

## Comment on Recent Decisions

APPEAL AND ERROR—BILL OF EXCEPTIONS—COURT RULE MAKING SAVING OF EXCEPTIONS UNNECESSARY.—Trial courts have from time to time made rules dispensing with the requirement that attorneys request each exception to be saved, but thereby have misled attorneys into omitting to specify in their bills of exceptions those errors they wished to have reviewed on appeal. In a recent case, where such a rule had governed the trial, plaintiff, on appeal, alleged error in the trial court's refusal to rule out certain improper questions put to a witness. Plaintiff's attorney had filed a bill of exceptions but had apparently failed to specify the alleged errors during the trial which he wished to have reviewed. *Held*, the rule of the trial court was a proper one but it could not dispense with a detailed bill of exceptions. *Gilstrap v. Osteopathic Sanatorium Co.* (Mo. App. 1930) 24 S. W. (2d) 249, 258.

Some states dispense by statute with the necessity of saving exceptions. R. S. III. (Cahill, 1929) c. 110 sec. 81. Others specifically authorize trial courts to do so by rule. Ark. Stat. (Crawford & Moses, 1929) sec. 1318. Still others specifically require exceptions to be saved. Wyo. Stat. (1920) sec. 5864; Cal. Code of Civ. Proc. (Deering, 1923) sec. 646; Ind. Stat. (Burns, 1926) sec. 685.

The Missouri statute construed in the principal case merely specifies that, "Whenever, in the progress of any trial in any civil suit pending in any court of record, either party shall except to the opinion of the court, and shall write his exception and pray the court to allow and sign the same, the person composing the court shall, if such bill be true, sign the same." R. S. Mo. (1919) sec. 1459. In *Tyon v. Wabash Ry.* (1921) 207 Mo. App. 322, 232 S. W. 786, it was held under this section that exceptions must be saved during the trial to adverse rulings and that the trial court cannot obviate this necessity. See also *Green v. Terminal Ry.* (1908) 211 Mo. 18, 109 S. W. 715. The decision on the second point was overruled in *State ex rel. Brockman v. Miller* (Mo. 1922) 241 S. W. 920, and trial courts were empowered to provide by rule for the automatic saving of exceptions. *State v. Rollinger* (Mo. 1923) 256 S. W. 460, 461; *Myrick v. Hamilton* (Mo. App. 1930) 24 S. W. (2d) 165.

The Missouri courts, however, have consistently held that the necessity of detailed bills of exceptions cannot be avoided by a rule of the trial court or by any other means. *Harrison v. Bartlett* (1872) 51 Mo. 170; *State ex rel. Brockman v. Miller*, above; *Straub v. Laclede Gaslight Co.* (Mo. App. 1926) 287 S. W. 1060; 3 C. J. 220.

In all the Missouri cases cited above except *State ex rel. Brockman v. Miller*, the appellants appear to have been misled into believing that exceptions were brought under the review of the appellate court automatically without their being included specifically in a bill of exceptions. Unless some means are used to avoid giving a misleading impression of the effect of

the automatic saving of exceptions, appellate review of many acts of trial courts will continue to be refused. At the same time it is very desirable for the sake of convenience that trial courts should adopt a rule dispensing with the formality of the saving of exceptions. The confusion which results when such a rule is in force seems to be caused by the exceptional character of this procedure. The Illinois statute universalizes this practice and does away with the difficulty.

J. D. F., '32.

**APPEAL AND ERROR—JURISDICTION—EMINENT DOMAIN AS INVOLVING TITLE TO REAL ESTATE.**—In a condemnation suit where the only issue before the St. Louis Court of Appeals was the propriety of the award of damages in the trial court, the case was transferred to the Supreme Court of Missouri on the ground that it involved title to real estate. Const. Mo. art. 6 sec. 12. *Held*, if the only question in a condemnation proceeding is the right to condemn and determine damages, title is not involved. It is neither "in dispute" nor "in issue." It is merely "affected." *Missouri Power and Light Co. v. Creed* (1930) 30 S. W. (2d) 605.

Most of the older cases have determined that title is involved even where damages or the right of condemnation is the main issue. *Hayes v. Ellison* (Mo. 1916) 191 S. W. 49; *Kansas City v. Railroad* (1905) 187 Mo. 146, 86 S. W. 190; *State ex rel. v. Rombauer* (1894) 124 Mo. 598, 28 S. W. 75; *City of Tarkio v. Clark* (1905) 186 Mo. 294, 85 S. W. 329. But these cases fail to explain how or why the title is involved so as to be in issue, a subject of controversy. The *Rombauer* case, in coming to its conclusion, reasons that in condemning land for railroad tracks the rights of exclusive use and possession, essential elements of perfect title, are taken from the landowner and vested in the corporation. The title, however, is not "in issue" directly as opposed to collaterally. It is rather "affected," and the only question is whether the defendant's land should be subjected to an easement.

The court previously reasoned that in condemning for a sewer only the easement and not the fee is affected; but while the fee remains in the owners, their right to sue is either lessened or taken away, and as a consequence the title is affected to the extent of the injury inflicted. *City of Moberly v. Totter* (1915) 266 Mo. 457, 181 S. W. 991. See also *Prairie Pipe Line Co. v. Shipp* (Mo. App. 1923) 240 S. W. 473. The instant case, however, demands that title be more than affected, possibly to the extent that the condemnation issues be incidental to the question of ownership.

The basic issue is whether courts should accept the *Moberly* case rule that title is involved if there is a question whether or not the title should be or is going to be lessened, or the new rule that title is involved only where there is the actual question of wherein the title or any portion thereof is vested. This latter view, that of the instant case, would seem to narrow the scope of cases which could be appealed on the constitutional ground to those where the real and central issue is to whom the title belongs. This result is commendable in that it will help to relieve the Missouri Supreme Court of an overflow of litigation.

H. R. S., '32.