kirks v. Allen*, 250 S.W.2d 348 (Mo. 1952), *trans'd*, 255 S.W.2d 144 (Ct. App. 1953); *State ex rel. Wallach v. Oehler*, 348 Mo. 655, 154 S.W.2d 781 (1941), *trans'd*, 159 S.W.2d 313 (Ct. App. 1942); *State v. Armour Pharmacy, Inc.*, 152 S.W.2d 67 (Mo. 1941), *trans'd*; *State ex rel. Dengel v. Hartmann*, 339 Mo. 200, 96 S.W.2d 329 (1936) (en banc); *St. Louis Trust Co. v. Hill*, 336 Mo. 17,

1.021(b). *The Article and Section of the Constitution Must Be Specified*

Since "ambush" tactics are not favored in trial litigation,<sup>44</sup> when a party first attempts to raise a constitutional issue,<sup>45</sup> he must specify the constitu-

76 S.W.2d 685 (1934) (en banc); Shroyer v. Missouri Livestock Comm'n, 332 Mo. 1219, 61 S.W.2d 713 (1933) (en banc); Sloan v. Polar Wave Ice & Fuel Co., 323 Mo. 363, 19 S.W.2d 476 (1929); Cartwright v. McDonald County, 319 Mo. 848, 5 S.W.2d 54 (1928); State v. Hale, 248 S.W. 958 (Mo.), *trans'd* from court of appeals, *retrans'd*, 256 S.W. 1092 (Ct. App. 1923); Bealmer v. Hartford Fire Ins. Co., 281 Mo. 495, 220 S.W. 954, *trans'd*, 225 S.W. 132 (Ct. App. 1920); Hydraulic Press Brick Co. v. Lane, 205 S.W. 801 (Mo. 1918), *trans'd*, 211 S.W. 93 (Ct. App. 1919); Jacobs v. City of St. Joseph, 204 Mo. 356, 102 S.W. 988 (1907), *trans'd*, 127 Mo. App. 669, 106 S.W. 1072 (1908); Parlin & Orendorf Co. v. Hord, 145 Mo. 117, 46 S.W. 753 (1898), *trans'd*, 78 Mo. App. 279 (1899); City of St. Joseph v. Dye, 137 Mo. 177, 38 S.W. 942, *trans'd* from court of appeals, *retrans'd*, 72 Mo. App. 214 (1897); Lang v. Callaway, *supra* note 40; Baldwin v. Fries, 103 Mo. 286, 15 S.W. 760, *trans'd* from court of appeals, *retrans'd*, 46 Mo. App. 288 (1891); City of St. Louis v. Stenson, 333 S.W.2d 529 (Mo. Ct. App. 1960); Williams v. Shrout, 294 S.W.2d 640 (Mo. Ct. App. 1956); Harris v. Pine Cleaners, Inc., 274 S.W.2d 328 (Mo. Ct. App. 1954); Morrison v. State, 252 S.W.2d 97 (Mo. Ct. App. 1952); Veal v. Leimkuehler, 249 S.W.2d 491 (Mo. Ct. App. 1952); Meder v. Wilson, 192 S.W.2d 606 (Mo. Ct. App. 1946); Grote v. Monward Realty Co., 232 Mo. App. 189, 96 S.W.2d 660 (1936); State *ex rel.* Highway Comm'n v. Brown, 231 Mo. App. 56, 95 S.W.2d 661 (1936); Limbaugh v. Monarch Life Ins. Co., 84 S.W.2d 208 (Mo. Ct. App. 1935); Lentz v. Asphalt Paving Co., 50 S.W.2d 1063 (Mo. Ct. App. 1932); Jennings v. Jennings, 225 Mo. App. 1010, 33 S.W.2d 165 (1930); Wechsler v. Davis, 209 Mo. App. 570, 239 S.W. 554 (1922); Badger v. Badger, 204 Mo. App. 252, 224 S.W. 41 (1920); Boonville Special Rd. Dist. v. Fuser, 184 Mo. App. 634, 171 S.W. 962 (1914); Walker v. Dunham, 135 Mo. App. 396, 115 S.W. 1086 (1909); Keller v. Home Life Ins. Co., 95 Mo. App. 627, 69 S.W. 612 (1902).

42. Funk v. Kansas City, 197 S.W. 343 (Mo. 1917), *trans'd* from court of appeals, *retrans'd*; Hardwicke v. Wurmser, 264 Mo. 138, 174 S.W. 808, *trans'd* from court of appeals, *retrans'd*, 180 S.W. 455 (Ct. App. 1915); Brown v. Missouri, Kan. & Tex. Ry., 175 Mo. 185, 74 S.W. 973 (1903), *trans'd* from court of appeals, *retrans'd*, 104 Mo. App. 691, 78 S.W. 273 (1940); Security Sav. Trust Co. v. Donnell, 145 Mo. 431, 46 S.W. 959 (1898), *trans'd* from court of appeals, *retrans'd*; Reaves v. Kramer, 231 Mo. App. 368, 97 S.W.2d 136 (1936).

43. Wilson & Co. v. Hartford Fire Ins. Co., 300 Mo. 1, 254 S.W. 266 (1923); Smith v. Glynn, 177 S.W. 848 (Mo. 1915), *trans'd* from court of appeals, *retrans'd*, 183 S.W. 681 (Ct. App. 1916); State v. Brownfield, 256 S.W. 143 (Mo. Ct. App. 1923); Carradine v. Ford, 195 Mo. App. 684, 187 S.W. 285 (1916); Hardwick v. Wabash R.R., 181 Mo. App. 156, 168 S.W. 328 (1914); Wabash W. Ry. v. Siefert, 41 Mo. App. 35 (1890).

44. Whatever the use of an ambush in war, or games of chance, its use does not commend itself to jurisprudence. An appellant may not mask his position in that way and preserve under such cover his constitutional point. Nor would a general reference to the Constitution, State or Federal, do. He must come into the open and put his finger on the specific provision of the Constitution touched by the adverse ruling. Lohmeyer v. St. Louis Cordage Co., 214 Mo. 685, 688, 113 S.W. 1108, 1109 (1908), *trans'd*, 137 Mo. App. 624, 119 S.W. 49 (1909).

45. The article and section number must be specified by the party raising the constitutional question. In Schildnecht v. City of Joplin, 327 Mo. 126, 35 S.W.2d 35 (en banc), *trans'd*, 226 Mo. App. 47, 41 S.W.2d 590 (1931), the plaintiff, attempting to raise a constitutional question in his petition, failed to specify any constitutional pro-

tional provision on which his contention is based.<sup>46</sup> This rule is designed to clarify the issue presented at the trial, prevent afterthoughts on appeal, and decrease the possibility of an appellate transfer for want of jurisdiction.<sup>47</sup>

The appellate court, in effect, places itself in the position of the trial judge, and seeks to determine whether the judge was sufficiently apprised of the constitutional section to understand that he was to construe it.<sup>48</sup> In making this inquiry, the reviewing court looks to the specificity of the contention.

The courts have consistently ruled that alleging a statute, ordinance or city charter, or some official act or omission to be "null and void"<sup>49</sup> or "unconstitutional,"<sup>50</sup> is insufficient specification. The requirement can be satis-

vision. The supreme court transferred the case even though the *defendant* did specify the section in his answer.

The lack of specification in the attempt to raise the constitutional issue in the trial court cannot be corrected by sufficient specification in an appellate brief. *State v. Swift & Co.*, 270 Mo. 694, 195 S.W. 996, *trans'd*, 198 S.W. 457 (Ct. App. 1917); *City of St. Joseph v. Metropolitan Life Ins. Co.*, 183 Mo. 1, 81 S.W. 1080, *trans'd*, 110 Mo. App. 124, 84 S.W. 97 (1904).

46. *Barnes v. Anchor Temple Ass'n*, 369 S.W.2d 192 (Mo.), *trans'd*, 369 S.W.2d 893 (Ct. App. 1963); *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); *Schildnecht v. City of Joplin*, *supra* note 45; *State ex rel. Tadlock v. Mooneyham*, 296 Mo. 421, 247 S.W. 163 (1922), *trans'd*, 212 Mo. App. 573, 253 S.W. 1098 (1923); *Street v. School Dist.*, 221 Mo. 663, 120 S.W. 1159 (1909), *trans'd*, 141 Mo. App. 189, 124 S.W. 564 (1910); *First Nat'l Bank v. Foster*, 271 S.W. 536 (Mo. Ct. App. 1925).

47. *City of St. Louis v. Butler Co.*, *supra* note 46, at 1227-28, 219 S.W.2d at 376.

48. "What we conceive the rule to be is that it is necessary to point to the Constitution and declare how the Constitution is being violated with such certainty that the court is directed to the exact provision intended and the manner in which it is alleged to be involved . . . ." *State ex rel. Bloker v. Byrd*, 208 Mo. App. 514, 533, 237 S.W. 166, 172 (1921).

Early cases did not require a specific reference to any constitutional provision as long as the court could identify the section involved. *State ex rel. Ridge v. Smith*, 150 Mo. 75, 51 S.W. 713 (1899) (en banc); *Baldwin v. Fries*, 103 Mo. 286, 15 S.W. 760, *trans'd from* court of appeals, *retrans'd*, 46 Mo. App. 288 (1891); *State ex rel. Cambell v. St. Louis Court of Appeals*, 97 Mo. 276, 10 S.W. 874 (1889). Numerical specification is preferred today. See notes 51-59 *infra* and accompanying text.

49. *West v. Dyer*, 212 S.W. 880 (Mo. 1919), *trans'd from* 191 S.W. 1024 (Ct. App. 1917), *retrans'd*, 217 S.W. 584 (Ct. App. 1920); *State ex rel. Franklin County v. Tibbe Elec. Co.*, 250 Mo. 522, 157 S.W. 635 (1913).

50. "To say merely that an act is unconstitutional indicates nothing." *Ash v. City of Independence*, 169 Mo. 77, 68 S.W. 888 (1902), *trans'd*, 103 Mo. App. 299, 77 S.W. 104 (1903). The reason for this rule was expressed:

[I]t requires little stretch of the imagination to conceive of a party, under the general allegation of unconstitutionality found in this answer, urging a violation of one section or article of the State or Federal Constitution, and obtaining an adverse ruling thereon, and on appeal to an appellate court, insisting that a different provision of the Constitution has been violated, and one which was not called to

fied in one of three ways. First, the provision can be identified by numerical characters designating the appropriate article and section of the constitution;<sup>51</sup> this is the least ambiguous method of specification. A second acceptable method is the quotation of a vital portion of the provision.<sup>52</sup> Third,

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the attention of the circuit court, and upon which it had made no ruling and had no opportunity to correct. *Id.* at 79, 68 S.W. at 888. Similar language is found in *Harris v. Bates*, 364 Mo. 1023, 270 S.W.2d 763 (1954); *Hohlstein v. St. Louis Roofing Co.*, 328 Mo. 899, 42 S.W.2d 573 (1931), *trans'd*, 49 S.W.2d 226 (Ct. App. 1932); *City of St. Joseph v. Georgetown Lodge*, 8 S.W.2d 979 (Mo.), *trans'd*, 222 Mo. App. 1076, 11 S.W.2d 1082 (1928); *State v. Lofton*, 1 S.W.2d 830 (Mo. 1927); *State v. Richardson*, 267 S.W. 841 (Mo. 1924); *State v. Campbell*, 259 S.W. 430 (Mo.), *trans'd*, 266 S.W. 764 (Ct. App. 1924); *State v. McIntyre*, 252 S.W. 386 (Mo.), *trans'd*, 256 S.W. 141 (Ct. App. 1923); *City of St. Joseph v. Cox*, 226 S.W. 871 (Mo. 1920), *trans'd*, 208 Mo. App. 109, 232 S.W. 256 (1921); *State v. Hefton*, 213 S.W. 442 (Mo. 1919); *City of Lancaster v. Reed*, 201 S.W. 95 (Mo. 1918), *trans'd*, 207 S.W. 868 (Ct. App. 1919); *Pickel v. Pickel*, 243 Mo. 641, 147 S.W. 1059 (1912); *State v. Cook*, 217 Mo. 326, 117 S.W. 30 (1909), *trans'd*, 148 Mo. App. 383, 128 S.W. 212 (1910); *State v. Kuehner*, 207 Mo. 605, 106 S.W. 60 (1907), *trans'd*, 110 S.W. 605 (Ct. App. 1908); *City of Excelsior Springs ex rel. McCormick v. Ettenson*, 188 Mo. 129, 86 S.W. 255 (1905), *trans'd from court of appeals, retrans'd*, 120 Mo. App. 215, 96 S.W. 701 (1906); *Shaw v. Goldman*, 183 Mo. 461, 81 S.W. 1223 (1904), *trans'd*, 116 Mo. App. 332, 92 S.W. 165 (1906); *City of St. Joseph v. Metropolitan Life Ins. Co.*, 183 Mo. 1, 81 S.W. 1080, *trans'd*, 110 Mo. App. 124, 84 S.W. 97 (1904); *Johnson v. Kansas City Elec. Light Co.*, 232 S.W. 1094 (Mo. Ct. App. 1921); *State v. Brockmiller*, 107 Mo. App. 599, 81 S.W. 214 (1904); *Dawson v. Waldheim*, 91 Mo. App. 117 (1901); *cf. Consolidated School Dist. v. Day*, 328 Mo. 1105, 43 S.W.2d 428 (1931) (en banc); *State v. Swift & Co.*, 270 Mo. 694, 195 S.W. 996, *trans'd*, 198 S.W. 457 (Ct. App. 1917); *City of Independence v. Knoepker*, 205 Mo. 338, 103 S.W. 940 (1907), *trans'd*; *State v. Kanan*, 282 S.W. 465 (Mo. Ct. App. 1926); *State v. Jones*, 269 S.W. 954 (Mo. Ct. App. 1925); *State v. Cobb*, 113 Mo. App. 156, 87 S.W. 551 (1905).

51. *Harris v. Bates*, *supra* note 50; *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). In *Ash v. City of Independence*, 245 Mo. 120, 46 S.W. 749 (1898), *trans'd*, 79 Mo. App. 79 (1899), the supreme court reviewed the earlier Missouri position (see note 48 *supra*) in the light of a United States Supreme Court opinion (*F. G. Oxley Stave Co. v. Butler Co.*, 166 U.S. 648 (1896)) which required specification of the constitutional section. After the supreme court transferred on other grounds, the court of appeals remanded for a new trial. On appeal from this trial, 169 Mo. 77, 68 S.W. 888 (1902), *trans'd*, 103 Mo. App. 299, 77 S.W. 104 (1903), the supreme court applied the new federal rule and transferred for want of specification. Although the language in the second supreme court opinion was expressly limited to the facts of that case, the specification requirement was more broadly stated in *Lohmeyer v. St. Louis Cordage Co.*, 214 Mo. 685, 113 S.W. 1108 (1908), *trans'd*, 137 Mo. App. 624, 119 S.W. 49 (1909) (see note 44 *supra*). In *State ex rel. Bloker v. Byrd*, 208 Mo. App. 514, 237 S.W. 166 (1921), *Lohmeyer* was interpreted as *not* requiring specification by numerical characters. However, *Bloker*, although not overruled, has not been cited as authority for this point in later cases, so presumably the numerical characters must be cited unless another acceptable alternative is used. See text accompanying notes 51-59 *infra*.

If the section has numerous paragraphs, the particular paragraph in question must also be specified. *State v. Christopher*, 212 Mo. 244, 110 S.W. 697, *trans'd from court of appeals, retrans'd*, 134 Mo. App. 6, 114 S.W. 549 (1908). Apparently no case has been



the use of the popular name of a constitutional clause is deemed sufficient specification if the phrase is so well known that the section can be easily identified. The popular names of the "due process,"<sup>53</sup> "interstate commerce,"<sup>54</sup> and "double jeopardy"<sup>55</sup> clauses may apparently be used, but references made by the general phrases "public welfare, health and safety,"<sup>56</sup> "public use,"<sup>57</sup> "fair and impartial trial,"<sup>58</sup> or "trial by jury"<sup>59</sup> have been held insufficient.

When the constitutional question is predicated on a legislative act, both the act and the constitutional provision which it purportedly contravenes must be specified.<sup>60</sup> In *City of Excelsior Springs ex rel. McCormick v. Ettenson*,<sup>61</sup> the court noted that since the particular statute referred to was not

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transferred because of an error in the specification by numerical character, but the supreme court indicated in *Village of Grandview v. McElroy*, 318 Mo. 135, 298 S.W. 760 (1927), *trans'd*, that such a transfer *might* result.

52. *City of St. Louis v. Butler Co.*, *supra* note 51.

53. *City of St. Louis v. Friedman*, 358 Mo. 681, 216 S.W.2d 475 (1948); *State v. Becker*, 268 S.W.2d 51 (Mo. Ct. App.), *trans'd*, 364 Mo. 1079, 272 S.W.2d 283 (1954). *Contra*, *Robinson v. Nick*, 345 Mo. 305, 134 S.W.2d 112 (1939) (en banc), *trans'd*, 235 Mo. App. 461, 136 S.W.2d 374 (1940); *Hulett v. Missouri, Kan. & Tex. Ry.*, 145 Mo. 35, 46 S.W. 951 (1898), *trans'd*, 80 Mo. App. 87 (1899); *W. M. Chrysler Co. v. Smith*, 377 S.W.2d 134 (Mo. Ct. App. 1964); *Orrick v. Orrick*, 241 Mo. App. 143, 233 S.W.2d 826 (1950); *cf. Cirese v. Spitaufsky*, 259 S.W.2d 836 (Mo. 1953), *trans'd from* 253 S.W.2d 512 (Ct. App. 1952), *retrans'd*, 265 S.W.2d 753 (Ct. App. 1954); *Baker v. Baker*, 274 S.W.2d 322 (Mo. Ct. App. 1954). In *State v. England*, 8 S.W.2d 1077 (Mo. Ct. App.), *trans'd*, 11 S.W.2d 1024 (Mo. 1928), the supreme court retained jurisdiction even though only the section, not the article of the due process clause had been specified.

54. *State ex rel. Campbell v. St. Louis Court of Appeals*, 97 Mo. 276, 10 S.W. 874 (1889); *Town of Canton v. McDaniel*, 91 Mo. App. 626 (1902), *trans'd*, 188 Mo. 207, 86 S.W. 1092 (1905) (en banc).

55. In *State v. Linton*, 217 S.W. 874, 876 (Mo. Ct. App.), *trans'd*, 283 Mo. 1, 222 S.W. 847 (1920), the supreme court stated: "In view of the fact that there is but one section of our Constitution . . . that deals with the question of jeopardy, we hold that the appellant has sufficiently pointed out the provision of the Missouri Constitution on which he relies . . ." Compare *City of Olivette v. Graeler*, 329 S.W.2d 275 (Mo. Ct. App. 1959), *trans'd*, 338 S.W.2d 827 (Mo. 1960).

56. *Barnes v. Anchor Temple Ass'n*, 369 S.W.2d 192 (Mo.), *trans'd*, 369 S.W.2d 893 (Ct. App. 1963).

57. *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). Clark and Hyde, JJ., dissented on this point.

58. *State v. Kramer*, 222 S.W. 822 (Mo.), *trans'd from* court of appeals, *retrans'd*, 206 Mo. App. 49, 226 S.W. 643 (1920).

59. *Crowell v. Metta*, 213 Mo. App. 683, 253 S.W. 205 (1923).

60. See generally, *Nall v. Wabash, St. L. & Pac. Ry.*, 97 Mo. 68, 10 S.W. 610 (1889), *trans'd from* court of appeals, *retrans'd*. In this early case the court held that when the statute is not specified by title, date of passage or subject-matter, it is deemed wholly foreign to the case.

61. 188 Mo. 129, 86 S.W. 255 (1905), *trans'd from* court of appeals, *retrans'd*, 120 Mo. App. 215, 96 S.W. 701 (1906). The court said that the only exception to the rule

indicated, the court would be required to search the statutes to find this provision and then go through both the state and federal constitutions to see if there was any contradiction. This procedure would place an unnecessary burden on the court and permit an appellant to invoke a different statute or constitutional provision on appeal.

1.021(c). *The Facts Which Necessitate a Construction of the Constitution Must Be Stated*

In addition to specifying the applicable constitutional provision, the party attempting to raise a constitutional question must state and relate those facts which require a construction of the provision.<sup>62</sup> The mere assertion, without any supporting facts, that some constitutional provision has been violated, is termed a legal conclusion and is not a satisfactory statement of facts.<sup>63</sup>

of specification is found when the question is presented in the record in such a form that the case cannot be decided without passing on the constitutionality of the legislative act. *Accord*, *Corbett v. Lincoln Sav. & Loan Ass'n*, 4 S.W.2d 824 (Mo. 1928), *trans'd*, 223 Mo. App. 329, 17 S.W.2d 275 (1929). This is the "inherency" doctrine which is discussed in § 1.022(d).

The necessary specification may be by reference. In *Berry v. Majestic Milling Co.*, 284 Mo. 182, 223 S.W. 738 (1920), *trans'd from* 202 S.W. 622 (Ct. App. 1918), the defendant answered that the statute under which the plaintiff sought to recover violated a designated constitutional provision. The supreme court held that although the defendant did not specify the statute, "the plaintiff did not need to be told what section he was proceeding under, nor, would the court need any additional specification." *Id.* at 189, 223 S.W. at 739.

62. *Wrigley Properties, Inc. v. City of Ladue*, 369 S.W.2d 397 (Mo. 1963); *Kansas City v. Reed*, 358 Mo. 532, 216 S.W.2d 514 (1948); *Donovan v. Kansas City*, 352 Mo. 430, 175 S.W.2d 874 (1943) (en banc); *State v. Williams*, 337 Mo. 987, 87 S.W.2d 423 (1935), *trans'd*, 108 S.W.2d 177 (Ct. App. 1937); *Beck v. Kansas City Pub. Serv. Co.*, 37 S.W.2d 589 (Mo. 1931), *trans'd*, 48 S.W.2d 213 (Ct. App. 1932); *State v. Smith*, 256 S.W. 468 (Mo. 1923), *trans'd*, 261 S.W. 696 (Ct. App. 1924); *State v. Euge*, 349 S.W.2d 502 (Mo. Ct. App. 1961); *Bormann v. City of Richmond Heights*, 213 S.W.2d 249 (Mo. Ct. App. 1948); *cf.* Mo. Rev. STAT. § 409.050 (1959); Mo. Sup. Ct. R. 55.06. These provisions specify that "a pleading . . . shall contain (1) a short and plain statement of the facts showing that the pleader is entitled to relief . . ."

