WITNESSES:
RIGHT OF CONFRONTATION:
RIGHT OF CROSS-EXAMINATION:
EVIDENCE:

House Bill No. 219 of the 68th General Assembly, proposing to amend Sections 561.450 and 561.460, RSMo 1949, is unconstitutional.

April 21, 1955

Honorable Daniel Curran
House of Representatives
Room 408, Capitol Building
Jefferson City, Missouri

Dear Sir:

You recently requested an opinion of this office as to the constitutionality of the provisions of House Bill No. 219, wherein it is proposed to amend Sections 561.450 and 561.460, RSMo 1949, by adding to each section the provision:

> "Where the check has been protested, the notice of protest thereof is admissible as proof of presentation, nonpayment and protest, and is presumptive evidence that there was a lack of funds in or with the bank or other depositary, or where the check has not been protested, a certificate under oath of any officer of the bank or other depositary that there was a lack of funds in or with the bank or other depositary is admissible as proof and is presumptive evidence of the lack of funds."

The questionable part of this provision is that which provides for the admission in evidence of the notice of protest as proof of presentation, nonpayment and protest, and for admission into evidence of a certificate under oath of any officer of the bank upon which the check is drawn. Your specific question was whether or not these provisions would violate the right of the defendant to meet the witnesses against him face to face.

This right is granted by Section 18(a), Article I, Constitution of Missouri, 1945, wherein it is provided: "That in criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face . . ." This provision of the Constitution has been considered by the Supreme

Court of Missouri on various occasions, but in none of these cases was the exact question which you ask considered by the court. The court has held that where a witness testified at one trial of the defendant and where eventually a second trial of the same case was necessary and the witness was unavailable, the state could use the transcript of the testimony of the witness at the first trial. It was held that this did not violate the constitutional rights of the defendant especially since, as a matter of fact, he had met the witness face to face at the first trial and had enjoyed the right of cross-examination. State v. Brown, 331 Mo. 556, 56 S.W. (2d) 405. This is true even though the defendant did not avail himself of his right to cross-examine at the first trial. State v. Logan, 344 Mo. 351, 126 S.W. (2d) 256. See also State v. Harp (En Banc), 320 Mo. 1, 6 S. W. (2d) 562, and State v. Lloyd, 337 Mo. 990, 87 S.W. (2d) 418, where it was held that testimony given in the presence of the defendant at his preliminary hearing was admissible at the trial where the witness was unavailable and that the defendant's constitutional right of confrontation was not violated thereby. The court has likewise held that the use of dying declarations was admissible and that the use of such declarations did not violate the defendant's constitutional right of confrontation where the declarations of one whom the defendant had killed were admitted into evidence against the defendant on trial for such homicide. See State v. Logan, 344 Mo. 351, 126 S.W. (2d) 256. This admissibility of dying declarations was well established in the common law and was part of the law concerning the right of the defendant to meet the witnesses against him face to face at the time such constitutional provisions were enacted in Missouri.

The Supreme Court of Missouri has likewise held in the case of State v. Pendergraft, 332 Mo. 301, 58 S.W. (2d) 290, that the use of official records was permissible to prove a charge of being an habitual criminal even though the defendant was thereby denied the privilege of confronting the witnesses against him and could not cross-examine them.

It should be noted that this case concerning official records is the only one in Missouri where the court has allowed the use of evidence when the defendant did not have at that time or had not had in the past (at a former trial or preliminary hearing) the right to confront and cross-examine the witness.

The proposed provisions of House Bill No. 219 would allow the admission in evidence against the defendant of an extra-judicial statement of some official of the bank upon which a

fraudulent check was drawn. The defendant would not have the right to meet such witness or witnesses face to face and would not have the privilege of cross-examining them. The only case in Missouri considering the admission of such extrajudicial statements is that of State v. Gorden, 356 Mo. 1010, 204 S.W. (2d) 713. That case was a trial for the crime of incest, and when the victim was placed upon the witness stand she refused to testify as to the acts constituting the offense on the grounds that such testimony might tend to incriminate her. When faced with this situation the state introduced an unsworn statement previously made by the victim to the chief of police. This statement was accepted as evidence of the facts contained therein, and the Supreme Court reversed the conviction obtained thereby, stating emphatically that the use of such extrajudicial statements as proof of the truth of the facts contained therein was a flagrant violation of the right of the defendant to meet the witnesses against him face to face as granted by Section 18, Article I, Constitution of Missouri, 1945. The court said, 204 S.W. (2d) l. c. 715:

> "* * * This provision assures to one accused of crime the rights of confrontation and of cross-examination under oath and excludes extrajudicial statement of witnesses as probative evidence of a defendant's guilt in the circumstances of the instant case. * * "

On this basis it would seem that the provisions proposed to be enacted by House Bill No. 219 would be unconstitutional as violative of the rights of the defendant to meet the witnesses against him face to face.

The writer is informed that the provisions proposed to be enacted by House Bill No. 219 have been taken from Section 1292-a of the New York Penal Code. An examination has been made of McKinneys's Consolidated Laws of New York, Annotated, Volume 39, Part 2, wherein this section is contained, and it appears from such annotations that this New York statute has never been attacked on the grounds of its constitutionality.

