JURISDICTION : Right of trial court to entertain the setting aside of the verdict after case has been appealed.

March 22, 1938.

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Mr. G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

Referring to your letter of January 1st and January 16th last, relative to the case of State vs. Hotsenpiller, wherein you state that the defendant was convicted in the trial court and appealed, therefrom, to the Supreme Court on the 9th of October, 1937 and that by reason of the death of the court reporter, some fifty days after the case was appealed, a bill of exceptions has not been procured by the defendant, and wherein your letter of January 1st, you ask this department for an opinion on the following two questions, to-wit:

> "1. Has the circuit court such jurisdiction as will permit him to enter an order directing a new trial of this case, after the appeal has been perfected to the point that the same is now pending in the Supreme Court of Missouri?
>
> "2. After the trial, and the facts that Gus Le Compte the Court reporter lived fifty days, will the mere fact that the court reporter did not transcribe his notes for the appellant to put in the bill of exceptions, be sufficient alone to grant a new trial?"

It appears from your letter of January 16th, that the court, in an informal way, stated that he did not have jurisdiction. We take this to mean that the

court did not, or would not, entertain setting the verdict aside and giving the defendant a new trial. Hence, your first question may, in fact, be a moot one. However, we will answer the question, assuming it is still a live one, but will have to give you the answer in two ways, because we do not know whether or not the term, at which the defendant was convicted and the appeal taken, has finally adjourned.

If such term has finally adjourned, then the trial court would not have jurisdiction to entertain the setting aside of the verdict on the motion for a new trial. In the case of Reed vs. Bright, 232 Mo. l. c. 415, the court said:

> "An appeal, except for limited purposes, divests the trial court of jurisdiction. In this case the term had ended. Under such circumstances the general rule is that the circuit court is divested of jurisdiction and the jurisdiction as to the judgment and the cause is vested in the appellate court."

If on the other hand such term is still in existence, then the case of Hydraulic Press Brick Company vs. Bambrick Bros. Const. Co. et al., 211 S. W. l. c. 94, applies, wherein the court said:

> "It is well settled that the circuit court has jurisdiction of a cause, and power to control and set aside its judgments and orders, during the term at which the judgment was rendered or the orders made, and the effect of the action of the trial court, in settling aside the judgment at the same term at which it was rendered, had the effect of vacating the appeal from that judgment, and when it entered up a new judgment at the same term during which the first

> was entered, as appears by the certificate of the clerk, and as learned counsel for appellant practically admits was done, the appeal from this first judgment fell, and could be taken only from the final judgment, and it is from a final judgment alone that an appeal lies."

Relative to your second question, we cite you State vs. Thompson, 130 Mo., wherein the court said:

> "The evidence has not been preserved in the bill of exceptions, the stenographer having died about a month after the trial without having transcibed his notes, owing to a long illness beginning soon after circuit court adjourned, and continuing down to the time of his death, and no one else can translate the stenographer's notes of the evidence.
>
> "Upon these grounds, and upon the further ground that no other notes of the evidence were taken, either by defendant's or other counsel in the cause, we are moved, on behalf of defendant, to reverse the judgment and remand the cause.
>
> "This we can not do. Notwithstanding the sickness of the stenographer, there was nothing to prevent defendant's counsel to have remembered and written down the substance, at least, of the testimony and have the same inserted in the bill of exceptions, because it is evident the evidence could not have been lengthy, and due diligence required of them when discovering the stenographer

> was dangerously ill, to have preserved the evidence in some way. This might have been done if their memory failed, by calling on the witnesses who had testified at the trial."

Additional cases could be cited, illustrating the principle of law applicable, but we believe the aforesaid will suffice. However, it appears that the holding in the Missouri cases are based upon whether or not the facts and circumstances show due diligence on the part of the defendant.

We are not sufficiently advised, in the instant case, as to whether or not the defendant, by the exercise of due diligence, could have procured a transcript of the testimony and, hence, all that we are able to say is that, if the defendant, by prompt action, could have procured, from the reporter, a transcript of the testimony before the reporter became incapacitated or if the defendant, himself, could have made a resume of the testimony, which you would have agreed to as fairly setting forth the facts of the case, but the defendant has failed to do either one, then we do not believe that the defendant would be entitled to a retrial, due to a lack of a bill of exceptions.

Respectfully yours,

JAMES W. BUFFINGTON
Assistant Attorney General

APPROVED:

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JWB:LB