63. *Marshall v. City of Gladstone*, 380 S.W.2d 312 (Mo. 1964), *trans'd*; *Georg v. Koenig*, 370 S.W.2d 356 (Mo. 1963), *trans'd*; *State ex rel. Coates v. Parchman*, 346 S.W.2d 74 (Mo. 1961), *trans'd*, 354 S.W.2d 321 (Ct. App. 1962); *Goodson v. City of Ferguson*, 339 S.W.2d 841 (Mo. 1960), *trans'd*, 345 S.W.2d 381 (Ct. App. 1961); *State ex rel. Barnett v. Sappington*, 260 S.W.2d 669 (Mo. 1953), *trans'd*, 266 S.W.2d 774 (Ct. App. 1954); *State ex rel. Houser v. St. Louis Union Trust Co.*, 248 S.W.2d 592 (Mo. 1952), *trans'd*, 260 S.W.2d 821 (Ct. App. 1953); *Juengel v. City of Glendale*, 161 S.W.2d 408 (Mo.), *trans'd*, 164 S.W.2d 610 (Ct. App. 1942); *Beiser v. Woods*, 347 Mo. 437, 147 S.W.2d 656 (1940), *trans'd*, 236 Mo. App. 126, 150 S.W.2d 524 (1941); *Crescent Planing Mill Co. v. Mueller*, 117 S.W.2d 247 (Mo. 1938), *trans'd*, 234 Mo. App. 1243, 123 S.W.2d 193 (1939); *City of Marshfield ex rel. Hasten v. Brown*, 337 Mo. 1136, 88 S.W.2d 339, *trans'd from* 79 S.W.2d 519 (Ct. App. 1935), *retrans'd*, 99 S.W.2d 485 (Ct. App. 1936); *State v. Williams*, *supra* note 62; *Beck v. Kansas City Pub. Serv. Co.*, *supra* note 62; *State v. Berry*, 253 S.W. 712 (Mo.), *trans'd*, 255 S.W. 337 (Ct. App.

To satisfy the statement of facts requirement, the party raising a constitutional question need not prove the validity of his claim nor even show a rational connection between the constitution and the facts,<sup>64</sup> but he must state some facts which indicate how his constitutional rights have been infringed. In *Ragan v. Ragan*,<sup>65</sup> the wife contended that the judgment granting her husband a divorce denied her the free exercise of her religion as a Jehovah's Witness, contrary to article I, section five of the Missouri Constitution and the first and fourteenth amendments of the federal constitution.

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1923); *State v. Goetz*, 253 S.W. 710 (Mo.), *trans'd*, 255 S.W. 345 (Ct. App. 1923); *Dorrah v. Pemiscot County Bank*, 248 S.W. 960 (Mo.), *trans'd*, 213 Mo. App. 541, 256 S.W. 560 (1923); *Ragan v. Ragan*, 315 S.W.2d 142 (Mo. Ct. App. 1958); *Bormann v. City of Richmond Heights*, *supra* note 62; see *Magenheim v. Board of Educ.*, 340 S.W.2d 619 (Mo. 1960), *trans'd*, 347 S.W.2d 409 (Ct. App. 1961); *Bennett v. Cutler*, 245 S.W.2d 900 (Mo. 1952); *State ex rel. Allison v. Barton*, 355 Mo. 690, 197 S.W.2d 667 (1946) (en banc); *Donovan v. Kansas City*, *supra* note 62; *State ex rel. Kenosha Auto Transp. Corp. v. Flanigan*, 349 Mo. 54, 159 S.W.2d 598 (1942) (en banc); *Wheat v. Platte City Benefit Assessment Special Rd. Dist.*, 330 Mo. 1245, 52 S.W.2d 856 (1932), *trans'd*, 227 Mo. App. 869, 59 S.W.2d 88 (1933); *McGill v. City of St. Joseph*, 31 S.W.2d 1038 (Mo. 1930), *trans'd*, 225 Mo. App. 1033, 38 S.W.2d 725 (1931); *Village of Grandview v. McElroy*, 318 Mo. 135, 298 S.W. 760 (1927), *trans'd*; *State v. Tatman*, 312 Mo. 134, 278 S.W. 713 (1925), *trans'd*, 291 S.W. 151 (Ct. App. 1927); *State v. Smith*, *supra* note 62; *State v. McIntyre*, 252 S.W. 386 (Mo.), *trans'd*, 256 S.W. 141 (Ct. App. 1923); *State v. Nece*, 248 S.W. 963 (Mo.), *trans'd*, 255 S.W. 1075 (Ct. App. 1923); *State v. Goad*, 296 Mo. 452, 246 S.W. 917 (1922), *trans'd*; *Carmody v. St. Louis Transit Co.*, 188 Mo. 572, 87 S.W. 913 (1905), *trans'd*, 122 Mo. App. 338, 99 S.W. 495 (1907); *State ex rel. Kansas City Loan Guar. Co. v. Smith*, 176 Mo. 44, 75 S.W. 468 (1903) (en banc). *But see* *City of St. Louis v. Green*, 353 S.W.2d 606 (Mo. 1962) (supreme court retained case although plaintiff apparently stated only a legal conclusion).

64. In order to raise a purported constitutional question a party need only allege some facts showing how his rights have been violated. Then, once the purported question has been raised, the court will employ certain standards to determine whether the question is one which the supreme court will review. At the "standards" phase of inquiry the party raising the constitutional question must show a "rational connection" among the facts, the specified constitutional provision and the statute, if one is involved. Otherwise, the question will be deemed colorable. The jurisdictional decision determines whether the supreme court will retain or transfer the case; there is no inquiry made on the merits of the claim. See § 1.032. *But see* *Village of Beverly Hills v. Schulter*, 130 S.W.2d 532 (Mo. 1939). The plaintiff had specified the applicable ordinance and the article and section number of the constitutional provision in his petition, but failed to allege any facts to support his claim. The supreme court retained the case, stating: "In some cases, in order to raise a constitutional question, it is necessary to state in what way constitutional rights are transgressed . . . but such is apparent here, if defendant is correct respecting validity on constitutional grounds." *Id.* at 534. The court determined the sufficiency of plaintiff's contention retrospectively, by reading back into the petition its decision on the merits of the case. By permitting such a determination of jurisdiction, *Schulter* contradicts the established body of law which upholds the use of the requirements and discretionary standards. The case may have questionable weight today, since it has never been cited as authority for this point.

65. 315 S.W.2d 142 (Mo. Ct. App. 1958).

This contention, unsupported by any statement of facts tending to show how her religious freedom was limited, did not present a constitutional question.

Sufficient facts were stated in *State v. Kentner*,<sup>66</sup> a criminal action for violation of a statute forbidding the operation of a bucket shop. The defendant challenged the sufficiency of the information on the ground that:

‘[T]he act of the Legislature and laws upon which this prosecution is based is unconstitutional and void for the reason that it gives to the informer or prosecuting attorney one-fourth ( $\frac{1}{4}$ ) of the amount of the fine imposed for this violation, and for that reason is in conflict with that provision of the Constitution of the state of Missouri which grants exclusive power to the Governor of the state to grant pardon and remit offense . . . .’<sup>67</sup>

When *no* facts are stated, as in *Ragan*, the jurisdictional result is clear. However, when *some* facts have been stated, as in *Kentner*, the result is less clear. Because there is no definite tests of the degree to which facts must be stated, each case must be handled on an *ad hoc* basis.

### 1.022. *The Trial Court Must Rule on the Constitutional Question*

Because supreme court jurisdiction is predicated on an allegedly erroneous construction of the constitution, the trial record must affirmatively indicate that the trial court did construe the constitution.<sup>68</sup> Although a constitutional contention cannot be ruled on unless it was raised, the converse is not necessarily true; that is, if the constitutional question was raised it will not always be ruled on. The function of the proper raising requirement is to insure that the trial court will have an opportunity to construe the constitution.

Although the contention may have been presented at the first available opportunity, and may include both a specification of the article and section of the constitutional provision and a statement of facts, the trial court may still not pass on the contention if (1) it was raised but withdrawn before the trial court ruled on it, (2) it contained two issues, so that the court could have disposed of the question on non-constitutional grounds, or (3) it did not unconditionally present a constitutional question.

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66. 74 S.W. 9 (Mo. Ct. App.), *trans'd*, 178 Mo. 487, 77 S.W. 522 (1903).

67. *Ibid.*

68. *State ex rel. Daniels v. Kasten*, 368 S.W.2d 429 (Mo. 1963), *trans'd*; *Municipal Sec. Corp. v. Kansas City*, 186 S.W. 989 (Mo. 1916), *trans'd from* court of appeals, *retrans'd*, 195 Mo. App. 464, 193 S.W. 880 (1917); *Shell v. Missouri Pac. Ry.*, 202 Mo. 339, 100 S.W. 617 (1907), *trans'd*, 132 Mo. App. 528, 112 S.W. 39 (1908); *Harding v. City of Carthage*, 171 Mo. 442, 71 S.W. 673 (1903), *trans'd from* court of appeals, *retrans'd*, 105 Mo. App. 16, 78 S.W. 654 (1904); *Clark v. Porter*, 162 Mo. 516, 63 S.W. 89 (1901), *trans'd from* 77 Mo. App. 103 (1898), *retrans'd*, 90 Mo. App. 143 (1901); *Baldwin v. Fries*, 103 Mo. 286, 15 S.W. 760, *trans'd from* court of appeals, *retrans'd*, 46 Mo. App. 288 (1891).

1.022(a). *Opportunity of the Trial Court to Rule on the Constitutional Question*

When a constitutional issue was raised but withdrawn,<sup>69</sup> or when the case was disposed of before the trial court construed the constitution,<sup>70</sup> the case no longer involves a constitutional question on which supreme court jurisdiction can be based. In *Harding v. City of Carthage*,<sup>71</sup> the plaintiff filed a petition to enjoin the city from holding an election on the ground that it would violate the state constitution. When the plaintiff failed to appear at the hearing, the cause was dismissed for failure to prosecute. After the plaintiff's motion to set aside the dismissal was overruled, he appealed to the court of appeals which transferred to the supreme court on the ground that a constitutional question was involved. The supreme court retransferred because the trial court had disposed of the case before an opportunity to rule on the constitutional question was presented.

1.022(b). *Contention with Two Issues: One Constitutional and One Non-Constitutional*

When a properly raised contention includes two distinct issues, only one of which is constitutional, the trial court may avoid the constitutional issue. These alternative issues may be expressly presented to the trial court or implied by the record.

In *Ingle v. City of Fulton*,<sup>72</sup> in which the plaintiff instituted an action to enjoin the city from enforcing an ordinance which prohibited mining, both issues were expressly presented. The petition alleged, alternatively, unconstitutionality of the ordinance, and abuse of the city's statutory authority in the enactment of this ordinance. The trial court sustained plaintiff's motion for judgment on the pleading and granted the injunction. Because the trial record did not disclose whether the constitution had been construed, the court of appeals retained the case. When the record does not indicate which issue was decided, the appellate courts will infer that the constitutional issue has been avoided.<sup>73</sup>

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69. *Municipal Sec. Corp. v. Kansas City*, *supra* note 68; *Shell v. Missouri Pac. Ry.*, *supra* note 68; *Lins v. Boeckeler Lumber Co.*, 221 Mo. App. 181, 299 S.W. 150 (1927).

70. *Harding v. City of Carthage*, 171 Mo. 442, 71 S.W. 673 (1903), *trans'd* from court of appeals, *retrans'd*, 105 Mo. App. 16, 78 S.W. 654 (1904). *But see* *Cohen v. Ennis*, 308 S.W.2d 669 (Mo.), *trans'd*, 314 S.W.2d 239 (Ct. App.), *retrans'd*, 318 S.W.2d 310 (Mo. 1958) (en banc).

71. 171 Mo. 442, 71 S.W. 673 (1903), *trans'd* from court of appeals, *retrans'd*, 105 Mo. App. 16, 78 S.W. 654 (1904).

72. 260 S.W.2d 666 (Mo. 1953), *trans'd*, 268 S.W.2d 600 (Ct. App. 1954).

73. See *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); *Motchar v. Hollingsworth*, 162 S.W.2d 805 (Mo.), *trans'd*, 167 S.W.2d 390 (Ct. App. 1942); *Juengel v. City of Glendale*, 161

When a constitutional issue has been clearly presented but an alternative issue can be implied from the record, the trial court may avoid construing the constitution.<sup>74</sup> In *Saxton Nat'l Bank v. Bennett*,<sup>75</sup> a constitutional question was presented in an amended motion for a new trial. The trial court, in denying the motion, appeared to construe the constitution, but since the motion had been filed after the statutory deadline, the trial court could have denied the motion on the ground that it was made too late. The supreme court held that due to this ambiguous ruling there was no constitutional question to be considered on appeal.

The trial court's avoidance of the constitutional question by ruling on an implied alternative issue appears to be the reason for denying supreme court jurisdiction when the proper requirements for raising the question are not met. For example, if a plaintiff has based his cause of action on a statute, the defendant should challenge the constitutionality of this statute in his pre-trial pleadings.<sup>76</sup> However, if the defendant waits until the trial to object, and the trial court simply overrules the objection without stating a reason, the defendant cannot invoke supreme court jurisdiction based on a constitutional question.

The practice of the supreme court has been to transfer such cases on the ground that a constitutional question, not presented at the first available opportunity, is improperly raised. The supreme court has failed to articulate the underlying reason for denying its jurisdiction: that the trial court did not construe the constitution. The defendant's objection, in the above hypothetical case, appears to contain only one issue, the constitutionality of the statute; in fact, two issues are present. The second is the implied issue of whether the constitutional contention was properly raised so that the trial court had an opportunity to construe the constitution. Because the trial court could dispose of the contention by holding that the question was not raised at the first available opportunity, no construction of the constitution was necessary.

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S.W.2d 408 (Mo.), *trans'd*, 164 S.W.2d 610 (Ct. App. 1942); *City of Tarkio v. Loyd*, 179 Mo. 600, 78 S.W. 797, *trans'd*, 109 Mo. App. 171, 82 S.W. 1127 (1904); *Town of Kirkwood v. Meramec Highlands Co.*, 160 Mo. 111, 60 S.W. 1072 (1901), *trans'd*, 94 Mo. App. 637, 68 S.W. 761 (1902); *Coleman v. Cole*, 158 Mo. 253, 59 S.W. 106 (1900), *trans'd from court of appeals, retrans'd*, 96 Mo. App. 22, 69 S.W. 692 (1902); *State ex rel. Magidson v. Henze*, 342 S.W.2d 261 (Mo. Ct. App. 1961); *Samuel Haas Trimmed Hat Co. v. Service Ass'n*, 222 Mo. App. 307, 297 S.W. 129 (1927); *cf. Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (rule 4 for avoiding constitutional determinations). Compare *State ex rel. Campbell v. St. Louis Court of Appeals*, 97 Mo. 276, 10 S.W. 874 (1889).

74. *Saxton Nat'l Bank v. Bennett*, 138 Mo. 494, 40 S.W. 97 (1897); *McCarty v. O'Bryan*, 137 Mo. 584, 38 S.W. 456 (1896) (en banc), *trans'd from court of appeals*.

75. 138 Mo. 494, 40 S.W. 97 (1897).

76. See § 1.021(a)(1).

1.022(c). *The Constitutionality of a Legislative Act Must Be Unconditionally Challenged*

For a case to involve a construction of the constitution on the ground that a legislative act is unconstitutional, the constitutionality of the act must be directly challenged.<sup>77</sup> To contend that a legislative act would be unconstitutional if construed in a certain manner does not meet this requirement.<sup>78</sup> The supreme court first stated this rule in *Nickell v. Kansas City, St. L. & C.R.R.*:<sup>79</sup> "A challenge that the statute is unconstitutional in any event is the only challenge that is sufficient to raise a constitutional question and invest this court with appellate jurisdiction."<sup>80</sup> Under this formula, the defendant cannot dispute the plaintiff's construction of a legislative act and simultaneously challenge the constitutionality of the act on the construction advanced by plaintiff and adopted by the court.<sup>81</sup>

This formula, although consistently followed,<sup>82</sup> is stated too broadly.<sup>83</sup>

77. *Knight v. Calvert Fire Ins. Co.*, 260 S.W.2d 673 (Mo. 1953), *trans'd*, 268 S.W.2d 53 (Ct. App. 1954); *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). In *Mesenbrink v. Boudreau*, 171 S.W.2d 728 (Mo. Ct. App. 1943), *trans'd*, the court of appeals commented on the phrase "to raise a constitutional question an attack on a statute involved must be that it is unconstitutional in any event, not that it is unconstitutional as construed by the court." It stated that the phrase is applicable only where a legislative act and not an official act or omission is challenged as unconstitutional.

78. *State v. Lauridsen*, 312 S.W.2d 140 (Mo.), *trans'd*, 318 S.W.2d 511 (Ct. App. 1958); *Community Fire Protection Dist. v. Board of Educ.*, 312 S.W.2d 75 (Mo.), *trans'd*, 315 S.W.2d 873 (Ct. App. 1958); *Knight v. Calvert Fire Ins. Co.*, *supra* note 77; *Phillips Pipe Line Co. v. Brandstetter*, *supra* note 77; *Nemours v. City of Clayton*, 351 Mo. 317, 172 S.W.2d 937, *trans'd*, 237 Mo. App. 497, 175 S.W.2d 60 (1943); *State ex rel. Miller v. St. Louis Union Trust Co.*, 335 Mo. 845, 74 S.W.2d 348 (Mo. 1934) (en banc); *State ex rel. Burnett v. School Dist.*, 335 Mo. 803, 74 S.W.2d 30 (1934) (en banc); *Detmer, Bruner & Mason v. New York Cent. R.R.*, 72 S.W.2d 984 (Mo. 1934), *trans'd*, 229 Mo. App. 702, 80 S.W.2d 222 (1935). Additional cases are cited in note 82 *infra*.

79. 326 Mo. 338, 32 S.W.2d 79 (1930), *trans'd*, 226 Mo. App. 302, 41 S.W.2d 595 (1931).

80. *Id.* at 341, 32 S.W.2d at 81. (Emphasis added.)

81. *State ex rel. Volker v. Kirby*, 345 Mo. 801, 136 S.W.2d 319 (1940) (concurring opinion). In *City of St. Louis v. Friedman*, 358 Mo. 681, 216 S.W.2d 475 (1948), an action by the city to enjoin defendant from using her property in a manner in violation of a city zoning ordinance, the defendant denied that she had violated the ordinance by storing junk and then stated that the particular clause of the ordinance invoked against her was unconstitutional insofar as it prohibited the storage of scrap iron and junk in the district zoned as "industrial." The trial court granted the injunction and defendant appealed to the supreme court. That court held that the defendant could, without being inconsistent, deny that she had violated the ordinance and also assert that the ordinance was unconstitutional however interpreted. The court retained the case on the ground that the constitutional question was *unconditionally* raised.

82. *Community Fire Protection Dist. v. Board of Educ.*, 312 S.W.2d 75 (Mo.), *trans'd*, 315 S.W.2d 873 (Ct. App. 1958); *State ex rel. Thompson v. Roberts*, 264

It fails to consider that many statutes are constitutional when applied to some fact situations and not when applied to others. The Missouri state income tax would be unconstitutional if applied to a non-resident of the state who earned no income within it. It is clear that the court's generalization is unfortunate as it permits the court to look merely to the form of the contention and not inquire whether the trial court did construe the constitution.<sup>84</sup> In *Cotton v. Iowa Mut. Liab. Ins. Co.*,<sup>85</sup> a declaratory

S.W.2d 314 (Mo.), *trans'd*, 269 S.W.2d 148 (Ct. App. 1954); *Knight v. Calvert Fire Ins. Co.*, 260 S.W.2d 673 (Mo. 1953), *trans'd*, 268 S.W.2d 53 (Ct. App. 1954); *State ex rel. Barnett v. Sappington*, 260 S.W.2d 669 (Mo. 1953), *trans'd*, 266 S.W.2d 774 (Ct. App. 1954); *Cotton v. Iowa Mut. Liab. Ins. Co.*, 363 Mo. 400, 251 S.W.2d 246 (1952), *trans'd*, 260 S.W.2d 43 (Ct. App. 1953); *Stribling v. Jolley*, 362 Mo. 995, 245 S.W.2d 885, *trans'd*, 241 Mo. App. 1123, 253 S.W.2d 519 (1952); *Hayes v. Hayes*, 153 S.W.2d 1 (Mo.), *trans'd*, 156 S.W.2d 34 (Ct. App. 1941); *Superior Press Brick Co. v. City of St. Louis*, 152 S.W.2d 178 (Mo.), *trans'd*, 155 S.W.2d 290 (Ct. App. 1941); *State ex rel. Volker v. Kirby*, 345 Mo. 801, 136 S.W.2d 319 (1940) (en banc); *Langan v. United States Life Ins. Co.*, 114 S.W.2d 984 (Mo.), *trans'd*, 121 S.W.2d 268 (Ct. App. 1938); *Moyer v. Orek Coal Co.*, 78 S.W.2d 107 (Mo. 1934), *trans'd*, 229 Mo. App. 811, 82 S.W.2d 924 (1935); *Curtin v. Zerbst Pharmacal Co.*, 333 Mo. 346, 62 S.W.2d 771 (1933), *trans'd*, 229 Mo. App. 82, 72 S.W.2d 152 (1934); *Chilton v. Drainage Dist.*, 332 Mo. 1173, 61 S.W.2d 744 (1933), *trans'd from* 224 Mo. App. 467, 28 S.W.2d 120 (1930), *retrans'd*, 228 Mo. App. 4, 63 S.W.2d 421 (1933); *Woodling v. Westport Hotel Operating Co.*, 331 Mo. 812, 55 S.W.2d 477 (1932), *trans'd*, 227 Mo. App. 1231, 63 S.W.2d 207 (1933); *Dietrich v. Brickey*, 327 Mo. 189, 37 S.W.2d 428 (1931), *trans'd*, 48 S.W.2d 69 (Ct. App. 1932); *Service Purchasing Co. v. Brennan*, 32 S.W.2d 81 (Mo. 1930), *trans'd*, 226 Mo. App. 110, 42 S.W.2d 39 (1931); *State v. Hatton*, 240 Mo. App. 1244, 228 S.W.2d 10 (1950). *But cf.* *Hartvedt v. Maurer*, 359 Mo. 16, 220 S.W.2d 55 (1949).

83. See *State ex rel. Volker v. Kirby*, 345 Mo. 801, 136 S.W.2d 319 (1940) (concurring opinion).

84. See cases cited notes 78, 82 *supra*. However, in *State ex rel. Walker v. Locust Creek Drainage Dist.*, 58 S.W.2d 452 (Mo. 1933), *trans'd*, 228 Mo. App. 434, 67 S.W.2d 840 (1934), the court appears to have expressed a willingness to pierce the form of the contention. In this case, a writ of mandamus was sought to compel a drainage district to construct and maintain a bridge across its drainage ditch intersecting a public highway. In the petition, relator attempted to raise a constitutional question by alleging that if the statutes were construed to fix upon the county and the taxpayers the cost of building the bridge, the statutes were unconstitutional. The court found in favor of the defendants, dismissed the petition, and relator appealed. The supreme court, by looking beyond the form of the contention and into the record, held that since the trial court had not ruled on the constitutionality of the statutes, the appeal must be transferred. However, jurisdiction would have been denied even if the trial court had ruled on the constitutional question because it had not been properly preserved (see § 1.024).

