CRIMINAL LAW

The state may take depositions in criminal cases under Art. I, Section 18(b), Constitution 1945, when it is not necessary to pay traveling expenses of defendant and his counsel. State may not take same if it is necessary to pay said traveling expenses until the Legislature makes provisions therefor.

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Honorable Henry H. Fox, Jr.
Prosecuting Attorney
Jackson County
Kansas City, Missouri

Attention: Mr. Ben Leventhal,
Assistant Prosecuting Attorney

Dear Sir:

This will acknowledge receipt of your request for an official opinion which reads:

> "Will you please furnish me with the interpretation by your office of Article I, Bill of Rights, Section 18 of the Constitution of the State of Missouri, 1945, regarding the State taking depositions of witnesses?
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> "I would appreciate any circulars or printed matter showing discussions or debates in the State Legislature regarding this matter."

Section 18(b) of Article I of the Constitution of Missouri, 1945, provides:

> "Upon a hearing and finding by the circuit court in any case wherein the accused is charged with a felony, that it is necessary to take the deposition of any witness within the state, other than defendant and spouse, in order to preserve the testimony, and on condition that the court make such orders as will fully protect the rights of personal confrontation and cross-examination of the witness by defendant, the state may take the deposition of such witness and either party may use the same at the trial,

> as in civil cases, provided there has been substantial compliance with such orders. The reasonable personal and traveling expenses of defendant and his counsel shall be paid by the state or county as provided by law."

The only question that calls for an interpretation of this section is, does the section require an act of the Legislature to put it into operation, or is the section self-executing, at least to the point where any rights or duties granted may be protected and enforced.

The general principles of law as to self-executing provisions in a constitution are stated in 11 Am. Jur., Section 71, Constitutional Law, page 688, as follows:

> "Although a Constitution is usually a declaration of principles of the fundamental law, many of its provisions being only commands to the legislature to enact laws to carry out the purposes of the framers of the Constitution or mere restrictions upon the power of the legislature to pass laws, it is entirely within the power of those who establish and adopt the Constitution to make any of its provisions self-executing.
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> "A constitutional provision is self-executing where no legislation is necessary to give effect to it.
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> "A clear distinction exists between the questions as to whether a constitutional provision is mandatory or directory and whether it is self-executing or requires legislation in order to give it effect. A provision may be mandatory without being self-executing. The question has been said to be one of intention in every case."

Section 72, 11 Am. Jur., Constitutional Law, page 689, states in part:

> "When the Federal Constitution and the first state Constitutions were formed, a Constitution was treated as establishing

> a mere outline of government providing for the different departments of the governmental machinery and securing certain fundamental and inalienable rights of citizens, but leaving all matters of administration and policy to the departments created by the Constitution. * * * During the last fifty years, state Constitutions have been generally drafted upon a different principle and have often become, in effect, extensive codes of laws intended to operate directly upon the people in a manner similar to that of statutory enactments. Accordingly, the presumption now is that all provisions of the Constitution are self-executing. * * * * "

Section 74, 11 Am. Jur, Constitutional Law, page 691, states in part:

> "One of the recognized rules is that a constitutional provision is not self-executing when it merely lays down general principles, but that it is self-executing if it supplies a sufficient rule by means of which the right which it grants may be enjoyed and protected, or the duty which it imposes may be enforced, without the aid of a legislative enactment. * * * "

The Missouri courts have followed the foregoing principles of law:

In the case of State v. Kyle, 166 Mo. 287, l.c. 302, the court said:

> "There are a number of provisions in the Constitution of this State, that are unquestionably self-executing, and require no legislation to put them in operation. The test in such cases is, can the Constitution as amended be enforced without the aid of legislation? 'The question in every case is whether the language of a constitutional provision is addressed to the courts or the Legislature; does it indicate that it was intended as a present enactment, complete in itself as definitive legislation, or does it contemplate subsequent legislation to carry it into effect?