It should be noted that until January 1, 1939, the right to confrontation was purely a statutory right in New York, the constitutional provision to that effect going into force on said date. However, it would appear from the case of People v. Nisonoff, decided by the Court of Appeals in New York in 1944, 293 N.Y. 597, 59 N.E. (2d) 420, that the Court of Appeals in New York would not sustain the provisions here in question if they were attacked on

constitutional grounds. In the Nisonoff case the defendant was charged with committing manslaughter as a result of the death of a young lady upon whom he had performed an abortion. An autopsy on the victim had been performed by an assistant medical examiner who, pursuant to provisions of law, dictated his findings while making the autopsy examination. At the time of trial the assistant medical examiner was dead and such findings were offered in evidence. The New York Court of Appeals carefully considered the question and pointed out that the constitutional provision effective January 1, 1939, guaranteeing to the defendant the right to be confronted by the witnesses against him, must be considered in the light of the law as it existed at the time when such provision was enacted. The court also pointed out that the use of official records was well recognized in New York and elsewhere and stood upon a plane comparable to that of dying declarations and that, therefore, official records were admissible against the defendant even though he was thereby denied his right of confrontation, as a well-established exception to such right.

It would appear that the reasoning of the New York Court is in accord with that of the Supreme Court of Missouri, since both recognize the admissibility of dying declarations and official records as being long-established exceptions to the defendant's right of confrontation. However, neither extends such exceptions to extrajudicial statements of witnesses which are not embodied in official records.

A search of the cases has revealed no decisions exactly in point. However, the Illinois case of People v. Vammer, 320 Ill. 287, 150 N.E. 628, considered a similar situation. This was a prosecution for forgery and the state introduced in evidence the check alleged to have been forged. This check showed on its face the notation that it was returned because of forgery. The Supreme Court of Illinois pointed out that, since the person who made such notation was not present to confront and be cross-examined by the defendant, the constitutional provision that the defendant had a right to meet the witness face to face was violated.

A similar conclusion was reached by the Supreme Court of West Virginia in the case of State v. Fugate, 103 W. Va. 653, 138 S.E. 318. This again was a case of forgery and the notice of protest introduced in evidence stated that the payment on the check was refused because of forgery. The court pointed out that the forgery was an issue in the case and that the admission of such documentary evidence violated the defendant's constitutional

rights. The court said, 138 S.E. l. c. 320:

> "In support of the first assignment, it is urged that the evidence complained of violated section 14 of our Bill of Rights (Const W. Va. art. 3), providing that the defendant in criminal prosecutions be confronted with the witnesses against him. This right is fundamental in our jurisprudence. 8 R.C.L. 89. The question here was whether or not the note was forged. The defendant did not admit the forgery; hence it was an issue to be proved by competent evidence beyond a reasonable doubt. The written statement that the signature was 'forged' was permitted to go to the jury, with all the consequent prejudicial effect flowing therefrom."

In the Arkansas case of Smith v. State, 200 Ark. 1152, 143 S.W. (2d) 190, the defendant was charged with assault with intent to kill. His defense was a plea of insanity and the state introduced hospital records tending to show that the defendant was sane, without producing as a witness the doctor or doctors who made such finding. The Supreme Court of Arkansas held that the admission of such evidence was reversible error because it denied defendant the constitutional right of confrontation. At 143 S.W. (2d) 192 the court said:

> "It is a fundamental rule of the English common law, embodied in both the State and Federal Constitutions as a part of the Declaration of Rights, that in all criminal prosecutions the accused shall have and enjoy the right to be confronted by the witnesses against him. To be confronted by the witnesses against him does not mean merely that they are to be made visible to the accused, so that he shall have the opportunity to see and to hear them, but it imports the constitutional privilege to cross-examine them. The right of cross-examination is a substantive right, and a most valuable and important one. By it the accused can test the interest, prejudice, motive, knowledge, and truthfulness of the witness, and nothing can be substituted for this right of cross-examination."

Honorable Daniel Curran

The Supreme Court of Michigan reached a similar result in the case of People v. Mayrand, 300 Mich. 225, 1 N.W. (2d) 519, and so did the Supreme Court of South Carolina in the case of State v. Hester, 137 S.C. 145, 134 S.E. 885.

In California the right of confrontation appears to be statutory rather than constitutional, and hence the California cases indicating that such statutory right may be abridged by another statute are not in point. Further, it is felt that the decision of such courts as those in Louisiana and Washington, wherein it is held that a document is not a "witness" and therefore does not come within the purview of the constitutional right, is not persuasive.

The provisions proposed to be enacted by House Bill No. 219 would allow the introduction in evidence of either a notice of protest or a certificate of the drawee bank. Such would constitute extrajudicial writings not constituting official records and not coming within any other well-recognized exception to the defendant's constitutional right of confrontation, and therefore would be violative of the defendant's constitutional rights.

CONCLUSION

It is therefore the conclusion of this office that the provisions proposed to be enacted by House Bill No. 219, set out hereinabove, would be violative of the right of confrontation granted to defendant by Section 18(a), Article I, Constitution of Missouri, 1945.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Fred L. Howard.

Yours very truly,

JOHN M. DALTON
Attorney General

FLH:ml:da