In a later case, *Hartvedt v. Maurer*, 359 Mo. 16, 220 S.W.2d 55 (1949), the supreme court disregarded the form of the contention and retained jurisdiction. The contention was if the new statute was construed to shorten the time for revivor and substitution of parties where the right thereto had vested prior to the effective date of the new statute, the plaintiffs would be deprived of a vested right counter to the retrospective provision of the constitution.

85. 363 Mo. 400, 251 S.W.2d 246 (1952), *trans'd*, 260 S.W.2d 43 (Ct. App. 1953).



judgment action, the plaintiff contended that *if* the statute relieved the defendant from liability for negligence in the operation of a vehicle on a public highway, it violated the state and federal constitutions. The trial court entered judgment for the plaintiff and held that the statute was unconstitutional insofar as it purported to exempt the defendant from liability. On appeal, the supreme court transferred the case on the ground that the only attack sufficient to vest that court with original appellate jurisdiction is that the statute is totally unconstitutional under all constructions. The supreme court apparently disregarded the important fact that the trial court *did* construe the constitution, which fact should have been sufficient to vest the supreme court with jurisdiction.

The contention that a legislative act would be unconstitutional if construed in a certain manner can best be understood by employing the concept of "avoidability." For example, a defendant might contend that *if* a statute is construed as plaintiff suggests, it would be unconstitutional and that to uphold the statute the court should give it a different meaning. If the trial court adopts the defendant's construction of the statute, it need not inquire whether this construction renders the statute unconstitutional, because there was no allegation that it did. Appeal then lies to the court of appeals. But if the trial court follows the plaintiff's construction, it must then face the issue of the constitutionality of the statute. In such a case, a constitutional issue is involved on which supreme court jurisdiction *should* be predicated.<sup>86</sup>

Perhaps the trial court does not actually construe the constitution in most cases involving conditional contentions. However, by mechanically referring to the form of the contention, the supreme court has transferred cases such as *Cotton v. Iowa Mut. Liab. Ins. Co.*<sup>87</sup> in which the trial court *did* construe the constitution. This result is inconsistent with article V, section three of the Missouri Constitution which expressly gives the supreme court original appellate jurisdiction over all cases involving the construction of the constitution. If the trial court *did* construe the constitution, the supreme court should have jurisdiction whether the form was conditional or unconditional.

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86. *Ibid.* In *Peterson v. Chicago & A. Ry.*, 265 Mo. 462, 178 S.W. 182 (1915), *trans'd from* court of appeals; *Dorrance v. Dorrance*, 242 Mo. 625, 148 S.W. 94 (1912) (en banc), the supreme court retained jurisdiction over conditional constitutional contentions. These cases are inconsistent with modern cases because they were decided prior to *Nickell v. Kansas City, St. L. & G.R.R.*, 326 Mo. 338, 32 S.W.2d 79 (1930), discussed in text accompanying notes 79-80 *supra*.

87. 363 Mo. 400, 251 S.W.2d 246 (1952), discussed in text accompanying note 85 *supra*.

1.022(d). *Inherency Doctrine*

Missouri cases have held that to warrant an original appeal to the supreme court based on a constitutional question, the record must affirmatively indicate that either: (1) the protection of the constitution was expressly invoked, ruled on by the trial court adversely to the appellant, and the issue preserved for appeal, *or* (2) a construction of the constitution was essential or necessary to the trial court's determination of the case.<sup>88</sup> The first doctrine required an affirmative showing in the record that the trial court *did* rule on the constitutional question, while the second required only that such a ruling could be implied from the facts of the case. The latter rule, known as the "inherency" doctrine, has been rejected by the supreme court.<sup>89</sup> However, since this doctrine did significantly confuse the law relating to appeals in cases involving a construction of the constitution,<sup>90</sup> and has been mentioned in recent cases,<sup>91</sup> it merits discussion in this treatise.

88. *Juengel v. City of Glendale*, 161 S.W.2d 408 (Mo.), *trans'd*, 164 S.W.2d 610 (Ct. App. 1942); *State ex rel. Missouri Elec. Power Co. v. Allen*, 340 Mo. 44, 100 S.W.2d 868 (1936); *State ex rel. Rose v. Webb City*, 333 Mo. 1127, 64 S.W.2d 597 (1933), *trans'd*, 74 S.W.2d 45 (Ct. App. 1934); *Schildnecht v. City of Joplin*, 327 Mo. 126, 35 S.W.2d 35 (en banc), *trans'd*, 226 Mo. App. 47, 41 S.W.2d 590 (1931); *Lieber v. Heil*, 325 Mo. 1148, 30 S.W.2d 143 (1930), *trans'd from* 220 Mo. App. 896, 296 S.W. 200 (1927), *retrans'd*, 32 S.W.2d 792 (Ct. App. 1930); *Syz v. Milk Wagon Drivers' Local 603*, 323 Mo. 130, 18 S.W.2d 441 (1929), *trans'd*, 24 S.W.2d 1080 (Ct. App. 1930); *State ex rel. Schuler v. Nolte*, 315 Mo. 84, 285 S.W. 501 (1926) (en banc); *Ranney v. City of Cape Girardeau*, 255 Mo. 514, 164 S.W. 582 (1914), *trans'd from* court of appeals, *retrans'd*, 185 Mo. App. 229, 170 S.W. 342 (1914); *Sheets v. Iowa State Ins. Co.*, 226 Mo. 613, 126 S.W. 413 (1910), *trans'd*, 153 Mo. App. 620, 135 S.W. 80 (1911); *Street v. School Dist.*, 221 Mo. 663, 120 S.W. 1159 (1909), *trans'd*, 141 Mo. App. 189, 124 S.W. 564 (1910); *Lohmeyer v. St. Louis Cordage Co.*, 214 Mo. 685, 113 S.W. 1108 (1908), *trans'd*, 137 Mo. App. 624, 119 S.W. 49 (1909); *Carmody v. St. Louis Transit Co.*, 188 Mo. 572, 87 S.W. 913 (1905), *trans'd*, 122 Mo. App. 338, 99 S.W. 495 (1907); *City of Excelsior Springs v. Ettenson*, 188 Mo. 129, 86 S.W. 255 (1905), *trans'd from* court of appeals, *retrans'd*, 120 Mo. App. 215, 96 S.W. 701 (1906); *State ex rel. Horton v. Bland*, 186 Mo. 691, 85 S.W. 561 (1905) (en banc); *City of Tarkio v. Loyd*, 179 Mo. 600, 78 S.W. 797, *trans'd*, 109 Mo. App. 171, 82 S.W. 1127 (1904); *State ex rel. Kansas City Loan Guar. Co. v. Smith*, 176 Mo. 44, 75 S.W. 468 (1903) (en banc); *Fisk v. Wellsville Fire Brick Co.*, 145 S.W.2d 451 (Mo. Ct. App. 1940), *trans'd*, 348 Mo. 73, 152 S.W.2d 113 (1941); *Davis v. Missouri Elec. Power Co.*, 88 S.W.2d 217 (Mo. Ct. App. 1935).

89. *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).

90. In *Miller v. Connor*, 250 Mo. 677, 683-84, 157 S.W. 81, 83, *trans'd from* court of appeals, *retrans'd*, 177 Mo. App. 630, 160 S.W. 582 (1913), the supreme court commingled the two doctrines of appellate jurisdiction:

In order to bring an appeal within our jurisdiction on a constitutional ground, it must appear that a constitutional construction *was essential to the determination of the case*. . . .

So, it must appear that a constitutional question was raised in the trial court and ruled on to the disadvantage of the party appealing. (Emphasis added.)

While using language characteristic of the inherency doctrine (necessary and essential),

The four early cases<sup>92</sup> which established the inherency doctrine<sup>93</sup> dispensed with the normal requirements in cases where no judgment could be rendered without a construction of the constitution, since the constitutional

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the supreme court denied jurisdiction because the requirements (raised and ruled on) were not met. See *State v. Kramer*, 222 S.W. 822 (Mo.), *trans'd*, 206 Mo. App. 49, 226 S.W. 643 (1920); *William R. Bush Constr. Co. v. Withnell*, 185 Mo. App. 408, 170 S.W. 361 (1914), *trans'd, retrans'd from supreme court*, 190 Mo. App. 33, 175 S.W. 260 (1915); see text accompanying note 100 *infra*.

91. See cases cited note 100 *infra*.

92. The four foundation cases for the inherency doctrine are *State ex rel. Mulholland v. Smith*, 141 Mo. 1, 41 S.W. 906 (1897) (en banc); *State ex rel. Smith v. Smith*, 152 Mo. 444, 54 S.W. 218 (1899) (en banc); *State ex rel. Curtice v. Smith*, 177 Mo. 69, 75 S.W. 625 (1903) (en banc); and *McGrew v. Missouri Pac. Ry.*, 230 Mo. 496, 132 S.W. 1076 (1910) (en banc).

In *State ex rel. Mulholland v. Smith*, *supra*, an employee of a street railroad was charged with violating a city ordinance. While reconstructing a switch, he dug up a city street without permission, for which he was convicted by a police judge. The case was appealed to the criminal court and the parties submitted an agreed statement of facts which admitted the breach of the ordinance. On appeal to the court of appeals, from a judgment for the defendant, the ordinance was alleged to be an impairment of contract. The contract allegedly impaired was one by which the county court, prior to the extension of the city limits, had assented to railroad construction and maintenance in the area in which the digging had occurred. The defendant sought mandamus in the supreme court to direct the court of appeals to transfer the case on the ground that a constitutional question was involved. What procedure was necessary to raise a constitutional question in the trial court where a controversy was submitted for judgment on an agreed statement of facts? The supreme court en banc held that when the case was submitted in this manner, it was the province of the court to apply all of the existing law to the agreed facts, and to pronounce the proper judgment. On appeal, any proposition of law found by the criminal court to be applicable to the agreed facts could be relied on by either party, if nothing had occurred to indicate a waiver. In awarding the peremptory writ of mandamus, the supreme court held that the question whether the defendant was entitled to act in disregard of the ordinance because of the vested contractual right of the railway, required a construction of the constitution. When the judgment of a court, on agreed facts, obviously and necessarily comprehends a decision of a question of constitutional rights, that question is "involved" in the judgment.

In *State ex rel. Smith v. Smith*, *supra*, the question whether the Board of Police Commissioners of Kansas City had the power to discharge a policeman depended, in turn, on whether the city charter or certain state statutes were controlling. The supreme court, on mandamus, ordered the record sent up on the ground that a correct interpretation of the statutes could be reached only by consulting the constitutional provisions authorizing the adoption of the charter.

In *State ex rel. Curtice v. Smith*, *supra*, plaintiff sued on a tax bill authorized by ordinance for street paving. The defendants answered that the ordinance was contrary to a provision of the Kansas City Charter and was, therefore, void. The plaintiff replied that the defendants could not raise any defense to the tax bill since they did not object within sixty days after issuance of the bill, as required by the charter provision. The circuit court allowed the defenses, denied plaintiff's instruction that the city charter be declared constitutional, and denied all the defendants' instructions covering all the phases of their defenses. The court then entered judgment for the plaintiff and defendants appealed to the court of appeals. That court held that the constitutionality of

question “necessarily” and “essentially” existed.<sup>94</sup> The inherency doctrine was subsequently used in several cases<sup>95</sup> and was discussed and rejected in others on the ground that it was not applicable to the facts involved.<sup>96</sup>

the charter provision was not involved when the tax bill was void, assumed jurisdiction and reversed the judgment. The plaintiff thereupon sought a writ of mandamus in the supreme court to compel the court of appeals to transfer the cause. The supreme court en banc granted the writ, holding that the case could not be decided in favor of the defendants without first holding that the charter provision invoked by the plaintiff was unconstitutional; therefore, a constitutional question was necessarily involved and the supreme court, not the court of appeals, had jurisdiction. *Dickey v. Holmes*, 208 Mo. 664, 106 S.W. 511 (1907), *trans'd*, involved the same constitutional question raised in the same manner as was the issue in *State ex rel. Curtice v. Smith*, *supra*. The supreme court held that the constitutional question was necessarily involved in the decision of the case but transferred because the constitutional question was no longer debatable. See § 1.033.

*McGrew v. Missouri Pac. Ry.*, *supra*, was an action based on statutes to recover damages from the railway for charging higher rates for short-haul than for long-haul freight transportation. From a judgment for the plaintiff, the defendant appealed to the supreme court, where he first raised the question of the constitutionality of the statute on which the cause of action was based. The court en banc did not discuss jurisdiction but did discuss the constitutional question. The court held that the constitutionality of the statutes on which the cause of action was based was involved in the case from start to finish because unless the statutes had legal force and effect, the plaintiff had no cause of action. Therefore, the defendant could challenge the statute at any time and in any court until the final decision in the case. Although *McGrew* has been cited as a foundation case for the inherency doctrine, it has long been distinguished and overruled insofar as it pertains to jurisdictional questions. In *Strother v. Atchison, T. & S.F. Ry.*, 274 Mo. 272, 203 S.W. 207 (1918), *trans'd*, 212 S.W. 404 (Ct. App. 1919), the cause of action was statutory but the defendant did not question the constitutionality of the statute until his motion for new trial. The defendant appealed to the supreme court, basing jurisdiction on the *McGrew* theory of “inherency.” The supreme court, in transferring, held that “the doctrine of the *McGrew* case cannot be applied where the question of jurisdiction is involved.” *Id.* at 285, 203 S.W. at 211. Otherwise, every action based on a statute could present a constitutional question which might be raised for the first time on appeal and thereby contradict the rule that the constitutional question must be raised at the earliest possible time permitted by orderly procedure. See § 1.021(a). *Strother*, as it restricts *McGrew*, has been uniformly followed. *Schildnecht v. City of Joplin*, 327 Mo. 126, 35 S.W.2d 35 (en banc), *trans'd*, 226 Mo. App. 47, 41 S.W.2d 590 (1931); *Lieber v. Heil*, 325 Mo. 1148, 30 S.W.2d 143 (1930), *trans'd from* 220 Mo. App. 896, 296 S.W. 200 (1927), *retrans'd*, 32 S.W.2d 792 (Ct. App. 1930); *Syz v. Milk Wagon Drivers' Local 603*, 323 Mo. 130, 18 S.W.2d 441 (1929), *trans'd*, 24 S.W.2d 1080 (Ct. App. 1930).

93. See the discussion of the doctrine in *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).

94. *Ex parte Bass*, 328 Mo. 195, 40 S.W.2d 457 (1931) (concurring opinion); *Cartwright v. McDonald County*, 319 Mo. 848, 5 S.W.2d 54 (1928); *State ex rel. Schuler v. Nolte*, 315 Mo. 84, 285 S.W. 501 (1926) (en banc); see *State ex rel. Rose v. Webb City*, 333 Mo. 1127, 64 S.W.2d 597 (1933), *trans'd*, 74 S.W.2d 45 (Ct. App. 1934).

95. *Massey-Harris Harvester Co. v. Federal Bank*, 340 Mo. 1133, 104 S.W.2d 385 (1937); *State ex rel. Building Comm'n v. Smith*, 336 Mo. 810, 81 S.W.2d 613 (1935); *L. E. Lines Music Co. v. Holt*, 332 Mo. 749, 60 S.W.2d 32 (1933), *trans'd*

In 1949 the supreme court *en banc* in *City of St. Louis v. Butler Co.*<sup>97</sup> declared the inherency doctrine unconstitutional.<sup>98</sup> The policy underlying

from 48 S.W.2d 92 (Ct. App. 1932); *Ex parte Bass*, *supra* note 94; *Dickey v. Holmes*, 208 Mo. 664, 106 S.W. 511 (1907), *trans'd*; *Wooster v. Trimont Mfg. Co.*, 197 S.W.2d 710 (Mo. Ct. App. 1946), *trans'd*, 356 Mo. 682, 203 S.W.2d 411 (1947); *Fisk v. Wells-ville Fire Brick Co.*, 145 S.W.2d 451 (Mo. Ct. App. 1940), *trans'd*, 348 Mo. 73, 152 S.W.2d 113 (1941); *State ex rel. Smith v. Bowman*, 184 Mo. App. 549, 170 S.W. 700 (1914) (concurring opinion); *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). *Contra*, *L. E. Lines Music Co. v. Holt*, 61 S.W.2d 326 (Mo. 1933) (dissenting opinion).

96. *Juengel v. City of Glendale*, 161 S.W.2d 408 (Mo.), *trans'd*, 164 S.W.2d 610 (Ct. App. 1942); *Crescent Planing Mill Co. v. Mueller*, 117 S.W.2d 247 (Mo. 1938), *trans'd*, 234 Mo. App. 1243, 123 S.W.2d 193 (1939); *Esmar v. Haussler*, 341 Mo. 33, 106 S.W.2d 412 (1937), *trans'd*, 234 Mo. App. 217, 115 S.W.2d 54 (1938); *State ex rel. Missouri Elec. Power Co. v. Allen*, 100 S.W.2d 868 (Mo. 1936); *State ex rel. Rose v. Webb City*, 333 Mo. 1127, 64 S.W.2d 597 (1933), *trans'd*, 74 S.W.2d 45 (Ct. App. 1934); *Wheat v. Platte City Benefit Assessment Special Rd. Dist.*, 330 Mo. 1245, 52 S.W.2d 856 (1932), *trans'd*, 227 Mo. App. 869, 59 S.W.2d 88 (1933); *Lieber v. Heil*, 325 Mo. 1148, 30 S.W.2d 143 (1930), *trans'd from* 220 Mo. App. 896, 296 S.W. 200 (1927), *retrans'd*, 32 S.W.2d 792 (Ct. App. 1930); *Syz v. Milk Wagon Drivers' Local 603*, 323 Mo. 130, 18 S.W.2d 441 (1929), *trans'd*, 24 S.W.2d 1080 (Ct. App. 1930); *Cartwright v. McDonald County*, 319 Mo. 848, 5 S.W.2d 54 (1928); *State ex rel. Schuler v. Nolte*, 315 Mo. 84, 285 S.W. 501 (1926) (en banc); *State v. Berry*, 253 S.W. 712 (Mo.), *trans'd from* court of appeals, *retrans'd*, 255 S.W. 337 (Ct. App. 1923); *Kircher v. Evers*, 238 S.W. 1086 (Mo. 1922), *trans'd*, 247 S.W. 251 (Ct. App. 1923); *Powell v. Reidinger*, 228 S.W. 503 (Mo.), *trans'd*, 234 S.W. 850 (Ct. App. 1921); *Rolling v. Business Men's Acc. Ass'n of America*, 213 S.W. 52 (Mo. 1919), *trans'd*, 204 Mo. App. 679, 220 S.W. 1022 (1920); *Strother v. Atchison, T. & S.F. Ry.*, 274 Mo. 272, 203 S.W. 207 (1918), *trans'd*, 212 S.W. 404 (Ct. App. 1919); *City of Milan v. Allen*, 175 S.W. 933 (Mo. 1915), *trans'd from* court of appeals; *Ranney v. City of Cape Girardeau*, 255 Mo. 514, 164 S.W. 582 (1914), *trans'd from* court of appeals, *retrans'd*, 185 Mo. App. 229, 170 S.W. 342 (1914); *Sheets v. Iowa State Ins. Co.*, 226 Mo. 613, 126 S.W. 413 (1910), *trans'd*, 153 Mo. App. 620, 135 S.W. 80 (1911); *Wabash R.R. v. Flannigan*, 218 Mo. 566, 117 S.W. 722 (1909), *trans'd from* 118 Mo. App. 124, 100 S.W. 661 (1906), *retrans'd*; *Lohmeyer v. St. Louis Cordage Co.*, 214 Mo. 685, 113 S.W. 1108 (1908), *trans'd*, 137 Mo. App. 624, 119 S.W. 49 (1909); *City of Excelsior Springs v. Ettenson*, 188 Mo. 129, 86 S.W. 255 (1905), *trans'd from* court of appeals, *retrans'd*, 120 Mo. App. 215, 96 S.W. 701 (1906); *State ex rel. Horton v. Bland*, 186 Mo. 691, 85 S.W. 561 (1905) (en banc); *City of Tarkio v. Loyd*, 179 Mo. 600, 78 S.W. 797, *trans'd*, 109 Mo. App. 171, 82 S.W. 1127 (1904); *State ex rel. Kansas City Loan Guar. Co. v. Smith*, 176 Mo. 44, 75 S.W. 468 (1903) (en banc); *State ex rel. Hobart v. Smith*, 173 Mo. 398, 73 S.W. 211 (1903) (en banc); *Town of Kirkwood v. Meramec Highlands Co.*, 160 Mo. 111, 60 S.W. 1072 (1901), *trans'd*; *Standard Inv. Co. v. Stephensmeier*, 117 S.W.2d 620 (Mo. Ct. App. 1938); *Pearson Elevator Co. v. Missouri, Kan. & Tex. R.R.*, 46 S.W.2d 247 (Mo. Ct. App. 1932).

97. 358 Mo. 1221, 219 S.W.2d 372 (en banc), *trans'd*, 223 S.W.2d 831 (Ct. App. 1949).

98. The supreme court held that acceptance of jurisdiction based on a constitutional question which had not been presented in conformity with the requirements would violate the constitution since the court's appellate jurisdiction is derived from and limited by the

this rejection was clearly expressed: "We must have a workable legal rule in this state on the enigmatic doctrine of inherency and the only way to get it is to eliminate the doctrine. The history of our decisions during the last fifty-two years shows that confusion is worse confounded by relying upon it."<sup>99</sup> *Butler* has been uniformly followed by the courts<sup>100</sup> so that today, for

constitution. However, the constitution provides in general terms that the supreme court shall have exclusive appellate jurisdiction in cases "involving the construction of the constitution." The constitution does not distinguish between a case in which the trial court's ruling is expressly shown in the trial record and one in which such a ruling can only be inferred. On this basis, it is difficult to say that the inherency doctrine is unconstitutional. Rather, the court probably found that the inherency doctrine was impossible to apply. See *Wooster v. Trimont Mfg. Co.*, 197 S.W.2d 710 (Mo. Ct. App. 1946), *trans'd*, 356 Mo. 682, 203 S.W.2d 411 (1947).