> This is to be determined from a consideration both of the language used and of the intrinsic nature of the provision itself. If the nature and extent of the right conferred and of the liability imposed are fixed by the provision itself, so that they can be determined by the examination and construction of its own terms, and there is no language used indicating that the subject is referred to the Legislature for action, then the provision should be construed as self-executing, and its language as addressed to the courts.' * * * *"

The court has also held that part of an act may be self-executing and part not, and where possible, may be divided so that the self-executing part becomes operative. In the case of State ex inf. Attorney General v. Duncan, et al., 265 Mo. 26, l.c. 49, the court said:

> "But as stated above, neither authority nor argument can make clearer the patent conclusion that the first clause of section 9 of article 9 of the Constitution, supra, down to the first semicolon, is not self-executing, but that it requires legislation to carry it into effect; and that the remainder of this section is self-executing. No reason can be seen why such a condition is not permissible under the facts here; that is to say, why one clause of a given section of a constitution may not be self-executing and another clause or clauses of the same section not self-executing. Indeed, we have held that such a condition may exist without doing violence to the organic law. (Sharp v. Biscuit Co., 179 Mo. 553.) The matter with which this section of the Constitution was dealing is divisible. * * * * "

Also see State v. O'Malley, 117 S.W. (2d) 319, l.c. 323, citing the Duncan case.

Down to the last line Section 18(b) of Article I of the Constitution of Missouri, 1945, is clear and definite, its provisions do not need any kind of an enabling act by the Legislature to make them operative, and when the question of the traveling expenses of the defendant and his counsel does not enter into the taking of the deposition, it is our opinion the court may order the testimony taken. In a somewhat similar

situation dealing with the establishment of magistrate courts where the Legislature did not provide a salary for the judge, the Supreme Court said in the case of State ex rel. Randolph County v. Walden, 206 S.W. (2d) 979, l.c. 985:

> " * * * Certainly nothing in any of these constitutional provisions can be construed as suspending the operation of magistrate courts until the General Assembly had acted--and much less can they be thought to sanction the making of structural changes in these courts, as Section 1, Laws Mo. 1945, p. 767 has done, by nullifying the provision in Section 18, Article V of the Constitution, that the number of magistrates may be increased by two in any county, and substituting a provision that it can be done only in counties of more than 30,000 inhabitants. * * * *
>
> "Relator further argues that Section 1, Laws Mo. 1945, p. 768 leaves the magistrate courts hamstrung because in the last sentence it only provides for the salaries of magistrates in counties of 30,000 inhabitants or more, and thereby leaves magistrates in counties of less population unprovided for. This does not by any means follow. The mere fact that the Legislature may fail to provide a salary for a court does not destroy the court as such."

We cite the Walden case to support our contention that depositions may be taken under the provisions of Section 18(b) when the traveling expense matter does not enter into the taking.

The Legislature has not made any provision to pay the traveling expense of the defendant and his counsel, and until they do, it is our opinion the act is inoperative when travel would be necessary and the payment of the travel expenses necessary, because it would deny the defendant his rights of confrontation and cross-examination.

The courts have held that in order to pay any such fees or cost there must be statutory authority authorizing same. The Supreme Court said in the case of Cramer v. Smith, et al., 168 S.W. (2d) 1039, l.c. 1040:

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> "'At common law costs as such in a criminal case were unknown. As a consequence it is the rule as well in criminal as in civil cases that the recovery and allowance of costs rests entirely on statutory provisions--that no right to or liability for costs exists in the absence of statutory authorization. Such statutes are penal in their nature, and are to be strictly construed.' 20 C.J.S., Costs, § 435, p. 677."

In the 1945 session of the Missouri State Legislature, House Bill No. 575 was introduced covering this situation, but it was never passed. There is no record of any debates or discussions.

CONCLUSION

It is the opinion of this department that the state may take depositions under the provisions of Section 18(b) of Article I of the Constitution of Missouri, 1945, when the provision allowing defendant and his counsel traveling expenses does not enter into the taking thereof, and it is our further opinion that until the Legislature enacts a law providing for the payment of the traveling expenses of defendant and his counsel the entire act (Section 18(b)) would be inoperative when travel would be necessary in the taking of the depositions.

Respectfully submitted,

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APPROVED:

J. E. TAYLOR
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