99. 358 Mo. at 1232, 219 S.W.2d at 380. Jurisdictional confusion concerning what constitutes an inherent constitutional question is illustrated by *Butler* itself. The city brought suit, pursuant to an ordinance, to condemn land for use as a public street. The defendants filed a motion to dismiss on the ground that the condemnation would be void because the proposed street would be a cul-de-sac solely for private use in violation of the "applicable" provisions of the federal and state constitutions and the city charter. The trial court sustained the motion to dismiss by a general order without specifying whether its ruling was based on the constitutions or the city charter. The city's motion for new trial, contending that the cul-de-sac was a public highway for public use, was denied. The city appealed to the supreme court but did not specify the "applicable" provisions of the constitution until a supplemental brief was filed. It is apparent from the record that by not specifying article and section number in its motion for new trial, the city did not properly raise its constitutional question. See § 1.021(b). Even if "private use" were held to be sufficient specification, it would also appear that since the motion to dismiss contained two issues, one constitutional (state and federal constitutions) and one non-constitutional (city charter), it could be inferred from the trial court's failure to indicate the grounds for dismissal that no construction of the constitution was involved. This avoidance of the constitutional question by the trial court would have been sufficient ground to transfer the case to the court of appeals. See § 1.022(b). The supreme court, however, chose to discuss "inherency," even though this apparently did not apply to cases which involved *frustrated* attempts to raise constitutional questions. "Inherency," in its usual context, pertained to cases in which *no* attempt was made to raise constitutional questions in the trial court, but in which a ruling on such an issue was necessarily and essentially a part of the judgment. See note 92 *supra*.

In *Butler* five judges concurred in the majority opinion in which the inherency doctrine was held unconstitutional. These five judges also concurred in a separate opinion which held that there was no compliance with the raising requirements and the constitutional question was thus waived. Judge Clark dissented on the ground that the constitutional question was "inherent" in the case. He thought the only real question was whether the attempted taking of the land was for a public or private use as those terms were used by the constitution and, therefore, that a construction of the constitution was involved. Judge Hyde dissented in a separate opinion on the ground that the public use question, the only issue in the case, so clearly involved Mo. CONST. art. I, § 28, that the court should have held that a constitutional question was sufficiently raised. This dissent could have been justified without the inherency doctrine by simply saying that "public use" is sufficient specification to inform the court that the litigants were discussing "public use" as used in article I, section 28. Therefore, the constitutional question could have been considered properly raised. See § 1.021(b).

a case to involve a construction of the constitution, it must affirmatively appear from the record that the constitutional question has been properly raised, ruled on by the trial court adversely to the party appealing, and preserved throughout for appellate review.

### 1.023. *The Trial Court Must Rule on the Constitutional Question Adversely to the Party Appealing*

For a case to involve a construction of the constitution on appeal, the record must show that the trial court's ruling on the constitutional issue was adverse to the party appealing.<sup>101</sup> If the constitutional question is decided in the plaintiff's favor, he may not appeal to the supreme court on constitutional grounds,<sup>102</sup> but the defendant who receives an adverse ruling

100. *State ex rel. Barnett v. Sappington*, 260 S.W.2d 669 (Mo. 1953), *trans'd*, 266 S.W.2d 774 (Ct. App. 1954); *Cirese v. Spitcaufsky*, 259 S.W.2d 836 (Mo. 1953), *trans'd from* 253 S.W.2d 512 (Ct. App. 1952), *retrans'd*, 265 S.W.2d 753 (Ct. App. 1954); *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); *State ex rel. Houser v. St. Louis Union Trust Co.*, 248 S.W.2d 592 (Mo. 1952), *trans'd*, 260 S.W.2d 821 (Ct. App. 1953); *W. M. Chrysler Co. v. Smith*, 377 S.W.2d 134 (Mo. Ct. App. 1964); *City of St. Louis v. Stenson*, 333 S.W.2d 529 (Mo. Ct. App. 1960).

Several recent cases exhibit confusion in the area of "inherency." In *Thomas v. Thomas*, 288 S.W.2d 689, 695-96 (Mo. Ct. App. 1956), the court of appeals in dictum said:

But, in order to preserve a constitutional question for appellate review the question must be raised at the first available opportunity, and the point must be presented in the motion for a new trial, if any. *City of St. Louis v. Butler Co.*, 358 Mo. 1221, 219 S.W.2d 372. There is an exception to this rule; namely, where, on the whole case, some provision of the constitution was either directly or by inexorable implication involved in the rendition of the judgment and decided against the appellant. *Lohmeyer v. St. Louis Cordage Co.*, 214 Mo. 685, 690, 113 S.W. 1108.

This statement is internally inconsistent. The court first quoted *Butler* which rejected "inherency," and, in the same paragraph, held that an "inherent" situation such as that in *Lohmeyer* could be presented. Since *Lohmeyer* was specifically overruled by *Butler* on this point, it is no longer authority for the use of the inherency doctrine. See *State ex rel. Magidson v. Henze*, 342 S.W.2d 261 (Mo. Ct. App. 1961); *Morrison v. State*, 252 S.W.2d 97 (Mo. Ct. App. 1952).

101. *E.g.*, *Eder v. Painters' Dist. Council*, 239 Mo. App. 1089, 199 S.W.2d 648 (1947), *trans'd*; *Schildnecht v. City of Joplin*, 327 Mo. 126, 35 S.W.2d 35 (en banc), *trans'd*, 226 Mo. App. 47, 41 S.W.2d 590 (1931); *Lux v. Milwaukee Mechanics' Ins. Co.*, 285 S.W. 424 (Mo. 1926), *trans'd from* court of appeals, *retrans'd*, 221 Mo. App. 999, 295 S.W. 847 (1927); *Brown v. Missouri, Kan. & Tex. Ry.*, 175 Mo. 185, 74 S.W. 973 (1903), *trans'd from* court of appeals, *retrans'd*, 104 Mo. App. 691, 78 S.W. 273 (1904); *Ash v. City of Independence*, 145 Mo. 120, 46 S.W. 749 (1898), *trans'd*, 79 Mo. App. 70 (1899).

102. *Ash v. City of Independence*, *supra* note 101; *Killian v. Brith Sholom Congregation*, 154 S.W.2d 387 (Mo. Ct. App. 1941); *accord*, *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). *Contra*, *City of Springfield ex rel. Central Nat'l Bank v. Weaver*, 66 Mo. App. 293, *trans'd*, 137 Mo. 650, 37 S.W. 509 (1896).

may appeal to the supreme court.<sup>103</sup> If the constitutional question is decided in the defendant's favor, he may not appeal to the supreme court on constitutional grounds,<sup>104</sup> but the plaintiff may.<sup>105</sup>

Trial court's decision on the constitutional question	Appellant	Appellate forum
adverse to plaintiff	plaintiff	supreme court
	defendant	court of appeals
adverse to defendant	plaintiff	court of appeals
	defendant	supreme court

An illustration of this requirement would be a civil case in which the trial court instructed the jury that nine of their number could render a verdict, and the defendant objected that the instruction violated his constitutional right to a unanimous verdict. The trial court, in overruling the objection and holding a nine-juror verdict constitutional, decided the constitutional question for the plaintiff and against the defendant. If nine jurors returned a verdict for the plaintiff, the defendant could appeal to the supreme court because he received an adverse ruling on both the constitutional contention and the merits of the case. If the jury had rendered a verdict for the defendant, then the plaintiff must appeal to the court of appeals; although he had lost the case, the decision on the constitutional question was not adverse to him.

If the trial court had ruled for the defendant on the constitutional issue, holding the nine-juror verdict unconstitutional, and the jury gave a unanimous verdict for the plaintiff, the defendant's appellate forum would have been the court of appeals. In such a situation, the defendant-appellant would be contesting the correctness of the judgment, not the ruling on the constitutional question.

103. *Watkins v. Edgar*, 94 Mo. App. 285, 68 S.W. 87 (1902), *trans'd*.

104. *Community Fire Protection Dist. v. Board of Educ.*, 312 S.W.2d 75 (Mo.), *trans'd*, 315 S.W.2d 873 (Ct. App. 1958); *Hanlon v. Pulitzer Publishing Co.*, 167 Mo. 121, 66 S.W. 940 (1902), *trans'd*; *Emery v. St. Louis & S.F.R.R.*, 144 Mo. App. 523, 129 S.W. 44 (1910), *retrans'd from supreme court after transfer to supreme court*, 135 Mo. App. 628, 116 S.W. 491 (1909).

105. *Haag v. Ward*, 186 Mo. 325, 85 S.W. 391 (1904).



To meet the adverse party requirement, the appellant need not be the party who raised the constitutional question at the trial; his opponent may have raised the issue and prevailed thereon. Nevertheless, the appellant may appeal on the basis of a ruling adverse to him on this constitutional issue.<sup>106</sup>

#### 1.024. *The Constitutional Question Must Be Preserved for Appeal*

Although a constitutional question has been properly raised in and ruled on by the trial court adversely to the party appealing, unless it is preserved for appellate review it will not be considered an issue on which supreme court jurisdiction can be based.<sup>107</sup> Because this jurisdiction is determined from the record at the time the appeal is taken,<sup>108</sup> a constitutional question must have been kept alive throughout the trial<sup>109</sup> and presented in a motion for new trial.<sup>110</sup>

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106. This was clearly stated in *City of St. Louis v. Butler Co.*, 358 Mo. 1221, 1226-27, 219 S.W.2d 372, 376, *trans'd*, 223 S.W.2d 831 (Ct. App. 1949):

We concede that the appellant City is not debarred from raising the constitutional question merely because it took the negative side thereon below. It was the respondent who invoked it and was successful thereon—if the trial court decided the case on that ground. But even so, the City was the losing party and could raise it on appeal.

*Accord*, *Ingle v. City of Fulton*, 260 S.W.2d 666 (Mo. 1953), *trans'd*, 268 S.W.2d 600 (Ct. App. 1954); *Cirese v. Spitscaufsky*, 259 S.W.2d 836 (Mo. 1953), *trans'd from* 253 S.W.2d 512 (Ct. App. 1952), *retrans'd*, 265 S.W.2d 753 (Ct. App. 1954); *Dye v. School Dist.*, 355 Mo. 231, 195 S.W.2d 874 (1946) (en banc), *trans'd from* 190 S.W.2d 467 (Ct. App. 1945); *Eder v. Painters' Dist. Council*, 239 Mo. App. 1089, 199 S.W.2d 648 (1947), *trans'd*; *State v. Hunter*, 198 S.W.2d 544 (Mo. Ct. App. 1946); *Wooster v. Trimont Mfg. Co.*, 197 S.W.2d 710 (Mo. Ct. App. 1946), *trans'd*, 356 Mo. 682, 203 S.W.2d 411 (1947).

107. *E.g.*, *Cooper County Bank v. Bank of Bunceton*, 310 Mo. 519, 276 S.W. 622 (1925), *trans'd*, 221 Mo. App. 814, 288 S.W. 95 (1926); *State v. Goad*, 296 Mo. 452, 246 S.W. 917 (1922), *trans'd*; *Kircher v. Evers*, 238 S.W. 1086 (Mo. 1922), *trans'd from* 210 S.W. 917 (Ct. App. 1919), *retrans'd*, 247 S.W. 251 (Ct. App. 1923); *City of Louisiana v. Lang*, 251 Mo. 664, 158 S.W. 1 (1913), *trans'd*, 181 Mo. App. 670, 164 S.W. 641 (1914); *Ross v. Grand Pants Co.*, 241 Mo. 296, 145 S.W. 410 (1912), *trans'd*, 170 Mo. App. 291, 156 S.W. 92 (1913); *State v. Van Graafeiland*, 293 S.W. 445 (Mo. Ct. App. 1927). The only situation in which the appellant was not required to preserve his constitutional issue arose when the issue was deemed "inherent." *Syz v. Milk Wagon Drivers' Local 603*, 323 Mo. 130, 18 S.W.2d 441 (1929), *trans'd*, 24 S.W.2d 1080 (Ct. App. 1930). The inherency doctrine, however, has been rejected by the courts. See § 1.022(d).

108. *E.g.*, *Odom v. Langstun*, 159 S.W.2d 686 (Mo.), *trans'd*, 237 Mo. App. 721, 170 S.W.2d 589 (1942), *retrans'd*, 351 Mo. 609, 173 S.W.2d 826 (1943); *Littlefield v. Littlefield*, 272 Mo. 163, 197 S.W. 1057 (1917), *trans'd from* 168 S.W. 841 (Ct. App. 1914), *retrans'd*; *Taylor v. St. Louis Merchants' Bridge Terminal Ry.*, 207 Mo. 495, 105 S.W. 740 (1907), *trans'd from* court of appeals; *Saxton Nat'l Bank v. Bennett*, 138 Mo. 494, 40 S.W. 97 (1897); *Bennet v. Missouri Pac. Ry.*, 105 Mo. 642, 16 S.W. 947 (1891), *trans'd from* court of appeals, *retrans'd*.

109. *E.g.*, *Diekroeger v. Jones*, 145 S.W.2d 435 (Mo. 1940), *trans'd*, 235 Mo. App.

After an appeal is taken to the supreme court, the constitutional issue can be waived by the appellant's failure to present it in his brief and oral argument.<sup>111</sup> The determination that the constitutional question has been

1117, 151 S.W.2d 691 (1941) (constitutional question raised in demurrer waived by participation in trial); *State v. Williams*, 337 Mo. 987, 87 S.W.2d 423 (1935), *trans'd*, 108 S.W.2d 177 (Ct. App. 1937) (constitutional question raised in objections to state's evidence not preserved in demurrers at end of presentation of evidence); *Deming v. City of Springfield*, 217 S.W. 27 (Mo. 1919), *trans'd*, 224 S.W. 1004 (Ct. App. 1920) (constitutional question raised in petition waived by failure to preserve during trial); *State v. Earll*, 225 Mo. 537, 125 S.W. 467 (1910), *trans'd* (constitutional question raised in demurrer waived by repleading); *State v. Christopher*, 212 Mo. 244, 110 S.W. 697, *trans'd from court of appeals, retrans'd*, 134 Mo. App. 6, 114 S.W. 549 (1908) (constitutional question raised in demurrer waived by repleading); *State v. Egan*, 272 S.W.2d 719 (Mo. Ct. App. 1954) (constitutional question raised by motion to suppress evidence waived by failure to object to admission of the evidence).

110. Generally, in early cases the objection to the trial court's ruling on a constitutional question had to be preserved by an exception and the exception saved in a bill of exceptions. Thus the constitutional issue would be deemed improperly preserved if (1) there was no objection included in the bill of exceptions; *Shanks v. St. Joseph Fin. & Loan Co.*, 163 S.W.2d 1017 (Mo. 1942), *trans'd*, 237 Mo. App. 1050, 170 S.W.2d 135 (1943); *State v. Hammer*, 33 Mo. 40, 61 S.W.2d 965, *trans'd from 56 S.W.2d 415 (Ct. App.)*, *retrans'd*, 63 S.W.2d 181 (Ct. App. 1933); *State ex rel. Walker v. Locust Creek Drainage Dist.*, 58 S.W.2d 452 (Mo. 1933), *trans'd*, 228 Mo. App. 434, 67 S.W.2d 840 (1934); *State v. Bell*, 289 S.W. 834 (Mo. 1926), *trans'd*; *State v. Graham*, 301 Mo. 272, 256 S.W. 770, *trans'd from court of appeals, retrans'd*, 295 Mo. 695, *retrans'd*, 250 S.W. 925 (Ct. App. 1923), *retrans'd*; *State v. Berry*, 253 S.W. 712 (Mo.), *trans'd from court of appeals, retrans'd*, 255 S.W. 337 (Ct. App. 1923); *Parker-Washington Co. v. Field*, 219 S.W. 598 (Mo. 1920), *trans'd*, 239 S.W. 569 (Ct. App. 1922); *State v. Sollars*, 200 S.W. 1052 (Mo.) (en banc), *trans'd*, 202 S.W. 623 (Ct. App. 1918); *State v. Humfeld*, 253 Mo. 340, 161 S.W. 735 (1913), *trans'd*, 182 Mo. App. 639, 166 S.W. 331 (1914); *City of Louisiana v. Lang*, 251 Mo. 664, 158 S.W. 1 (1913), *trans'd*, 181 Mo. App. 670, 164 S.W. 641 (1914); *Harding v. Missouri Pac. Ry.*, 232 Mo. 444, 134 S.W. 641 (1911) (en banc); *Davis v. Missouri Elec. Power Co.*, 88 S.W.2d 217 (Mo. Ct. App. 1935); *State v. Dodo*, 253 S.W. 75 (Mo. Ct. App. 1923); *Riley Pa. Oil Co. v. Symonds*, 195 Mo. App. 111, 190 S.W. 1038 (1916); *Paul v. Western Union Tel. Co.*, 164 Mo. App. 233, 145 S.W. 99 (1912); or (2) there was no bill of exceptions filed: *Junior v. Junior*, 84 S.W.2d 909 (Mo. 1935), *trans'd*; *State v. Ottensmeyer*, 330 Mo. 754, 51 S.W.2d 39 (1932), *trans'd from 37 S.W.2d 497 (Ct. App. 1931)*, *retrans'd*, 55 S.W.2d 499 (Ct. App. 1932); *State v. Ewing*, 278 S.W. 712 (Mo. 1925), *trans'd*, 289 S.W. 348 (Ct. App. 1927); *State v. Baker*, 274 S.W. 359 (Mo. 1925); *State v. Turner*, 273 S.W. 739 (Mo. 1925), *trans'd*, 284 S.W. 827 (Ct. App. 1926); *State v. Sparks*, 268 S.W. 51 (Mo. 1925), *trans'd*, 278 S.W. 1073 (Ct. App. 1926); *State v. Hartman*, 282 Mo. 680, 222 S.W. 442 (1920).

It was also required that the question be incorporated into a motion for new trial and in a motion in arrest of judgment, if one was offered. *State v. Powers*, 350 Mo. 942, 169 S.W.2d 377, *trans'd*, 176 S.W.2d 293 (Ct. App. 1943); *Motchar v. Hollingsworth*, 162 S.W.2d 805 (Mo.), *trans'd*, 167 S.W.2d 390 (Ct. App. 1942); *Red School Dist. v. West Alton School Dist.*, 159 S.W.2d 676 (Mo.), *trans'd*, 162 S.W.2d 305 (Ct. App. 1942); *Crescent Planing Mill Co. v. Mueller*, 117 S.W.2d 247 (Mo. 1938), *trans'd*, 234 Mo. App. 1243, 123 S.W.2d 193 (1939); *State ex rel. Rose v. Webb City*, 333 Mo. 1127, 64 S.W.2d 597 (1933), *trans'd*, 74 S.W.2d 45 (Ct. App. 1934); *McGill v. City of St. Jo-*

preserved in an appellant's brief can be considered a condition precedent to the exercise of supreme court jurisdiction. If a reading of the trial court

seph, 31 S.W.2d 1038 (Mo. 1930), *trans'd*, 225 Mo. App. 1033, 38 S.W.2d 725 (1931) (motion in arrest of judgment); Kansas City *ex rel.* Barlow v. Robinson, 322 Mo. 1050, 32 S.W.2d 1075 (1929) (en banc) (dissenting opinion); Johnson v. Underwood, 324 Mo. 578, 24 S.W.2d 133 (1929); Syz v. Milk Wagon Drivers' Local 603, 323 Mo. 130, 18 S.W.2d 441 (1929), *trans'd*, 24 S.W.2d 1080 (Ct. App. 1930); Keena v. Keena, 3 S.W.2d 352 (Mo.), *trans'd*, 222 Mo. App. 825, 10 S.W.2d 344 (1928); Brown Shoe Co. v. Aetna Life Ins. Co., 281 S.W. 963 (Mo. 1926), *trans'd*, 220 Mo. App. 649, 291 S.W. 522 (1927); State *ex rel.* Freeling v. National City Bank, 267 S.W. 118 (Mo. 1924), *trans'd*, 220 Mo. App. 474, 274 S.W. 945 (1925) (motion in arrest of judgment); State v. Goetz, 253 S.W. 710 (Mo.), *trans'd*, 255 S.W. 345 (Ct. App. 1923); California Special Rd. Dist. v. Buckner, 248 S.W. 927 (Mo. 1923), *trans'd from* 231 S.W. 71 (Ct. App. 1921), *retrans'd*, 256 S.W. 98 (Ct. App. 1923); State v. Goad, 296 Mo. 452, 246 S.W. 917 (1922), *trans'd*; Kircher v. Evers, 238 S.W. 1086 (Mo. 1922), *trans'd from* 210 S.W. 917 (Ct. App. 1919), *retrans'd*, 247 S.W. 251 (Ct. App. 1923); State *ex rel.* City of St. Louis v. Missouri Pac. Ry., 262 Mo. 720, 174 S.W. 73 (1914) (en banc); State v. Humfeld, 253 Mo. 340, 161 S.W. 735 (1913), *trans'd*, 182 Mo. App. 639, 166 S.W. 331 (1914); State v. Finley, 234 Mo. 603, 137 S.W. 879 (1911), *trans'd*, 162 Mo. App. 164, 144 S.W. 120 (1912); State v. Gamma, 215 Mo. 100, 114 S.W. 619 (1908), *trans'd*, 149 Mo. App. 694, 129 S.W. 734 (1910); Lohmeyer v. St. Louis Cordage Co., 214 Mo. 685, 113 S.W. 1108 (1908), *trans'd*, 137 Mo. App. 624, 119 S.W. 49 (1909); Standard Inv. Co. v. Stephensmeier, 117 S.W.2d 620 (Mo. Ct. App. 1938); Klohr v. Edwards, 94 S.W.2d 99 (Mo. Ct. App. 1936); Davis v. Missouri Elec. Power Co., 88 S.W.2d 217 (Mo. Ct. App. 1935), *cert. denied*, 340 Mo. 44, 100 S.W.2d 868 (1936) (motion in arrest of judgment); Finkle v. Western Auto. Ins. Co., 224 Mo. App. 285, 26 S.W.2d 843 (1930); City of Ferguson *ex rel.* United Constr. Co. v. Steffen, 300 S.W. 1039 (Mo. Ct. App. 1928); State v. Kribs, 300 S.W. 521 (Mo. Ct. App. 1927); First Nat'l Bank v. Foster, 271 S.W. 536 (Mo. Ct. App. 1925); State v. Dodo, 253 S.W. 75 (Mo. Ct. App. 1923); Cotton Lumber Co. v. La Crosse Lumber Co., 200 Mo. App. 7, 204 S.W. 957 (1918). See also State *ex rel.* Alton R.R. v. Public Serv. Comm'n, 100 S.W.2d 474 (Mo. 1936), *trans'd*, 110 S.W.2d 1121 (Ct. App. 1937).

The method used to preserve a constitutional question has been simplified by statutes and court rules which abolished (1) formal exceptions: Mo. SUP. CT. R. 79.01 (civil cases) and Mo. SUP. CT. R. 28.01 (criminal cases); (2) bills of exception: Mo. SUP. CT. R. 82.12, Mo. REV. STAT. § 512.110 (1959) (civil cases) and Mo. SUP. CT. R. 28.08 (criminal cases); and (3) motions in arrest of judgment: Mo. SUP. CT. R. 81.01, Mo. REV. STAT. § 510.380 (1959) (civil cases) and Mo. SUP. CT. R. 27.21, Mo. REV. STAT. § 347.040 (1959) (criminal cases).

Under modern practice, the constitutional question must be kept alive throughout the trial (*supra* note 109) and presented in a motion for new trial. Witt v. City of Webster Groves, 383 S.W.2d 723 (Mo. 1964), *trans'd*; State *ex rel.* McNutt v. Northup, 367 S.W.2d 512 (Mo. 1963), *trans'd*; State *ex rel.* Williamson v. County Court, 363 S.W.2d 691 (Mo. 1963); Layson v. Jackson County, 365 Mo. 905, 290 S.W.2d 109 (1956); Ingle v. City of Fulton, 260 S.W.2d 666 (Mo. 1953), *trans'd*, 268 S.W.2d 600 (Ct. App. 1954); Cirese v. Spitcaufsky, 259 S.W.2d 836 (Mo. 1953), *trans'd from* 253 S.W.2d 512 (Ct. App. 1952), *retrans'd*, 265 S.W.2d 753 (Ct. App. 1954); 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); Deacon v. City of Ladue, 294 S.W.2d 616 (Mo. Ct. App. 1956); State v. Hunter, 198 S.W.2d 544 (Mo. Ct. App. 1946). *But see* Mooney v. County of St. Louis, 286 S.W.2d 763 (Mo. 1956).

record and the appellant's brief reveals a waiver, the case must be transferred to the court of appeals for review on the merits. Therefore, appellate

111. *Marshall v. City of Gladstone*, 380 S.W.2d 312 (Mo. 1964), *trans'd*; *City of Webster Groves v. Quick*, 319 S.W.2d 543 (Mo.), *trans'd*, 323 S.W.2d 386 (Ct. App. 1959); *State ex rel. Town of Olivette v. American Tel. & Tel. Co.*, 273 S.W.2d 286 (Mo. 1954), *trans'd from court of appeals, retrans'd*, 280 S.W.2d 134 (Ct. App. 1955); *State v. Harold*, 364 Mo. 1052, 271 S.W.2d 527 (1954), *trans'd*, 281 S.W.2d 605 (Ct. App. 1955); *State ex rel. Tucker v. Mattingly*, 268 S.W.2d 868 (Mo. 1954), *trans'd*, 275 S.W.2d 34 (Ct. App. 1955); *Berghorn v. Reorganized School Dist.*, 364 Mo. 121, 260 S.W.2d 573 (1953); *Stribling v. Jolley*, 362 Mo. 995, 245 S.W.2d 885, *trans'd*, 241 Mo. App. 1123, 253 S.W.2d 519 (1952); *Gruet Motor Car Co. v. Briner*, 224 S.W.2d 73 (Mo. 1949), *trans'd*, 229 S.W.2d 259 (Ct. App. 1950); *Hurtgen v. Gasche*, 223 S.W.2d 493 (Mo. 1949), *trans'd*, 227 S.W.2d 494 (Ct. App. 1950); *McGuire v. Hutchinson*, 356 Mo. 203, 201 S.W.2d 322 (1947), *trans'd*, 240 Mo. App. 504, 210 S.W.2d 521 (1948); *Hanna v. Sheetz*, 355 Mo. 1215, 200 S.W.2d 338, *trans'd*, 240 Mo. App. 385, 205 S.W.2d 955 (1947); *Hunter v. Hunter*, 355 Mo. 599, 197 S.W.2d 299 (1946), *trans'd*, 202 S.W.2d 101 (Ct. App. 1947); *Nemours v. City of Clayton*, 351 Mo. 317, 172 S.W.2d 937, *trans'd*, 237 Mo. App. 497, 175 S.W.2d 60 (1943); *Ewing v. Kansas City*, 350 Mo. 1071, 169 S.W.2d 897 (1943), *trans'd*, 238 Mo. App. 266, 180 S.W.2d 234 (1944); *Mueller v. Klinhart*, 164 S.W.2d 928 (Mo. 1942), *trans'd*, 167 S.W.2d 670 (Ct. App. 1943); *Wright v. Tucker*, 137 S.W.2d 557 (Mo. 1940), *trans'd*; *State v. Sanderson*, 124 S.W.2d 1071 (Mo. 1939), *trans'd from 107 S.W.2d 965* (Ct. App. 1937), *retrans'd*, 128 S.W.2d 277 (Ct. App. 1939); *State v. Legan*, 80 S.W.2d 122 (Mo. 1935), *trans'd*, 94 S.W.2d 913 (Ct. App. 1936); *Normandy Consol. School Dist. v. Wellston Sewer Dist.*, 74 S.W.2d 621 (Mo.), *trans'd*, 77 S.W.2d 477 (Ct. App. 1934); *State v. Hammer*, 33 Mo. 40, 61 S.W.2d 965, *trans'd from 56 S.W.2d 415* (Ct. App.), *retrans'd*, 63 S.W.2d 181 (Ct. App. 1933); *Allen v. Chicago, R.I. & Pac. Ry.*, 327 Mo. 526, 37 S.W.2d 607 (1931), *trans'd*, 227 Mo. App. 468, 54 S.W.2d 787 (1932); *McGill v. City of St. Joseph*, 31 S.W.2d 1038 (Mo. 1930), *trans'd*, 225 Mo. App. 1033, 38 S.W.2d 725 (1931); *Houston v. Wilhite*, 20 S.W.2d 553 (Mo. 1929), *trans'd*, 224 Mo. App. 695, 27 S.W.2d 772 (1930); *Brooks v. Menaugh*, 320 Mo. 183, 6 S.W.2d 902, *trans'd*, 10 S.W.2d 327 (Ct. App. 1928); *Willgues v. Pennsylvania R.R.*, 318 Mo. 28, 298 S.W. 817 (1927); *Brown Shoe Co. v. Aetna Life Ins. Co.*, 281 S.W. 963 (Mo. 1926), *trans'd*, 220 Mo. App. 649, 291 S.W. 522 (1927); *Cooper County Bank v. Bank of Bunceton*, 310 Mo. 519, 276 S.W. 622 (1925), *trans'd*, 221 Mo. App. 814, 288 S.W. 95 (1926); *Coombs v. Fuller*, 223 S.W. 741 (Mo. 1920), *trans'd*, 228 S.W. 870 (Ct. App. 1921); *Harbis v. Cudahy Packing Co.*, 223 S.W. 578 (Mo. 1920), *trans'd*, 211 Mo. App. 188, 241 S.W. 960 (1921); *Little River Drainage Dist. v. Houck*, 282 Mo. 458, 222 S.W. 384 (en banc), *trans'd*, 206 Mo. App. 283, 226 S.W. 72 (1920); *Scott v. Dickinson*, 217 S.W. 270 (Mo.), *trans'd from court of appeals, retrans'd*, 223 S.W. 1080 (Ct. App. 1920); *State ex rel. Crow v. Carothers*, 214 S.W. 857 (Mo. 1919), *trans'd*; *Kansas City Breweries Co. v. Markowitz*, 212 S.W. 849 (Mo. 1919), *trans'd*, 203 Mo. App. 390, 221 S.W. 398 (1920); *Moore v. United Ry.*, 256 Mo. 165, 165 S.W. 304, *trans'd*, 185 Mo. App. 184, 170 S.W. 386 (1914); *Botts v. Wabash R.R.*, 248 Mo. 56, 154 S.W. 53 (1913), *trans'd*; *State ex rel. Ridge v. Smith*, 150 Mo. 75, 51 S.W. 713 (1899) (en banc); *State ex rel. Dugan v. Kansas City Court of Appeals*, 105 Mo. 299, 16 S.W. 853 (1891) (en banc); *State ex rel. Jones v. Reagan*, 382 S.W.2d 426 (Mo. Ct. App. 1964); *W. M. Chrysler Co. v. Smith*, 377 S.W.2d 137 (Mo. Ct. App. 1964); *Sheets v. Thomann*, 336 S.W.2d 701 (Mo. Ct. App. 1960); *Baker v. Baker*, 274 S.W.2d 322 (Mo. Ct. App. 1954); *McEwen v. Sterling State Bank*, 222 Mo. App. 660, 5 S.W.2d 702 (1928); see *Kansas City ex rel. Barlow v. Robinson*, 322 Mo. 1050, 17 S.W.2d 977 (1929) (en banc). In

jurisdiction may be said to vest "conditionally" when an appeal is taken.<sup>112</sup> Although the parties cannot confer jurisdiction on an appellate court,<sup>113</sup>

this case the defendant had raised questions relating to both the state and federal constitutions, but included only the federal issue in his appellate brief. The failure to include the state constitutional question constituted an abandonment of that issue.

To be properly briefed, the appellant must include the constitutional question in his: (1) jurisdictional statement; (2) points relied on; and (3) argument. *Mo. Sup. Cr. R.* 83.05. See *Pruellage v. De Seaton Corp.*, 380 S.W.2d 403 (Mo. 1964), *trans'd*; *State v. Brookshire*, 325 S.W.2d 497 (Mo.), *trans'd*, 329 S.W.2d 252 (Ct. App. 1959); *Johnson v. Underwood*, 324 Mo. 578, 24 S.W.2d 133 (1929); *Standard Oil Co. v. City of Moberly*, 324 Mo. 577, 23 S.W.2d 1004, *trans'd*, 33 S.W.2d 157 (Ct. App. 1930). However, the jurisdictional statement requirement appears to be flexible. In *City of Richmond Heights v. Richmond Heights Memorial Post Benevolent Ass'n*, 358 Mo. 70, 213 S.W.2d 479 (1948), *trans'd from* court of appeals, the supreme court disregarded the improper jurisdictional statement because the constitutional question was in the statement of facts.

Proper briefing on appeal cannot correct errors of preservation made at the trial. See *Layson v. Jackson County*, *supra* note 110; *State v. Powers*, 350 Mo. 942, 169 S.W.2d 377, *trans'd*, 176 S.W.2d 293 (Ct. App. 1943); *Red School Dist. v. West Alton School Dist.*, 159 S.W.2d 676 (Mo.), *trans'd*, 162 S.W.2d 305 (Ct. App. 1942); *Deming v. City of Springfield*, 217 S.W. 27 (Mo. 1919), *trans'd*, 224 S.W. 1004 (Ct. App. 1920).

112. In *Feste v. Newman*, 368 S.W.2d 713 (1963) (en banc), *trans'd*, the supreme court stated:

A correct statement, as evidenced by the rulings of this court, is that appellate jurisdiction of this court of a case must exist at the time of taking the appeal . . . and if it does not then exist nothing occurring subsequently will result in this court acquiring jurisdiction. . . . However, even though the record indicates that appellate jurisdiction exists in this court at the time the appeal is taken, the failure to preserve and keep alive for appellate review issues essential to the exercise of jurisdiction will result in the lack of jurisdiction of this court to the rule the case on appeal. *Id.* at 715.

In *Little River Drainage Dist. v. Houck*, *supra* note 111, the court appears to require more for jurisdiction to vest unconditionally than was required by *Feste*. *Houck* indicated that jurisdiction vests only conditionally until it has been determined that the constitutional question is debatable and not colorable. This determination requires reference to the discretionary standards used by the appellate courts to determine whether a purported constitutional question, *i.e.*, one which has satisfied all the requirements, is a bona fide question which the supreme court may decide on its merits. For a complete discussion of these standards, see § 1.030. For a discussion of "conditional vestment" in the context of "amount" jurisdiction, see § 9.021(b) (1).

113. *City of Webster Groves v. Quick*, 319 S.W.2d 543 (Mo.), *trans'd*, 323 S.W.2d 386 (Ct. App. 1959) (consent); *Odom v. Langstun*, 159 S.W.2d 686 (Mo. 1942), *trans'd* (consent); *City of St. Joseph v. Georgetown Lodge 627*, 8 S.W.2d 979 (Mo.), *trans'd*, 222 Mo. App. 1076, 11 S.W.2d 1082 (1928) (consent, acquiescence or silence); *Lammering v. Gerhardt*, 289 S.W. 338 (Mo. 1926), *trans'd*, 298 S.W. 1045 (Ct. App. 1927) (acquiescence); *City of Laclede v. Libby*, 278 S.W. 372 (Mo. 1925), *trans'd*, 221 Mo. App. 703, 285 S.W. 178 (1926) (silence or consent); *Burns v. Prudential Ins. Co. of America*, 295 Mo. 680, 247 S.W. 159 (1922), *trans'd*, 253 S.W. 81 (Ct. App. 1923) (silence or consent); *Rollins v. Business Men's Acc. Ass'n of America*, 213 S.W. 52 (Mo. 1919), *trans'd*, 204 Mo. App. 679, 220 S.W. 1022 (1920) (consent); *Schmidt v. Supreme Court, United Order of Foresters*, 259 Mo. 491, 168 S.W. 626 (1914), *trans'd*, 191 Mo. App. 415, 177 S.W. 706 (1915) (consent); *Dubowsky v. Binggeli*, 258 Mo. 197, 167 S.W. 999, *trans'd*, 184 Mo. App. 361, 171 S.W. 12 (1914) (stipulation or acquiescence);

they can waive the constitutional issue and thereby cause the supreme court to "lose" its jurisdiction over a case.<sup>114</sup>

A party may desire to waive a constitutional question for one of several reasons: (1) he may recognize that the constitutional contention is untenable,<sup>115</sup> (2) he may realize after the appeal was taken that he would fare better in the court of appeals than in the supreme court, or (3) he may be using a strategic delaying tactic. Regardless of the reason, it is clear that waiver is undesirable, because it prevents the respondent from knowing with certainty at the time the appeal is taken in which appellate forum he

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*State v. Meyer*, 246 Mo. 596, 152 S.W. 331 (1912), *trans'd* (consent); *Morrow v. Caloric Appliance Corp.*, 362 S.W.2d 282 (Mo. Ct. App. 1962), *trans'd*, 372 S.W.2d 41 (Mo. 1963) (en banc) (acquiescence or express consent); *Dye v. School Dist.*, 190 S.W.2d 467 (Mo. Ct. App. 1945), *trans'd*, 355 Mo. 234, 195 S.W.2d 874 (1946) (en banc) (agreement).

The reasoning behind this rule was somewhat explained in *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), where the supreme court indicated that it did not wish to encourage litigants to invoke its jurisdiction on the basis of a properly raised constitutional question and then abandon the issue after this purpose had been served.

In *Bennet v. Missouri Pac. Ry.*, 105 Mo. 642, 16 S.W. 947 (1891), *trans'd* from court of appeals, *retrans'd*, the court held that jurisdiction is fixed by the record at the time the appeal is taken, and cannot be affected by any subsequent act of the parties. Since proper raising in the trial court was not evidenced by the trial record, the court transferred when the appellant attempted to raise a constitutional question on appeal and so vest the supreme court with jurisdiction. *Accord*, *Littlefield v. Littlefield*, 272 Mo. 163, 197 S.W. 1057 (1917), *trans'd* from 168 S.W. 841 (Ct. App. 1914), *retrans'd*; *Saxton Nat'l Bank v. Bennett*, 138 Mo. 494, 40 S.W. 97 (1897).

114. See *Feste v. Newman*, 368 S.W.2d 713 (Mo. 1963) (en banc), *trans'd*; *City of Webster Groves v. Quick*, *supra* note 113. *Contra*, *Odom v. Langstun*, *supra* note 113; *Rollins v. Business Men's Acc. Ass'n of America*, *supra* note 113; *Morrow v. Caloric Appliance Corp.*, *supra* note 113. In each of these cases the court made a blanket statement that no conduct of the parties could properly be construed as a waiver of supreme court jurisdiction. However, it should be noted that the language in *Feste* and in the cases cited *supra* note 111 refers to the waiver of *an issue*; since supreme court jurisdiction attaches to a case due to the presence of an issue falling within one of the nine enumerated categories, if *the issue* is abandoned, jurisdiction will not vest in the supreme court. The parties act only indirectly to divest the court of jurisdiction.

A different though related problem is the courts' failure to distinguish a true waiver situation from a failure to satisfy the requirements for presenting a constitutional question; this results in a misuse of the waiver-preservation language. In *McCary v. McCary*, 217 S.W. 547 (Mo. Ct. App. 1920), *trans'd*, 239 S.W. 848 (Mo. 1922), the issue was held to have been waived because the party attempting to raise a constitutional question in the trial court had not satisfied all the requirements. This is clearly erroneous, since the waiver discussed in text accompanying note 111-14 *supra* occurs upon a failure to preserve the constitutional question in an appellate brief.

115. *City of Webster Groves v. Quick*, *supra* note 113; *Cooper County Bank v. Bank of Bunceton*, 310 Mo. 519, 276 S.W. 622 (1925), *trans'd*, 221 Mo. App. 814, 288 S.W. 95 (1926); see *State ex rel. Tucker v. Mattingly*, 268 S.W.2d 868 (Mo. 1954), *trans'd*, 275 S.W.2d 34 (Ct. App. 1955).

will have to defend and places the burden of review on two appellate courts instead of one. However, since the probable basis for the limitations placed on exclusive appellate jurisdiction was a desire to have the highest state court review only the most important cases,<sup>116</sup> if the appellant decides to waive the issues, the case must be considered as no longer of such importance as to require consideration by the supreme court. Therefore, the waiver and transfer procedure seems, at worst, a necessary evil.

#### 1.030. DISCRETIONARY STANDARDS FOR LIMITING SUPREME COURT JURISDICTION

The court need only look to the record to decide whether the requirements so far considered have been satisfied. But to prevent a party who has satisfied these requirements from foisting on the supreme court a case which does not involve a bona fide constitutional question, the supreme court has also developed three discretionary standards for limiting its jurisdiction: (1) that the party raising the constitutional question have had standing to do so in the trial court, (2) that the constitutional question be real and substantial and not merely colorable, and (3) that the constitutional question be debatable at the time the appeal was taken. To apply these discretionary standards, the court must look beyond the record and into the merits of the contention.

#### 1.031. *Standing To Raise a Constitutional Issue*

When a case is appealed to the supreme court, the court will inquire, *sua sponte*, whether the party raising the constitutional question in the trial court had standing to do so.<sup>117</sup> The test evolved by the court is whether the rights of the party who raised the question have been directly affected.<sup>118</sup>

In *State v. Worley*,<sup>119</sup> the defendant appealed a conviction of illegal possession of narcotics, claiming that marijuana had been found in an automobile during a search which violated the federal and state constitutions. Since

116. See "Conclusion."

117. The focus is on the party raising the constitutional question at the trial, not on the appellant. See notes 124-27 *infra* and accompanying text.

118. "Repetition has almost rendered it axiomatic or at least elementary in our jurisprudence that before a person can question the constitutionality of any law [or an official action] he must be in such a position with regard to the law [or action] as to be directly affected by it." *State v. Kramer*, 222 S.W. 822, 824 (Mo.), *trans'd from* court of appeals, *retrans'd*, 206 Mo. App. 49, 226 S.W. 643 (1920).

119. 383 S.W.2d 529 (Mo. 1964). The supreme court inquired into the appellant's standing to raise the constitutional question even though it could have disposed of that issue on the ground that it was not properly preserved. See § 1.024. The case, however, was retained in the supreme court with jurisdiction based on felony. For a complete discussion of jurisdiction based on "felony" see Chapter Seven.

there was evidence at the trial that the car belonged to one of the defendant's associates, the supreme court held that there was no constitutional question in the case. "The constitutional limitations upon search and seizure apply only to the owner or to one in possession of the premises or property."<sup>120</sup> The constitutional rights of the party raising the issue must have been adversely affected,<sup>121</sup> for he cannot complain of discrimination against another person.<sup>122</sup>

Once the court has determined that the party raising the constitutional question had no standing to do so, it is faced with a jurisdictional decision: whether (1) to hold that since the trial court did rule on the constitutional issue, jurisdiction is vested in the supreme court, or (2) to hold that since the ruling was on a constitutional issue brought into the case by a party without standing, the effect was the same as if the constitutional question had never been raised. The court has consistently chosen the latter course.<sup>123</sup>

The court will treat a constitutional question as if it had not been raised when the party raising the question had no standing. This determination

120. *Id.* at 534. Other cases involving allegedly illegal searches state the same rule. *E.g.*, *State v. Green*, 292 S.W.2d 283 (Mo. 1956); *State ex rel. McDonald v. Frankenhoff*, 344 Mo. 188, 125 S.W.2d 816 (1939); *State v. Askew*, 331 Mo. 684, 56 S.W.2d 52 (1932); *State v. Williams*, 266 S.W. 484 (Mo. Ct. App. 1924).

121. *Sheehan v. First Nat'l Bank*, 346 Mo. 227, 140 S.W.2d 1 (1940); *Citizens Mut. Fire & Lightning Ins. Soc'y v. Schoen*, 93 S.W.2d 669 (Mo. 1936), *trans'd*, 105 S.W.2d 43 (Ct. App. 1937); *Kingshighway Presbyterian Church v. Sun Realty Co.*, 324 Mo. 510, 24 S.W.2d 108 (1930), *trans'd*; *Ex parte Tartar*, 278 Mo. 356, 213 S.W. 94 (1919); *Cunningham v. Current River Ry.*, 165 Mo. 270, 65 S.W. 556 (1901).

122. *Stribling v. Jolley*, 362 Mo. 995, 245 S.W.2d 885 (1952), *trans'd*, 241 Mo. App. 1123, 253 S.W.2d 519 (1953); *Stouffer v. Crawford*, 248 S.W. 581 (Mo. 1923); *State v. Baskowitz*, 250 Mo. 82, 156 S.W. 945 (1913) (en banc); *Danciger v. American Express Co.*, 247 Mo. 209, 152 S.W. 302 (1912), *trans'd*, 172 Mo. App. 391, 158 S.W. 466 (1913); *Dennis v. Modern Bhd. of America*, 231 Mo. 211, 132 S.W. 698 (1910), *trans'd from court of appeals, retrans'd*; *Ordelheide v. Modern Bhd. of America*, 226 Mo. 203, 125 S.W. 1105 (1910), *trans'd*, 158 Mo. App. 677, 139 S.W. 269 (1911); *State ex rel. Crandall v. McIntosh*, 205 Mo. 589, 103 S.W. 1078 (1907) (en banc); *State v. Bixman*, 162 Mo. 1, 62 S.W. 828 (1901) (en banc); *Ex parte Lucas*, 160 Mo. 218, 61 S.W. 218 (1901) (en banc); *State v. Egan*, 272 S.W.2d 719 (Mo. Ct. App. 1954). See also *Communications Workers v. Brown*, 247 S.W.2d 815 (Mo.), *trans'd*, 252 S.W.2d 103 (Ct. App. 1952) (the effect of estoppel on standing).

123. A group of cases arising between 1904 and 1908 and involving the nine-juror civil verdict amendment (Mo. CONST. art. II, § 28 (1875), as amended) merit discussion under this discretionary standard. In each case, the defendant's contention that the amendment was improperly ratified was overruled, an instruction given that the jury could return a verdict based on the concurrence of nine of their number, a unanimous verdict returned and judgment rendered for the plaintiff. Under the rules as set forth in § 1.023, since both the ruling on the constitutional question and the judgment on the merits were adverse to the appellant-defendant, it would appear that he could appeal to the supreme court. However, each case was transferred to the court of appeals because the return of a unanimous verdict was viewed as removing any constitutional question



does not depend on whether the party who raised the question was the appellant or respondent. In *Citizens Mut. Fire & Lightning Ins. Soc'y v. Schoen*,<sup>124</sup> the defendant argued that jurisdiction was vested in the supreme court due to the presence of a constitutional question which *he* had raised in the trial court.<sup>125</sup> In *Kingshighway Presbyterian Church v. Sun Realty Co.*,<sup>126</sup> the plaintiff claimed that the supreme court had jurisdiction of his appeal because a constitutional question had been raised below by the defendant-respondent.<sup>127</sup> In both cases the supreme court denied jurisdiction since the party raising the issue in the trial court did not have the proper standing.

### 1.032. *The Constitutional Question Must Be Real and Substantial and Not Merely Colorable*

When a constitutional question appears to have been properly raised, ruled on by the trial court adversely to the party appealing and preserved for appellate review, an issue is presented, which, at least on its face, constitutes a basis for original supreme court appellate jurisdiction. The courts,

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from the case. Although the courts did not employ the language of this standard, it is evident that the transfers were made because the unanimous verdict destroyed whatever standing the defendant might have had to challenge the amendment; such a verdict left his rights unaffected. *Lohmeyer v. St. Louis Cordage Co.*, 214 Mo. 685, 113 S.W. 1108 (1908), *trans'd*, 137 Mo. App. 624, 119 S.W. 49 (1909); *J. G. Hutchinson & Co. v. Morris Bros.*, 190 Mo. 673, 89 S.W. 870 (1905), *trans'd from court of appeals, retrans'd*, 131 Mo. App. 258, 110 S.W. 684 (1908); *Shareman v. St. Louis Transit Co.*, 186 Mo. 323, 85 S.W. 358, *trans'd*, 114 Mo. App. 372, 89 S.W. 575 (1905), *retrans'd*; *Hensler v. Stix*, 185 Mo. 238, 84 S.W. 894 (1904), *trans'd*, 113 Mo. App. 162, 88 S.W. 108 (1905); *Portwright v. St. Louis Transit Co.*, 183 Mo. 72, 81 S.W. 1091 (1904), *trans'd*; *Kimble v. St. Louis & So. Ry.*, 183 Mo. 70, 81 S.W. 887, *trans'd*, 108 Mo. App. 78, 82 S.W. 1096 (1904); *Meng v. St. Louis & So. Ry.*, 183 Mo. 68, 81 S.W. 907, *trans'd*, 108 Mo. App. 553, 84 S.W. 213 (1904).

124. 93 S.W.2d 669 (Mo. 1936), *trans'd*, 105 S.W.2d 43 (Ct. App. 1937).

125. *Accord*, *State v. Worley*, 383 S.W.2d 529 (Mo. 1964); *State v. Green*, 292 S.W.2d 283 (Mo. 1956); *Stribling v. Jolley*, 362 Mo. 995, 245 S.W.2d 885 (1952), *trans'd*, 241 Mo. App. 1123, 253 S.W.2d 519 (1953); *Sheehan v. First Nat'l Bank*, 346 Mo. 227, 140 S.W.2d 1 (1940) (*both parties had raised constitutional questions, but the court looked only to appellant's standing*); *Stouffer v. Crawford*, 248 S.W. 581 (Mo. 1923); *State v. Kramer*, 222 S.W. 822 (Mo.), *trans'd from court of appeals, retrans'd*, 206 Mo. App. 49, 226 S.W. 643 (1920); *State v. Baskowitz*, 250 Mo. 82, 156 S.W. 945 (1913) (*en banc*); *Dennis v. Modern Bhd. of America*, 231 Mo. 211, 132 S.W. 698 (1910), *trans'd from court of appeals, retrans'd*; *Ordelheide v. Modern Bhd. of America*, 226 Mo. 203, 125 S.W. 1105 (1910), *trans'd*, 158 Mo. App. 677, 139 S.W. 269 (1911); *Cunningham v. Current River Ry.*, 165 Mo. 270, 65 S.W. 556 (1901); *State v. Bixman*, 162 Mo. 1, 62 S.W. 828 (1901) (*en banc*); *State v. Williams*, 266 S.W. 484 (Mo. Ct. App. 1924).

126. 324 Mo. 510, 24 S.W.2d 108 (1930), *trans'd*.

127. *Accord*, *Danciger v. American Express Co.*, 247 Mo. 209, 152 S.W. 302 (1912), *trans'd*, 172 Mo. App. 391, 158 S.W. 466 (1913).

however, retain "the right to look within the shell of briefs, pleadings, and records to the kernel of the thing, to see if the jurisdictional question is of substance, and not merely colorable."<sup>128</sup> By using the discretionary standard of "colorability"<sup>129</sup> the courts attempt to distinguish those constitutional questions which really exist and provide a basis for the exercise of supreme court jurisdiction from those which are without substance and are deemed to have never existed.

Cases in which the constitutional question has been held colorable fall into one of two recurring patterns, depending on whether the contention is that a legislative act is unconstitutional or that the appellant's rights were infringed by an error in the initial hearing held by a court or an administrative body. In each situation the appellate court inquires whether there is any rational connection between the facts and the constitutional provision which would require a construction of that provision.<sup>130</sup>

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128. *Lohmeyer v. St. Louis Cordage Co.*, 214 Mo. 685, 691, 113 S.W. 1108, 1110-11 (1908), *trans'd*, 137 Mo. App. 624, 119 S.W. 49 (1909).

129. The terms "colorability" and "colorable," as used in this chapter and in recent court opinions, mean that the constitutional contention is without substance. Early cases, however, adopted a United States Supreme Court definition of "colorable" (*Penn Mut. Life Ins. Co. v. City of Austin*, 168 U.S. 685, 695 (1897)) as meaning "real, not fictitious or fraudulent." *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); *Dorrance v. Dorrance*, 242 Mo. 625, 148 S.W. 94 (1912) (en banc). The Missouri courts have reversed the meaning attached to "colorable"; the modern definition of this term was expressed in a 1920 case: "[the contention is] colorable, devoid of merit and insufficient to confer jurisdiction where jurisdiction depends on the existence of a constitutional question in the record." *State ex rel. Wolfe v. Missouri Dental Bd.*, 221 S.W. 70 (Mo. 1920); *accord*, *Little River Drainage Dist. v. Houck*, 282 Mo. 458, 222 S.W. 384 (en banc), *trans'd*, 206 Mo. App. 283, 226 S.W. 72 (1920); *McManus v. Burrows*, 280 Mo. 327, 217 S.W. 512 (1919) (en banc).

130. This test was stated in *Wabash R.R. v. Flannigan*, 218 Mo. 566, 117 S.W. 722 (1909), *trans'd from* 118 Mo. App. 124, 100 S.W. 661 (1906), *retrans'd*. Other cases have stated the rule as requiring that the construction be *essential* to the determination of the case. *Swift & Co. v. Doe*, 311 S.W.2d 15 (Mo.), *trans'd*, 315 S.W.2d 465 (Ct. App. 1958); *Junior v. Junior*, 84 S.W.2d 909 (Mo. 1935), *trans'd*; *Rollins v. Business Men's Acc. Ass'n of America*, 213 S.W. 52 (Mo. 1919), *trans'd*, 204 Mo. App. 679, 220 S.W. 1022 (1920); *Ranney v. City of Cape Girardeau*, 225 Mo. 514, 164 S.W. 582, *trans'd from* court of appeals, *retrans'd*, 185 Mo. App. 229, 170 S.W. 342 (1914); *Lohmeyer v. St. Louis Cordage Co.*, 214 Mo. 685, 113 S.W. 1108 (1908), *trans'd*, 137 Mo. App. 624, 119 S.W. 49 (1909); see *State ex rel. Fredericktown School Dist. v. Underwood School Dist.*, 250 S.W.2d 843 (Mo. Ct. App. 1952).

No construction of the constitution is involved if: (1) the case requires only a construction of a statute: *Community Fire Protection Dist. v. Board of Educ.*, 312 S.W.2d 75 (Mo. 1958); *State v. Harold*, 271 S.W.2d 527 (Mo. 1954); *Knight v. Calvert Fire Ins. Co.*, 260 S.W.2d 673 (Mo. 1953); *Phillips Pipe Line Co. v. Brandstetter*, 254 S.W.2d 636 (Mo. 1953); *City of Kirkwood ex rel. Farmers' & Merchants' Trust Co. v. Hillcrest Realty Co.*, 285 Mo. 552, 226 S.W. 835 (1920), *trans'd*, 234 S.W. 1023 (Ct. App. 1921); *State ex rel. Jones v. Howe Scale Co.*, 253 Mo. 63, 161 S.W. 789 (1913), *trans'd*, 182

When a legislative act is challenged as unconstitutional, the appellate court must inquire whether there is a clear relationship among the facts, the legislative act and the constitutional provision allegedly contravened. If this connection does not exist, the constitutional question is deemed colorable. For example, an ordinance may not apply to the facts of the case. In *Adelman v. Altman*,<sup>131</sup> the plaintiff, suing for personal injuries suffered when she was struck by an automobile in front of the property on which defendant contractor was working, based her cause of action against defendant on a city ordinance forbidding persons to obstruct sidewalks. From a judgment for the plaintiff, defendant appealed to the supreme court on the ground that the ordinance was unconstitutional. The supreme court transferred the case, holding that since the property *had no sidewalk*, the ordinance did not apply to the facts and so the question of its constitutionality was purely academic.<sup>132</sup>

In other cases, the legislative act may apply to the facts but no rational connection exists between the constitutional provision alleged to be violated and the legislative act. In *Ranney v. City of Cape Girardeau*,<sup>133</sup> the plaintiff's bill in equity alleged that a city ordinance calling for special benefit assessments for street improvements violated the section of the constitution

Mo. App. 658, 166 S.W. 328 (1914); (2) a determination of which statute applies to the facts: *Shaver v. Moyer*, 317 S.W.2d 414 (Mo. 1958). *Contra*, *State ex rel. Smith v. Smith*, 152 Mo. 444, 54 S.W. 218 (1899) (en banc); (3) a decision whether an ordinance violates a statute: *State ex rel. Magidson v. Henze*, 342 S.W.2d 261 (Mo. Ct. App. 1961); *Allega v. Associated Theatres, Inc.*, 295 S.W.2d 849 (Mo. Ct. App. 1956).

131. 285 Mo. 503, 226 S.W. 953 (1920), *trans'd*, 209 Mo. App. 583, 240 S.W. 272 (1922).

132. In the following cases the court found no rational connection between the statute and the facts. *Weisberg v. Boatmen's Bank*, 245 S.W. 1053 (Mo. 1922) (en banc), *trans'd*, 251 S.W. 393 (Ct. App. 1923); *Powell v. Reidinger*, 228 S.W. 503 (Mo.), *trans'd*, 234 S.W. 850 (Ct. App. 1921); *Trembley v. Fidelity & Cas. Co.*, 223 S.W. 887 (Mo. 1920), *trans'd*, 232 S.W. 179 (Ct. App. 1921); *Rollins v. Business Men's Acc. Ass'n of America*, 213 S.W. 52 (Mo. 1919), *trans'd*, 204 Mo. App. 679, 220 S.W. 1022 (1920); *Killian v. Brith Sholom Congregation*, 154 S.W.2d 387 (Mo. Ct. App. 1941); see *Clay & Bailey Mfg. Co. v. Anderson*, 344 S.W.2d 46 (Mo. 1961).

The cases arising between 1904 and 1908 concerning the nine-juror civil verdict amendment also involve the use of this test. If the defendant had raised, as a constitutional question, the improper ratification of the amendment, as an objection to a jury instruction authorizing a nine-juror verdict, if this was ruled on adversely to him, and if a verdict was rendered against him, he could appeal to the supreme court only if the verdict had been given by fewer than twelve jurors. Whether the amendment had any effect or not, since the jury had not acted under its provisions, the question of its ratification was moot. Because the defendant had lost due to a unanimous verdict, the nine-juror amendment had no rational connection with the facts of the case. See cases cited § 1.031, note 123.

133. 225 Mo. 514, 164 S.W. 582, *trans'd from court of appeals, retrans'd*, 185 Mo. App. 229, 170 S.W. 342 (1914).

requiring uniformity of taxation. Although the ordinance applied to the plaintiff as a taxpayer, the supreme court transferred because the constitutional provision did not apply to special benefit assessments and the issue was, therefore, colorable.<sup>134</sup>

When the constitutionality of a legislative act is challenged, it is evident that the court is using the "rational connection" test. However, in cases in which the contention is that an alleged error in the initial hearing has deprived the appellant of some constitutional right, the opinions do not, at least verbally, state this test. These errors divide into two groups: "ruling" errors and "procedure" errors. In *Mercantile Trust Co. v. Lyon*,<sup>135</sup> a "ruling" error case, the appellant contended that since the trial judge had refused to give certain instructions to the jury, the judgment deprived him of his property without due process of law. The supreme court transferred, stating:

[T]he due process clause [is not] so involved as to justify the retention of the case. Any other conclusion would mean that in any and every case either party could proffer an instruction to the effect that unless a stated finding of fact were made or a recited rule applied the due process clause would be infringed, and the case would be brought here. The theory that every error of the trial court so denies due process as to give this court jurisdiction is not tenable.<sup>136</sup>

This language indicates that the appellate courts first inquire whether the trial court had jurisdiction over the parties and the subject matter. If this is established, then any error committed by the trial court, although it may be ground for a reversal and remand, does not deny due process to the litigants and any contention that it does is colorable.<sup>137</sup> It appears that the court is, in effect, anticipating a decision on the merits of the claim by holding that the constitutional contention is "not tenable." This, however, is ignored; the court gives as the only reason for its conclusion of "color-

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134. The following cases were transferred due to a lack of rational connection between the statute and the constitutional provision. *City of University City ex rel. Schulz v. Amos*, 346 Mo. 319, 141 S.W.2d 777 (1940), *trans'd*, 236 Mo. App. 428, 156 S.W.2d 65 (1941); *Carson v. Missouri, Kan. & Tex. Ry.*, 184 S.W. 1039 (Mo.), *trans'd*, 190 S.W. 949 (Ct. App. 1916).

135. 195 S.W. 1032 (Mo. 1917), *trans'd*.

136. *Id.* at 1033.

137. *Gold Lumber Co. v. Baker*, 324 Mo. 984, 25 S.W.2d 457 (1930), *trans'd*, 225 Mo. App. 849, 36 S.W.2d 130 (1931); *Woody v. St. Louis & S.F. Ry.*, 173 Mo. 547, 73 S.W. 475 (1903), *trans'd*; *Johnson v. American Cent. Life Ins. Co.*, 212 Mo. App. 290, 249 S.W. 115 (1922); *Royle Mining Co. v. Fidelity & Cas. Co.*, 161 Mo. App. 185, 142 S.W. 438 (1911); *Davidson v. Hartford Life Ins. Co.*, 151 Mo. App. 561, 132 S.W. 291 (1910).

ability" its desire to forestall an inordinate increase in the supreme court work load.<sup>138</sup>

Although the majority of the "ruling error" contentions specify the due process clause,<sup>139</sup> others assert that the trial court judgment violated the

138. It must be obvious, that, if every time a court or jury should, in the course of a trial, do a party defendant a palpable and obvious wrong, that thereupon his constitutional rights in the particular mentioned must be deemed to be invaded, then the appellate jurisdiction of this court would greatly, and indeed inconceivably, be enlarged. *Hulett v. Missouri, Kan. & Tex. Ry.*, 145 Mo. 35, 37, 46 S.W. 951, 952 (1898), *trans'd*, 80 Mo. App. 87 (1899).

139. The constitutional contention is usually that the erroneous ruling of the trial court has deprived the appellant of property without due process of law. The specified errors are of varying types.

a) Trial court erred in delivering certain jury instructions: *State v. Richter*, 33 S.W.2d 926 (Mo.), *trans'd from* 224 Mo. App. 430, 27 S.W.2d 708 (1930), *retrans'd*, 36 S.W.2d 954 (Ct. App. 1931); *Mercantile Trust Co. v. Lyon*, 195 S.W. 1032 (Mo. 1917), *trans'd*; *Garey v. Jackson*, 184 S.W. 979 (Mo. 1916), *trans'd*, 197 Mo. App. 217, 193 S.W. 920 (1917); *City of Independence v. Knoepker*, 205 Mo. 338, 103 S.W. 940 (1907), *trans'd*; *Hulett v. Missouri, Kan. & Tex. Ry.*, *supra* note 138.

b) Trial court erred in misconstruing the pleadings: *Goodson v. City of Ferguson*, 339 S.W.2d 841 (Mo. 1960), *trans'd*, 345 S.W.2d 381 (Ct. App. 1961); *Miltenberger v. Center W. Enterprises, Inc.*, 245 S.W.2d 855 (Mo.), *trans'd*, 251 S.W.2d 385 (Ct. App. 1952); *Silberstein v. H-A Circus Operating Corp.*, 124 S.W.2d 1207 (Mo.), *trans'd*, 129 S.W.2d 1085 (Ct. App. 1939); *George L. Cousins Contracting Co. v. Acer Realty Co.*, 102 S.W.2d 936 (Mo.), *trans'd*, 110 S.W.2d 885 (Ct. App. 1937); *Wolf v. Hartford Fire Ins. Co.*, 304 Mo. 459, 263 S.W. 846 (1924) (en banc), *trans'd*, 219 Mo. App. 307, 269 S.W. 701 (1925); *Brookline Canning & Packing Co. v. Evans*, 238 Mo. 599, 142 S.W. 319 (1911), *trans'd*, 163 Mo. App. 564, 146 S.W. 828 (1912); *Berryman v. Maryland Motor Car Ins. Co.*, 199 Mo. App. 503, 204 S.W. 738 (1918), *trans'd from* 197 S.W. 850 (Mo. 1917); *Yeomans v. Herrick*, 178 Mo. App. 274, 165 S.W. 1112 (1914).

c) Trial court erred in misconstruing a statute: *Swenson v. Swenson*, 299 S.W.2d 523 (Mo. 1957), *trans'd*, 313 S.W.2d 770 (Ct. App. 1958); *Young v. Brassfield*, 223 S.W.2d 491 (Mo. 1949), *trans'd*, 241 Mo. App. 35, 228 S.W.2d 823 (1950); *Commercial Bank v. Songer*, 62 S.W.2d 903 (Mo. 1933), *trans'd*, 229 Mo. App. 168, 74 S.W.2d 100 (1934); *Guilod v. Kansas City Power & Light Co.*, 321 Mo. 586, 11 S.W.2d 1036 (1928), *trans'd*, 224 Mo. App. 382, 18 S.W.2d 97 (1929); *Corbett v. Lincoln Sav. & Loan Ass'n*, 4 S.W.2d 824 (Mo. 1928), *trans'd*, 223 Mo. App. 329, 17 S.W.2d 275 (1929); *Staggs v. Gotham Mining & Milling Co.*, 228 S.W. 461 (Mo.), *trans'd*, 208 Mo. App. 596, 235 S.W. 511 (1921); *Kribs v. United Order of Foresters*, 222 S.W. 1005 (Mo. 1920), *trans'd*, 233 S.W. 89 (Ct. App. 1921); *Bealmer v. Hartford Fire Ins. Co.*, 281 Mo. 495, 220 S.W. 954, *trans'd*, 225 S.W. 132 (Ct. App. 1920); *McManus v. Burrows*, 280 Mo. 327, 217 S.W. 512 (Mo. 1919) (en banc); *Bartholomew v. Board of Zoning Adjustment*, 307 S.W.2d 730 (Mo. Ct. App. 1957), *trans'd from* supreme court; *Hake v. Hake*, 13 S.W.2d 573 (Mo. Ct. App. 1929).

d) Trial court erred in misconstruing a contract: *Guilod v. Kansas City Power & Light Co.*, *supra*; *Newman v. John Hancock Mut. Life Ins. Co.*, 316 Mo. 454, 290 S.W. 133 (1927) (en banc), *trans'd from* court of appeals, *retrans'd*, 7 S.W.2d 1015 (Ct. App. 1928); *Staggs v. Gotham Mining & Milling Co.*, *supra*; *Donoho v. Missouri Pac. Ry.*, 184 S.W. 1149 (Mo.), *trans'd from* court of appeals, *retrans'd*, 193 Mo. App. 610, 187 S.W. 141 (1916); *Hilgert v. Barber Asphalt Paving Co.*, 173 Mo. 319, 72 S.W. 1070

constitutional provisions relating to double jeopardy,<sup>140</sup> the impairment of vested contract rights,<sup>141</sup> ex post facto laws,<sup>142</sup> free exercise of religion,<sup>143</sup>

(1903) (en banc), *trans'd*, 107 Mo. App. 385, 81 S.W. 496 (1904); *Johnson v. American Cent. Life Ins. Co.*, 212 Mo. App. 290, 249 S.W. 115 (1922).

e) Trial court erred in its ruling on proffered evidence: *Cohen v. Ennis*, 308 S.W.2d 669 (Mo.), *trans'd*, 314 S.W.2d 239 (Ct. App.), *retrans'd*, 318 S.W.2d 310 (Mo. 1958) (en banc); *Berberet v. Electric Park Amusement Co.*, 310 Mo. 655, 276 S.W. 36 (1925), *trans'd*; *Burns v. Prudential Ins. Co.*, 295 Mo. 680, 247 S.W. 159 (1922), *trans'd*, 253 S.W. 81 (Ct. App. 1923); *Lavelle v. Metropolitan Life Ins. Co.*, 231 S.W. 616 (Mo. 1921), *trans'd*, 209 Mo. App. 330, 238 S.W. 504 (1922).

f) Trial court erred in sustaining a motion to strike: *Home Owners' Loan Corp. v. Caplan*, 349 Mo. 353, 160 S.W.2d 754, *trans'd*, 236 Mo. App. 1276, 164 S.W.2d 652 (1942); *Boggs v. Missouri, Kan. & Tex. Ry.*, 50 S.W.2d 164 (Mo. Ct. App. 1932).

g) Trial court erred in sustaining or overruling a demurrer: *Finley v. Finley*, 165 S.W.2d 417 (Mo. 1942), *trans'd*, 172 S.W.2d 473 (Ct. App. 1943) (sustaining); *State v. Christopher*, 212 Mo. 244, 110 S.W. 697, *trans'd from court of appeals, retrans'd*, 134 Mo. App. 6, 114 S.W. 549 (1908) (overruling); *State ex rel. Johnson v. Hiller*, 295 S.W. 132 (Mo. Ct. App. 1927) (sustaining).

h) Trial court erred in directing a verdict for respondent: *Davis v. Thompson*, 209 Mo. 192, 107 S.W. 1067, *trans'd*, 134 Mo. App. 13, 114 S.W. 550 (1908); *Davidson v. Hartford Life Ins. Co.*, 151 Mo. App. 561, 132 S.W. 291 (1910); *accord*, *Supreme Lodge of the World v. Paramount Progressive Order of Moose*, 322 Mo. 866, 17 S.W.2d 327 (1929), *trans'd*, 224 Mo. App. 276, 26 S.W.2d 826 (1930) (verdict alleged to be contrary to the weight of the evidence).

i) Trial court committed miscellaneous error: *Dunbar v. Board of Zoning Adjustment*, 380 S.W.2d 442 (Mo. 1964) (trial court affirmed board determination which appellant claimed was unsupported by evidence); *McClard v. Morrison*, 273 S.W.2d 225 (Mo. 1954) (failure to give adequate verdict); *State ex rel. Markwell v. Colt*, 355 Mo. 55, 194 S.W.2d 1021 (1946), *trans'd*, 199 S.W.2d 412 (Ct. App. 1947) (sustaining motion to quash alternative writ of mandamus); *Devoto v. Devoto*, 326 Mo. 511, 31 S.W.2d 805 (1930), *trans'd*, 39 S.W.2d 1083 (Ct. App. 1931) (failure to make an accounting and adjust respective claims of plaintiff and defendant); *Brown v. Wabash Ry.*, 309 Mo. 217, 274 S.W. 388 (1925), *trans'd*, 222 Mo. App. 518, 281 S.W. 64 (1926) (misconstruction of foreign judgment); *Huckshold v. United Ry.*, 285 Mo. 497, 226 S.W. 852 (1920), *trans'd*, 234 S.W. 1072 (Ct. App. 1921) (permitting improper voir dire examination); *Stegall v. American Pigment & Chem. Co.*, 263 Mo. 719, 173 S.W. 674 (1915), *trans'd*, 182 S.W. 1086 (Ct. App. 1916) (refusal to quash service of process); *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) (refusal to permit removal of case to federal courts); *In re J. — L. — H. —*, 373 S.W.2d 635 (Mo. Ct. App. 1963) (failure to give plaintiff hearing on consolidated cause); *Vogel v. Vogel*, 333 S.W.2d 306 (Mo. Ct. App. 1960) (issuance of execution without proper notice); *Little River Drainage Dist. v. Jones*, 136 S.W.2d 440 (Mo. Ct. App. 1939) (erroneous interpretation of effect of tax judgment and sale). *Contra*, *Wooster v. Trimont Mfg. Co.*, 356 Mo. 682, 203 S.W.2d 411 (1947), *trans'd from 197 S.W.2d 710* (Ct. App. 1946) (granting motion to quash service of process).

j) Trial court committed unspecified error: *American Petroleum Exch. v. Public Serv. Comm'n*, 172 S.W.2d 952 (Mo.), *trans'd*, 238 Mo. App. 92, 176 S.W.2d 533 (1943); *Federal Land Bank v. Bross*, 116 S.W.2d 6 (Mo.), *trans'd*, 122 S.W.2d 35 (Ct. App. 1938); *Beck v. Kansas City Pub. Serv. Co.*, 37 S.W.2d 589 (Mo. 1931), *trans'd*, 48 S.W.2d 213 (Ct. App. 1932); *Gold Lumber Co. v. Baker*, 324 Mo. 984, 25 S.W.2d

right to notice of the charge,<sup>144</sup> or equal protection.<sup>145</sup> Regardless of the constitutional provision specified, no "ruling error" contention will serve as a basis for supreme court jurisdiction.

The error alleged in another group of cases is the *procedure* followed at the initial hearing. In these cases, the constitutional contention is deemed "colorable" when the contention can be resolved by a construction of a legislative act defining the jurisdiction or authority of the body whose actions are challenged as erroneous. In *State v. Brookshire*,<sup>146</sup> the prosecutor of Boone County filed a defective information charging defendant with the fraudulent issuance of a check, then amended it to state the proper date of the offense. The essence of defendant's challenge, on appeal, was that since the procedure followed by the trial court in handling the amended information violated the statutes and supreme court rule which authorized the state to amend an information in some situations, the defendant was denied due process. This contention required only a construction of the applicable statutes and supreme court rule to determine whether the information was properly amended, so the constitutional question was non-existent. On the other hand,

If it were defendant's position that the authorized procedure for amending the information was followed, but that that procedure denied him due process of law, such a contention would clearly call for

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457 (1930), *trans'd*, 225 Mo. App. 849, 36 S.W.2d 130 (1931); *Dorrah v. Pemiscot County Bank*, 248 S.W. 960 (Mo.), *trans'd*, 213 Mo. App. 541, 256 S.W. 560 (1923); *Woody v. St. Louis & S.F. Ry.*, 173 Mo. 547, 73 S.W. 475 (1903), *trans'd*.

In other cases the supreme court has held that an allegation that error committed by one of the courts of appeals denied the appellant his constitutional rights was similarly colorable. *Williams v. United States Express Co.*, 184 S.W. 1146 (Mo. 1916), *trans'd*, 195 Mo. App. 362, 191 S.W. 1087 (1917); *Sublette v. St. Louis, I.M. & So. Ry.*, 198 Mo. 190, 95 S.W. 430 (1906), *trans'd*, 122 Mo. App. 389, 99 S.W. 467 (1907).

140. *State v. Tatman*, 228 Mo. 470, 128 S.W. 736, *trans'd*, 151 Mo. App. 426, 132 S.W. 42 (1910).

141. *State v. Lauridsen*, 312 S.W.2d 140 (Mo.), *trans'd*, 318 S.W.2d 511 (Ct. App. 1958); *Newman v. John Hancock Mut. Life Ins. Co.*, 316 Mo. 454, 290 S.W. 133 (1927) (en banc), *trans'd from court of appeals, retrans'd*, 7 S.W.2d 1015 (Ct. App. 1928); *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); *Royle Mining Co. v. Fidelity & Cas. Co.*, 161 Mo. App. 185, 142 S.W. 438 (1911).

142. *Stegall v. American Pigment & Chem. Co.*, 263 Mo. 719, 173 S.W. 674 (1915), *trans'd*, 182 S.W. 1086 (Ct. App. 1916).

143. *City of Kansas City v. Baird*, 163 Mo. 196, 63 S.W. 495 (1901), *trans'd*.

144. *State v. Christopher*, 212 Mo. 244, 110 S.W. 697, *trans'd from court of appeals, retrans'd*, 134 Mo. App. 6, 114 S.W. 549 (1908).

145. *State v. Euge*, 359 S.W.2d 369 (Mo. Ct. App. 1962).

146. 325 S.W.2d 497 (Mo.), *trans'd*, 329 S.W.2d 252 (Ct. App. 1959).

the construction of the due process clause of the Missouri Constitution and of the Fourteenth Amendment to the Constitution of the United States.<sup>147</sup>

Although the court did not verbalize the rational connection test, it may be reasoned that since appellant's contention did not require reference to the constitution, there was no rational connection among it, the facts and the legislative act, and therefore, the contention could be deemed "colorable."<sup>148</sup>

Another related problem in "colorability" is the degree of rational connection required before a case will be held to involve a real and substantial constitutional question. It is clear that the appellant need not prove the merits of his contention when the colorability determination is made, for it is the final adjudication of the court which determines whether the merits of the contention have been proved. To vest jurisdiction in the supreme court, the appellant need only show some degree of rational connection. When this has been satisfied, the supreme court will retain jurisdiction, even though in the final disposition of the case, it may be unnecessary to decide the constitutional question.<sup>149</sup>

The major difficulty with the use of this discretionary standard is not the application of the test, but the misuse of the "colorability" language in cases which discuss the four requirements for the presentation of a purported constitutional question. The misapplication of the term "colorable" occurs in decisions when facts sufficient to *raise* the issue have not been specified.<sup>150</sup>

147. *Id.* at 501.

148. *State ex rel. Missouri, Kan. & Tex. R.R. v. Public Serv. Comm'n*, 378 S.W.2d 459 (Mo. 1964); *State ex rel. Doniphan Tel. Co. v. Public Serv. Comm'n*, 369 S.W.2d 572 (Mo. 1963), *trans'd*, 377 S.W.2d 469 (Ct. App. 1964); *Van Emelen v. Van Emelen*, 162 S.W.2d 272 (Mo.), *trans'd*, 166 S.W.2d 802 (Ct. App. 1942); *Daniel & Henry Co. v. F. Bierman & Sons Metal & Rubber Co.*, 116 S.W.2d 26 (Mo.), *trans'd*, 234 Mo. App. 792, 121 S.W.2d 200 (1938); *State ex rel. Orscheln Bros. Truck Lines, Inc. v. Public Serv. Comm'n*, 338 Mo. 572, 92 S.W.2d 882 (1935), *trans'd*, 231 Mo. App. 293, 98 S.W.2d 126 (1936).

149. *In re Search Warrant*, 369 S.W.2d 155 (Mo. 1963); *State v. Civella*, 368 S.W.2d 444 (Mo. 1963); *Kansas City v. Hammer*, 347 S.W.2d 865 (Mo. 1961); *In re Toler's Estate*, 325 S.W.2d 755 (Mo. 1959); *Swenson v. Swenson*, 299 S.W.2d 523 (Mo. 1957), *trans'd*, 313 S.W.2d 770 (Ct. App. 1958); *Dorrance v. Dorrance*, 242 Mo. 625, 148 S.W. 94 (1912) (en banc); *Wabash R.R. v. Flannigan*, 218 Mo. 566, 117 S.W. 722 (1909), *trans'd from* 118 Mo. App. 124, 100 S.W. 661 (1906), *retrans'd*.

However, it is apparent in some cases that the court did look to the merits of the claim to determine if it was colorable. See *Junkins v. Local 6313, Communications Workers*, 263 S.W.2d 337 (Mo. 1954); *In re J. — L. — H. —*, 373 S.W.2d 635 (Mo. Ct. App. 1963); *State v. Euge*, 350 S.W.2d 369 (Mo. Ct. App. 1962); *Vogel v. Vogel*, 333 S.W.2d 306 (Mo. Ct. App. 1960); *Little River Drainage Dist. v. Jones*, 234 Mo. App. 816, 136 S.W.2d 440 (1939).

150. *Magenheim v. Board of Educ.*, 340 S.W.2d 619 (Mo. 1960), *trans'd*, 347 S.W.2d 409 (Ct. App. 1961); *Junior v. Junior*, 84 S.W.2d 909 (Mo. 1935); *trans'd*; *State v.*



In *Bealmer v. Hartford Fire Ins. Co.*,<sup>151</sup> the supreme court transferred the appeal, saying that the mere allegation or assertion of a constitutional question is not sufficient; if no supporting facts are set forth, the issue is "colorable." *Bealmer* should have been transferred on the basis of an insufficient specification of facts; that it was transferred on the basis of "colorability" reflects the courts' confusion with regard to the scope of this standard.

Another misuse of "colorability" occurs when the issue was not properly preserved in the appellate briefs.<sup>152</sup> In *Botts v. Wabash R.R.*,<sup>153</sup> it was

Goad, 296 Mo. 452, 246 S.W. 917 (1922), *trans'd*; *State ex rel. Wolfe v. Missouri Dental Bd.*, 282 Mo. 292, 221 S.W. 70 (1920) (en banc); *State v. Euge*, 349 S.W.2d 502 (Mo. Ct. App. 1961). For a complete discussion of facts sufficient to raise a constitutional question see § 1.021(c).

151. 281 Mo. 495, 220 S.W. 954, *trans'd*, 225 S.W. 132 (Ct. App. 1920).

152. *City of Webster Groves v. Quick*, 319 S.W.2d 543 (Mo.), *trans'd*, 323 S.W.2d 386 (Ct. App. 1959); *State v. Harold*, 364 Mo. 1052, 271 S.W.2d 527 (1954), *trans'd*, 281 S.W.2d 605 (Ct. App. 1955); *Gruet Motor Car Co. v. Briner*, 224 S.W.2d 73 (Mo. 1949), *trans'd*, 229 S.W.2d 259 (Ct. App. 1950); *Hurtgen v. Gasche*, 223 S.W.2d 493 (Mo. 1949), *trans'd*, 227 S.W.2d 494 (Ct. App. 1950); *McGuire v. Hutchinson*, 356 Mo. 203, 201 S.W.2d 322 (1947), *trans'd*, 240 Mo. App. 504, 210 S.W.2d 521 (1948); *Hanna v. Sheetz*, 355 Mo. 1215, 200 S.W.2d 338, *trans'd*, 240 Mo. App. 385, 205 S.W.2d 955 (1947); *Hunter v. Hunter*, 355 Mo. 599, 197 S.W.2d 299 (1946), *trans'd*, 202 S.W.2d 101 (Ct. App. 1947); *City of St. Louis v. Fitch*, 353 Mo. 706, 183 S.W.2d 828 (1944), *trans'd*, 238 Mo. App. 725, 187 S.W.2d 63 (1945); *Bankers' Mortgage Co. v. Lessley*, 31 S.W.2d 1055 (Mo. 1930), *trans'd*, 225 Mo. App. 643, 38 S.W.2d 485 (1931); *Coombs v. Fuller*, 223 S.W. 741 (Mo. 1920), *trans'd*, 228 S.W. 870 (Ct. App. 1921); *Harbis v. Cudahy Packing Co.*, 223 S.W. 578 (Mo. 1920), *trans'd*, 211 Mo. App. 188, 241 S.W. 960 (1921); *Little River Drainage Dist. v. Houck*, 282 Mo. 458, 222 S.W. 384 (en banc), *trans'd*, 206 Mo. App. 283, 226 S.W. 72 (1920); *Moore v. United Ry.*, 256 Mo. 165, 165 S.W. 304, *trans'd*, 185 Mo. App. 184, 170 S.W. 386 (1914); *Botts v. Wabash R.R.*, 248 Mo. 56, 154 S.W. 53 (1913), *trans'd*; *Lohmeyer v. St. Louis Cordage Co.*, 214 Mo. 685, 113 S.W. 1108 (1908), *trans'd*, 137 Mo. App. 624, 119 S.W. 49 (1909); *State ex rel. Ridge v. Smith*, 150 Mo. 75, 51 S.W. 713 (1899) (en banc); *State ex rel. Dugan v. Kansas City Court of Appeals*, 105 Mo. 299, 16 S.W. 853 (1891) (en banc); see *Scott v. Dickinson*, 217 S.W. 270 (Mo.), *trans'd from court of appeals, retrans'd*, 223 S.W. 1080 (Ct. App. 1920).

The language used by the courts in discussing the now-rejected inherency doctrine (see § 1.022(d)) is also found in colorability cases. Some opinions (*Pearson Elevator Co. v. Missouri, Kan. & Tex. R.R.*, 46 S.W.2d 247 (Mo. Ct. App. 1932); *Rollins v. Business Men's Acc. Ass'n of America*, 213 S.W. 52 (Mo. 1919), *trans'd*, 204 Mo. App. 679, 220 S.W. 1022 (1920)) cited inherency cases (*City of Tarkio v. Loyd*, 179 Mo. 600, 78 S.W. 797, *trans'd*, 109 Mo. App. 171, 82 S.W. 1127 (1904); *State ex rel. Kansas City Loan Guar. Co. v. Smith*, 176 Mo. 44, 75 S.W. 468 (1903) (en banc)) for the rule that a construction of the constitution must be *essential* in the case before the supreme court must exercise its exclusive appellate jurisdiction. The "essential" test is used in different senses in the two doctrines, since under the inherency doctrine, the court viewed the judgment retrospectively, to see if the construction of the constitution had been necessary; in colorability cases, the court must inquire whether the construction *will be* required.

153. 248 Mo. 56, 154 S.W. 53 (1913), *trans'd*.

stated: "An objection to the constitutionality of a statute made in the trial court, which is abandoned after appeal taken to this court, or which is not attempted to be maintained . . . is merely colorable and meritless . . ." <sup>154</sup> The court's imputation of colorability to an issue *ab initio* on the ground that it was not properly preserved is unwarranted, and serves only to confuse the function of the four requirements and the discretionary standards used to limit supreme court jurisdiction.

### 1.033. *The Constitutional Question Must Be Debatable*

For original supreme court appellate jurisdiction to be based on a constitutional question, that question must be debatable;<sup>155</sup> it must be an open question at the time the appeal is taken. If the question has been settled by previous decisions, the supreme court will not take jurisdiction.<sup>156</sup>

154. *Id.* at 61, 154 S.W. at 55.

155. *E.g.*, *Jones v. Anheuser-Busch Brewing Ass'n*, 188 S.W. 82 (Mo.), *trans'd from court of appeals, retrans'd*, 189 S.W. 631 (Ct. App. 1916); *Clarkson v. Guernsey Furniture Co.*, 22 Mo. App. 109 (1886); *McCormick v. St. Louis, I.M. & So. R.R.*, 20 Mo. App. 65 (1885); *State v. Kaub*, 19 Mo. App. 149 (1885).

156. *E.g.*, *State ex rel. Doniphan Tel. Co. v. Public Serv. Comm'n*, 369 S.W.2d 572 (Mo. 1963), *trans'd*, 377 S.W.2d 469 (Ct. App. 1964); *Swift & Co. v. Doe*, 311 S.W.2d 15 (Mo.), *trans'd*, 315 S.W.2d 465 (Ct. App. 1958); *Turner v. Tyler Land & Timber Co.*, 259 Mo. 15, 167 S.W. 973 (1914), *trans'd*, 188 Mo. App. 481, 174 S.W. 184 (1915); *City of Richmond v. Creel*, 253 Mo. 256, 161 S.W. 794 (1913), *trans'd*, 183 Mo. App. 240, 170 S.W. 420 (1914). *Contra*, *Brown v. Missouri, Kan. & Tex. Ry.*, 175 Mo. 185, 74 S.W. 973 (1903), *trans'd from court of appeals, retrans'd*, 104 Mo. App. 691, 78 S.W. 273 (1904); *State ex rel. Crow v. Kramer*, 78 Mo. App. 60 (concurring opinion), *trans'd*, 150 Mo. 89, 51 S.W. 716 (1899) (en banc); see *McFall v. Barton-Mansfield Co.*, 333 Mo. 110, 61 S.W.2d 911 (1933). The same constitutional questions had been decided seven months before the appeal was granted in *McFall*. The supreme court, however, retained the case on the ground that, under the circumstances, the appellant had urged the questions in good faith. The court has not always been this lenient. In *Carson v. Missouri, Kan. & Tex. Ry.*, 184 S.W. 1039 (Mo.), *trans'd*, 190 S.W. 949 (Ct. App. 1916), the supreme court transferred the case when the same constitutional question had been decided only fourteen days prior to the time the appeal was taken.

If the appeal was granted *before* the constitutional question became non-debatable, the supreme court will retain jurisdiction. *Hoerath v. Sloan's Moving & Storage Co.*, 305 S.W.2d 418 (Mo. 1957); *Privitt v. St. Louis-San Francisco Ry.*, 300 S.W. 726 (Mo. 1927); *Fish v. Chicago, R.I. & Pac. Ry.*, 263 Mo. 106, 172 S.W. 340 (1914) (en banc); *Chandler v. Chicago & A.R.R.*, 251 Mo. 592, 158 S.W. 35 (1913); *Reeves v. Kansas City, St. L. & C.R.R.*, 251 Mo. 169, 158 S.W. 2 (1913); *Hamilton v. Kansas City So. Ry.*, 250 Mo. 714, 157 S.W. 622 (1913); *State ex rel. Dugan v. Kansas City Court of Appeals*, 105 Mo. 299, 16 S.W. 853 (1891) (en banc).

When the constitutional question is no longer debatable, the courts will treat its assertion as: (1) frivolous: *First Nat'l Bank v. Missouri Glass Co.*, 243 Mo. 409, 147 S.W. 1030, *trans'd from court of appeals, retrans'd*, 169 Mo. App. 374, 152 S.W. 378 (1912); (2) sham: *State v. Dinnisse*, 41 Mo. App. 22 (1890), *trans'd*, 109 Mo. 434, 19 S.W. 92 (1892); *State ex rel. Dugan v. Kansas City Court of Appeals, supra*; *State ex rel. Camp-*

Debatability, as a discretionary standard, is used to prevent an appellant from arbitrarily and for his own ends picking and choosing his forum and thereby perpetrating a constructive fraud on the courts.<sup>157</sup> The attempt to thrust jurisdiction on the supreme court can be illustrated by the nine-juror civil verdict cases. A constitutional amendment provides that in "all civil cases in courts of record, three-fourths of the members of the jury concurring may render a verdict."<sup>158</sup> This amendment has been held to have been duly submitted and ratified.<sup>159</sup> However, every defendant in a civil case *could* raise a constitutional question by objecting to an instruction permitting the return of a nine-juror verdict on the ground that the constitutional amendment authorizing such a verdict was unconstitutional because it had not been duly submitted and adopted. The overruling of the objection would constitute a ruling on the constitutional question. The defendant, on receiving an adverse verdict of less than twelve jurors, could preserve his constitutional question in his motion for new trial and, when the motion was overruled, appeal to the supreme court basing jurisdiction on this constitutional question. In the supreme court, he would brief and argue the purported constitutional question. The court, in applying its discretionary standards, could not conclude that the defendant did not have standing to raise this issue in the trial court since he was affected by the instruction; nor could the defendant's contention be called "colorable" since there was a rational connection among the facts, the amendment and the constitution. However, if the supreme court accepted jurisdiction of every case in which the constitutionality of this amendment was challenged, then conceivably every civil case in which a nine-, ten- or eleven-juror verdict was rendered could be appealed to the supreme court. To meet this possibility, supreme court jurisdiction over this issue has been systematically denied on the ground that the question is no longer debatable.<sup>160</sup>

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bell v. St. Louis Court of Appeals, 97 Mo. 276, 10 S.W. 374 (1889); (3) not raised in good faith: Dickey v. Holmes, 208 Mo. 664, 106 S.W. 511 (1907), *trans'd*; Carpenter v. Hamilton, 185 Mo. 603, 84 S.W. 863 (1904).

157. City of Marshfield *ex rel.* Hasten v. Brown, 337 Mo. 1136, 88 S.W.2d 339, *trans'd from* 79 S.W.2d 519 (Ct. App. 1935), *retrans'd*, 99 S.W. 485 (Ct. App. 1936); State *ex rel.* Simmons v. American Sur. Co., 210 S.W. 428 (Mo. 1919), *trans'd*, 217 S.W. 855 (Ct. App. 1920); Non-Royalty Shoe Co. v. Phoenix Assur. Co., 277 Mo. 399, 210 S.W. 37 (1918); State v. Wild, 190 S.W. 273 (Mo. 1916), *trans'd from* 179 S.W. 954 (Ct. App. 1915), *retrans'd*, 202 S.W. 613 (Ct. App. 1918).

158. Mo. CONST. art. II, § 28 (1875), as amended.

159. Gabbert v. Chicago, R.I. & Pac. Ry., 171 Mo. 84, 70 S.W. 891 (1902).

160. State *ex rel.* Simmons v. American Sur. Co., 210 S.W. 428 (Mo. 1919), *trans'd*, 217 S.W. 855 (Ct. App. 1920). However, if the appeal was granted before the constitutionality of the amendment was decided in another case, the supreme court has retained the case. Boling v. St. Louis & S.F.R.R., 189 Mo. 219, 88 S.W. 35 (1905), *trans'd from*

Debatability, as a means for limiting supreme court jurisdiction when the constitutionality of a legislative act has been challenged, can be traced to 1885, one year after the adoption of the present appellate court system.<sup>161</sup> However, its use to limit supreme court jurisdiction when the constitutionality of an official act or omission is challenged has been more recent.<sup>162</sup> For example, it was not until 1959 that the supreme court *en banc* held that the constitutional issue raised by a search and seizure contention was no longer debatable. In *State v. Harris*,<sup>163</sup> a prosecution for the possession of lottery tickets, the defendant filed a motion to suppress the "policy" paraphernalia on the ground that the evidence was obtained by an illegal search before his arrest. The motion was overruled and the defendant was convicted. He appealed to the court of appeals which transferred on the ground that the case involved the question of whether the search and seizure and the arrest were in contravention of the constitution. The supreme court rejected the earlier view that every search and seizure case involves a different set of facts and the disposition of the case requires a construction of the constitution in the light of these facts.<sup>164</sup> The court, in retransferring, held that: "It

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94 Mo. App. 67, 67 S.W. 937 (1902); *Franklin v. St. Louis & M.R.R.*, 188 Mo. 533, 87 S.W. 930 (1905); *Carpenter v. Hamilton*, 185 Mo. 603, 84 S.W. 863 (1904); *Meng v. St. Louis & So. Ry.*, 183 Mo. 68, 81 S.W. 907, *trans'd*, 108 Mo. App. 553, 84 S.W. 213 (1904); *Lee v. Jones*, 181 Mo. 291, 79 S.W. 927 (1904), *trans'd from* court of appeals; *Murray v. St. Louis Transit Co.*, 176 Mo. 183, 75 S.W. 611 (1903).

161. In *State v. Kaub*, 19 Mo. App. 149 (1885), defendant was convicted for selling lottery tickets. On appeal to the court of appeals, Kaub asserted that the statutes which established the court of criminal correction were in violation of the fourth amendment to the federal constitution. The court held that "In order to deprive this court of its appellate jurisdiction, the constitutional question arising in any cause must be one that is fairly debatable." *Id.* at 150. The court of appeals held that since the United States Supreme Court had determined that the fourth amendment was adopted as security against the apprehended encroachments of the federal government, not against those of the state governments, the question whether the fourth amendment imposed a restraint on the statutes of criminal procedure of the state was no longer debatable.

162. The application of the debatability doctrine to cases in which the constitutionality of some official action was challenged can be traced to 1919. In *State v. Meyers*, 217 S.W. 100 (Mo. 1919), *trans'd*, the court held that the question of the sufficiency of an information in a prosecution for a misdemeanor was not debatable, having been deemed "colorable" in *State v. Christopher*, 212 Mo. 244, 110 S.W. 697, *trans'd from* court of appeals, *retrans'd*, 134 Mo. App. 6, 114 S.W. 549 (1908).

163. 321 S.W.2d 468 (Mo. 1959) (*en banc*), *trans'd from* 313 S.W.2d 219 (Ct. App. 1958), *retrans'd*, 325 S.W.2d 352 (Ct. App. 1959).

164. The earlier view was expressed in *State v. Barrelli*, 317 Mo. 461, 296 S.W. 413 (1927); *State v. Pigg*, 312 Mo. 212, 278 S.W. 1030 (1925) (*en banc*); *State v. Cobb*, 309 Mo. 89, 273 S.W. 736 (1925); *State v. McBride*, 32 S.W.2d 134 (Mo. Ct. App. 1930), *trans'd*, 327 Mo. 184, 37 S.W.2d 423 (1931). *But see* *State v. Dunivan*, 217 Mo. App. 548, 269 S.W. 415 (1925).

The line of cases culminating in *McBride* was viewed by the St. Louis Court of Ap-

is the settled law of this state, pronounced by decision of this court, that the search of one's person is justified, and thus not an unreasonable search, only if it is incident to a lawful arrest."<sup>165</sup> Therefore, whether the search was incident to a lawful arrest depends on whether there was a lawful arrest as determined by an application of the laws of "arrest" to the particular facts; no construction of any constitutional provision is required. Although *Harris* is now the law, the question remains whether *Harris* has circumscribed too stringently the appellate jurisdiction of the supreme court.<sup>166</sup>

Clearly, the debatability standard is now applied alike to contentions challenging the constitutionality of legislative acts and of official acts and omissions. However, the number of rulings on a contention necessary to make the issue no longer debatable is not clear. Some cases indicate that one decision on the merits of the issue will make it non-debatable;<sup>167</sup> others

peals as determining the merits of the search and seizure contention and rendering it non-debatable. In *City of St. Louis v. Simon*, 223 S.W.2d 864 (Mo. Ct. App. 1949); *City of St. Louis v. Washington*, 223 S.W.2d 858 (Mo. Ct. App. 1949); *City of St. Louis v. Ward*, 223 S.W.2d 847 (Mo. Ct. App. 1949); *City of St. Louis v. Gavin*, 222 S.W.2d 531 (Mo. Ct. App. 1949), the court of appeals retained jurisdiction.

After 1949, it was apparently settled that all cases involving search and seizure contentions would be appealed to the court of appeals which would then inquire whether the arrest was lawful; this inquiry required reference only to the statutes, not the constitution. Therefore, the transfer in *Harris* was unusual, even unwarranted—as shown by the subsequent retransfer. The supreme court opinion in *Harris* definitely adopts the conclusion of non-debatability stated in *Gavin* and overrules the prior view presented in *Cobb*, *Pigg*, *Barrelli* and *McBride*.

165. *State v. Harris*, 321 S.W.2d 468, 470 (Mo. 1959) (en banc), *trans'd from* 313 S.W.2d 219 (Ct. App. 1958), *retrans'd*, 325 S.W.2d 352 (Ct. App. 1959).

166. *State v. Harris*, 321 S.W.2d 468 (Mo. 1959) (en banc) (dissent). The dissent contends that the supreme court is restricting the exercise of its jurisdiction by limiting the scope of a "construction of the constitution" to an interpretation of the language of the provision, leaving both the consideration of attendant circumstances and the application of the drafters' meaning to the courts of appeals. See § 1.010.

The views expressed in the dissent are in accord with *State v. McBride*, 32 S.W.2d 134 (Mo. Ct. App. 1930), *trans'd*, 327 Mo. 184, 37 S.W.2d 423 (1931), which restricted the use of the debatability doctrine to cases in which a statute was challenged. The court of appeals, in transferring *McBride* to the supreme court, held that since the facts of cases in which an official action is challenged are not static, but change, previous adjudications on the merits of the constitutional question will not bar future supreme court jurisdiction based on the same question. "The supreme court, by previous ruling in a similar case, could not put at rest the constitutional question of unreasonable search and seizure which, in the very nature of things, must depend upon a state of facts arising in a subsequent case." *State v. Harris*, *supra* at 472.

167. See *Knapp Bros. Mfg. Co. v. Kansas City Stockyards Co.*, 199 S.W. 168 (Mo. 1917), *trans'd*, 204 S.W. 194 (Ct. App. 1918) (holding one supreme court decision sufficient); *State v. Swift & Co.*, 270 Mo. 694, 195 S.W. 996, *trans'd*, 198 S.W. 457 (Ct. App. 1917) (holding one supreme court decision, division two sufficient); *State v. Evertz*, 190 S.W. 287 (Mo. 1916), *trans'd from* 181 S.W. 1055 (Ct. App. 1916),

indicate that the number may, in practice, be more than one.<sup>168</sup> Although cases appear to conflict, an appellant would be ill-advised to assume that the supreme court will take jurisdiction if the precise issue has been decided by the state supreme court or by the United States Supreme Court.

*retrans'd*, 202 S.W. 614 (Ct. App. 1918) (holding one supreme court decision, division two sufficient); *Carson v. Missouri, Kan. & Tex. Ry.*, 184 S.W. 1039 (Mo.), *trans'd*, 190 S.W. 949 (Ct. App. 1916) (holding one supreme court en banc decision sufficient); *Turner v. Tyler Land & Timber Co.*, 259 Mo. 15, 167 S.W. 973 (1914), *trans'd*, 188 Mo. App. 481, 174 S.W. 184 (1915); *State v. Kaub*, 19 Mo. App. 149 (1885) (holding one United States Supreme Court decision sufficient).

Many cases have held that when the supreme court has *once* determined the precise constitutional question raised in a case in which any court of appeals would otherwise have jurisdiction, the supreme court will not thereafter assume jurisdiction of such a case on account of that identical constitutional question, provided that the point was decided before the date at which the appeal was taken in the case. *E.g.*, *City of Marshfield ex rel. Hasten v. Brown*, 337 Mo. 1136, 88 S.W.2d 339, *trans'd from* 79 S.W.2d 519 (Ct. App. 1935), *retrans'd*, 99 S.W.2d 485 (Ct. App. 1936); *State v. Wild*, 190 S.W. 273 (Mo. 1916), *trans'd from* 179 S.W. 954 (Ct. App. 1915), *retrans'd*, 202 S.W. 613 (Ct. App. 1918).

Many modern cases erroneously cite *Dickey v. Holmes*, 208 Mo. 664, 106 S.W. 511 (1907), *trans'd*, for the principle that when the constitutionality of a statute has *once* been determined, the question may not subsequently be urged as jurisdictional. *E.g.*, *State Harris*, 321 S.W.2d 468 (1959) (en banc) (dissent); *State v. McBride*, 32 S.W.2d 134 (Mo. Ct. App. 1930), *trans'd*, 237 Mo. 184, 37 S.W.2d 423 (1931). But *Dickey* declared that a constitutional question *once* decided *could* be used for jurisdictional purposes in a later case, subject to exceptions.

In *State ex rel. Campbell v. St. Louis Court of Appeals*, 97 Mo. 276, 10 S.W. 874 (1889), the supreme court granted a writ of prohibition forcing the court of appeals to transfer. (*Carroll v. Campbell*, 25 Mo. App. 630 (1887)). The court of appeals had adjudicated the same constitutional question in 1883 when that court had jurisdiction to construe the constitution. Mo. CONST. art. VI, § 12 (1875). The supreme court held that a court of appeals construction of the constitution could not set the question at rest.

In *Greene County v. Lydy*, 263 Mo. 77, 88, 172 S.W. 376, 379 (1914) (en banc) Lamm, C.J., stated:

[I]t is a usual rule of decision in this jurisdiction (subject to exceptions) to consider constitutional questions once decided as no longer open. The contrary doctrine would put everything at sea, unsettle the law, and bring such questions within the maxim: Obedience is miserable where the law is uncertain. There is an amusing theory abroad in the land to the effect that a question once ruled here should not be taken as settled until it is ruled again. This has been bitterly called . . . the *regurgitation theory* . . .

168. *Lewis v. New York Life Ins. Co.*, 201 S.W. 851 (Mo. 1918), *trans'd*, 201 Mo. App. 48, 209 S.W. 625 (1919) (one United States Supreme Court decision and two Missouri Supreme Court decisions close the question); *First Nat'l Bank v. Missouri Glass Co.*, 243 Mo. 409, 147 S.W. 1030, *trans'd*, 169 Mo. App. 374, 152 S.W. 378 (1912) (seven supreme court decisions close the question); *State v. Zimmerman*, 216 Mo. 413, 115 S.W. 965 (1909), *trans'd* (seven supreme court decisions close the question); *State v. Campbell*, 214 Mo. 362, 113 S.W. 1081 (1908), *trans'd*, 137 Mo. App. 105, 119 S.W. 494 (1909) (seven supreme court decisions close the question); *Dickey v. Holmes*, 208 Mo. 664, 106 S.W. 511 (1907), *trans'd* (one supreme court decision en banc and two division two decisions close the question); *Wollums v. Mutual Benefit Health & Acc.*

Which appellate court should determine whether the constitutional question is no longer debatable? From *State v. Dinnisse*,<sup>169</sup> it appears that the supreme court determines whether a contention is debatable. In *Dinnisse* the court of appeals transferred to the supreme court on the ground that it could not make this determination.<sup>170</sup> However, once the supreme court has determined that the constitutional question is no longer debatable, the court of appeals will follow this determination and refrain from transferring another case for a similar ruling.

Debatability does not foreclose a party from raising the same constitutional contention which has been decided in a previous case. This standard merely holds that such an issue cannot be the basis for supreme court jurisdiction. Although a party raising this issue must appeal to the court of appeals, the supreme court may, through its supervisory powers, review the merits of the constitutional contention.<sup>171</sup>

#### 1.040. CONCLUSION

The constitutional drafters, intending that supreme court appellate jurisdiction be limited to the "important" cases, stipulated that the supreme

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Ass'n, 226 Mo. App. 647, 46 S.W.2d 259 (1931) (one United States Supreme Court decision and one Missouri Supreme Court decision close the question); *Robinson v. City of Springfield*, 191 S.W. 1094 (Mo. Ct. App. 1917) (one United States Supreme Court decision and four Missouri Supreme Court decisions close the question); *State v. Johnson*, 179 Mo. App. 344, 166 S.W. 853 (1914) (seven supreme court decisions close the question); *State v. Cowan*, 152 Mo. App. 622, 133 S.W. 344 (1911), *retrans'd from* St. Louis Court of Appeals, *retrans'd from* supreme court, *trans'd from* 146 Mo. App. 656, 124 S.W. 586 (1910), *retrans'd*, 152 Mo. App. 624, 140 S.W. 960 (1911) (seven supreme court decisions close the question); *Clarkson v. Guernsey Furniture Co.*, 22 Mo. App. 109 (1886) (three supreme court decisions close the questions).

Each of the following cases held that the constitutional questions had been settled by a long line of prior decisions. *State v. Campbell*, 259 S.W. 430 (Mo.), *trans'd*, 266 S.W. 764 (Ct. App. 1924); *Hamm v. Chicago, B. & Q. Ry.*, 235 S.W. 1046 (Mo. 1921), *trans'd*, 211 Mo. App. 460, 245 S.W. 1109 (1922); *Webster v. United States R.R. Administration*, 234 S.W. 790 (Mo. 1921), *trans'd*, 245 S.W. 625 (Ct. App. 1922); *Trembley v. Fidelity & Cas. Co.*, 223 S.W. 387 (Mo. 1920), *trans'd*, 232 S.W. 179 (Ct. App. 1921); *Non-Royalty Shoe Co. v. Phoenix Assur. Co.*, 277 Mo. 399, 210 S.W. 37 (1918); *Dodge v. New York Life Ins. Co.*, 189 S.W. 609 (Mo. Ct. App. 1916); *Pope v. New York Life Ins. Co.*, 192 Mo. App. 383, 181 S.W. 1047 (1916); *Mun v. New York Life Ins. Co.*, 181 S.W. 606 (Mo. Ct. App. 1916); *Applegate v. Travelers' Ins. Co.*, 153 Mo. App. 63, 132 S.W. 2 (1910).

169. 41 Mo. App. 22 (1890), *trans'd*, 109 Mo. 434, 19 S.W. 92 (1892).

170. *Ibid.* But see *Robinson v. City of Springfield*, 191 S.W. 1094 (Mo. Ct. App. 1917); *Clarkson v. Guernsey Furniture Co.*, 22 Mo. App. 109 (1886); *McCormick v. St. Louis, I.M. & So. Ry.*, 20 Mo. App. 65 (1885); *State v. Kaub*, 19 Mo. App. 149 (1885). In each case the court of appeals determined that the constitutional question was no longer debatable.

171. Mo. CONST. art. V, § 10; see "Introduction," notes 50-54 and accompanying text.

court have exclusive appellate jurisdiction over all cases involving a construction of the constitution. In the light of the drafters' intent, and its own desire to limit its jurisdiction, the supreme court defined the constitutional provision in a restrictive sense through the use of technical requirements and standards.

Appellate jurisdiction in cases involving a constitutional question is jurisdiction based on *an issue*. This issue must be properly raised in the trial court, ruled on adversely to the party appealing, and preserved for appellate review. Although these requirements, developed through case law, have been expressed by the court on innumerable occasions, lawyers continue to raise and preserve their constitutional questions improperly, perhaps by oversight. A codification by supreme court rule could, by reinforcing the bar, eliminate many of the transfers so caused. A proposed codification may state:

REQUIREMENTS FOR RAISING AND PRESERVING A CONSTITUTIONAL  
QUESTION FOR SUPREME COURT JURISDICTION

(a) Proper raising—A constitutional question shall be raised at the first available opportunity that good pleading and orderly practice allow. The constitutional provision shall be specified by article and section number, and facts shall be stated and related to the legislative act (if one is present) and the constitutional provision involved. Failure to comply with all of these requirements constitutes an improper raising of the constitutional issue and excludes this issue from the case. However, these requirements are deemed waived if the trial court indicates in the record that it did construe the constitution.

(b) Proper preservation—A constitutional question shall be preserved in the appropriate objections, trial motions, jury instructions, motions for new trial and appellate briefs. To constitute proper preservation, the constitutional provision shall be specified by article and section number and facts must be stated and related to the legislative act (if one is present) and the constitutional provision involved. Failure to comply with all of these requirements constitutes permanent abandonment of the constitutional issue and excludes this issue from the case.

The sole purpose of these requirements is to insure that an issue calling for construction of the constitution exists and is before the supreme court for review so that appellate jurisdiction may attach to it. Jurisdictional difficulties (except for oversights) are not caused by the existence of these requirements but by the theory behind their interrelationship. For example, the contention "*if* a statute is construed in a certain manner, it is unconstitutional" has been held not to raise a constitutional question on the ground that a challenge that a statute is unconstitutional *in any event* is the only challenge that is sufficient to raise a constitutional question and vest the



supreme court with appellate jurisdiction. Using this broad statement, the courts have failed to realize that the criterion should be whether the trial court did rule on the constitutional question. The determination of appellate jurisdiction based on the form of the contention is highly undesirable.

The satisfaction of all of the raising and preservation requirements merely presents a *purported* constitutional question. To prevent a party from foisting a hollow constitutional question on the supreme court, the courts have developed three standards for determining whether there is a constitutional question in the case upon which jurisdiction can be based. The party raising the constitutional question must have had standing to do so in the trial court; the question must be real and substantial and not merely colorable; and the question must be debatable. For a party to have standing, the official action or legislative act must directly affect his rights; for a question to be real and not merely colorable, there must be a rational connection among the facts, the legislative act (if one is present), and the constitution. These two standards are closely related because the theory of both is that the constitutional question was non-existent *ab initio*. The courts have misused the colorability standard when other requirements have not been satisfied. For example, the court has held that because the constitutional question has not been properly briefed, it was colorable. Not only does this conclusion distort the colorability test, but, in theory, it is incorrect. When a constitutional question, which has been properly raised and ruled on by the trial court adversely to the party appealing, has not been briefed, it *has* existed and could have been the basis for supreme court jurisdiction had it not been abandoned. This differs in theory from colorability where the constitutional question was non-existent *ab initio*.

The courts have failed to see that the cases which they often classify under the "construction-application" distinction are really problems in "debatability." "Construction" has been defined as the determination of meaning from the intent of the drafters; "application" is the use of this meaning in conjunction with the facts of the case. Therefore, a construction is a condition precedent to an application. The limitation of supreme court jurisdiction could have been achieved in the "application" cases by the use of the "debatability" standard. For example, plaintiff brings a foreign judgment into a Missouri court for enforcement, claiming that it should be given full faith and credit. The defendant files a motion to dismiss the petition on the ground that the foreign court did not have jurisdiction over his person. The courts have held that this case involves only an *application* of the full faith and credit clause because once the court determines the validity or invalidity of the foreign judgment, the applicability or inapplicability of the full faith and credit clause follows as a matter of course, without any need for con-

struction. The fact remains that a construction of the full faith and credit clause *was* necessary before the clause could be applied to the facts of this case. However, since this particular type of constitutional question has been previously determined many times by the supreme court, the court properly could have held that no further construction was necessary and therefore the constitutional question was no longer debatable.

The lawyer has been responsible for a great number of the transfers which have occurred. He has failed to follow the technical rules of pleading and practice and consequently has either failed to raise a constitutional question or, having raised it, has by oversight abandoned it. Therefore, a lawyer would be well advised to consult a check list, both during trial and at the time when the appeal is taken, to insure a hearing before the proper tribunal. He may ask himself:

- A. Were the trial and appellate requirements satisfied?
  1. Was the constitutional question properly raised
    - a. at the first available opportunity;
    - b. by specifying the article and section number of the constitutional provision; and
    - c. by stating and relating facts to the constitutional provision?
  2. Did the trial court
    - a. rule on the constitutional question;
    - b. adversely to him; and
    - c. is he now the appellant?
  3. Was the constitutional question properly preserved in
    - a. trial court motions, objections, and instructions to the jury;
    - b. motion for new trial; and
    - c. brief before the supreme court in
      - 1) jurisdictional statement;
      - 2) points relied on; and
      - 3) argument?
- B. Did the purported constitutional question satisfy the supreme court's discretionary standards?
  1. Did the party raising the constitutional question have standing to do so in the first instance; that is, did an official action or legislative act directly affect his rights?
  2. Was the contention real and substantial or merely colorable; that is, was there a rational connection among the facts, the legislative act (if there was one), and the constitution?
  3. Was the constitutional question debatable; that is, has this particular issue not been settled by a prior decision?

If all of these questions can be answered in the affirmative, the supreme court will have jurisdiction over the case.

The trial court may also facilitate determination of jurisdiction by stating in the record whether and how it determined all constitutional contentions raised before it. For example, if the defendant objects to the introduction of evidence on the ground that its admission violates a constitutional right, the trial court should indicate in the record that the objection was overruled because the evidence did not violate the defendant's constitutional rights. The trial court ruling on the constitutional question would then clearly appear on the face of the record. This would eliminate the necessity for having the appellate court "second guess" the action of the trial court in overruling the objection.

The above suggestions are not intended to be a panacea for eliminating all transfers in constitutional question cases. They are merely intended to streamline and clarify the technical requirements and standards established to determine jurisdiction. An exclusive appellate jurisdiction system based on construction of the constitution has built-in weaknesses. For example, the debatability standard presents difficulties because it is unclear when a constitutional question becomes non-debatable. It is impractical to establish a definite standard, such as when the constitutional question has been once decided, it will no longer be considered as a basis for supreme court jurisdiction. Constitutional questions differ in substance. One decision that a constitutional amendment was improperly ratified is sufficient to make that issue non-debatable, because the facts—as to the ratification—would be the same in every subsequent case. However, one decision that a given statute does not violate due process should not be the basis for a ruling that every subsequent due process case arising under the statute can no longer vest the court with jurisdiction. Slight variations in the facts may make all the difference in such cases.

No suggestion can prevent all transfers. Normally, the proper tribunal for an appeal is determined when the appeal is taken. If an appellant, who has properly raised and preserved a constitutional question, fails to brief the issue on appeal the court must transfer the case because the issue which gives it jurisdiction has been abandoned. This problem, like others, is inherent in an exclusive appellate jurisdiction system based on *an issue*.