IN RE: Validity of Senate Bill No. 82. Fifty-Seventh General Assembly of Missouri providing for altering form of Presidential Ballot by eliminating name of Electors and printing only Names of Candidates for President and Vice-President on the Ballot.

May 4, 1933.

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His Excellency
Governor Guy B. Park
Jefferson City
Missouri

Dear Sir:

You have asked me for an opinion as to Validity of Senate Bill No. 82, Fifty-Seventh General Assembly of Missouri altering form of Official Election Ballot in Missouri by eliminating names of Presidential Electors and providing for printing only the names of candidates for President and Vice-President on the ballot, and which said Senate Bill as finally passed is now before you for executive approval or vetoe.

The title of this Bill is as follows:

> "AN ACT to repeal Sections 10300 and 10310 of Article 7, Chapter 61, Revised Statutes of Missouri 1929, relating to the form of the ballot, etc., and to enact two new sections in lieu thereof, to be known by the same section numbers."

An examination of the Amendments made to Sections 10300 and 10310 R. S. of Mo. of 1929, in my opinion shows Senate Bill No. 82 as passed deals exclusively with the subject dealt with by the Statutes amended and the rule in Missouri is that a mere reference to the sections to be amended without other description of the subject matter of the amendatory law is a sufficient title to an amendatory act dealing exclusively with the subject of the act amended.

> Clark vs. Atchison, Topeka and Santa Fe Ry. Co., 319, Mo. l.c. 878.

> Article 7. Chapter 61, Revised Statutes of Missouri, of 1929, deals with Election Ballots, Voting and Election Returns and the two repealed sections 10300 and 10310, deal respectively with Form of the Ballot and the method to be followed by voter in

voting and the two sections enacted in lieu of the two repealed sections deal with the form of the Ballot and the procedure to be followed by voter in voting. The title of the Bill is legally sufficient.

The next question suggesting itself is the legal effect of the provisions of the Bill, providing the names of the candidates of the several political parties for Electors for President and Vice-President shall not be printed on the ballot but shall after nomination be filed with the Secretary of State, and placing on the ballot the names of the Candidates of the respective political parties for President and Vice-President and providing a vote for any candidate for President and Vice-President shall be a vote for the Electors of the Party by which such candidates were named.

Naturally the thought occurs, can the General Assembly of Missouri remove from the Ballot the names of the Electors and substitute therefor the names of the candidates for President and Vice-President and then provide a vote for such Presidential and Vice-Presidential candidate shall be a vote for the Electors of the Party by which such candidates for President and Vice-President were named?

To determine this question, we must examine the Federal Constitution because it commands the States to name a designated number of Presidential Electors.

Our State Constitution contains no specific provision as to the manner of selecting, nor number of Presidential Electors but Chapter 63 Revised Statutes of Missouri of 1929, does designate number of and provide method for selecting Presidential Electors and said statutory provisions are in harmony with both the Federal Constitution and the Federal Statutes on the subject and if a conflict existed between either State constitutional or statutory provision and Federal constitutional or statutory provisions, the State enactment would have to yield to the Federal provision.

Turning our attention now to the Federal Constitution, we find the Second Clause of Section One of Article II. of the Federal Constitution provides as follows:

"Each State shall appoint, in such Manner as the Legislature thereof may direct, a

> Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress."

Observe the language of the Federal Constitution is:

> "Each State shall appoint in such manner as the Legislature thereof may direct****."

This constitutional provision not only commands Presidential Electors shall be appointed by the State but it equally commands the appointment must be made in such manner as the Legislature of the State may direct.

The leading case construing clause 2. Section 1. Article II of the Federal Constitution above quoted, is that of McPherson vs. Blacker, 146, United States R.,P. 1, which case went to the Federal Supreme Court from a Decision of the Michigan Supreme Court construing the Michigan Statutes controlling election of Presidential Electors.

The manner of appointment of Presidential Electors by the Michigan Act was the Election of an Elector and an Alternate Elector in each of the Twelve Congressional Districts of the State and of an Elector and Alternate Elector at large in each of two Districts defined by the act.

It was insisted it was illegal for the Michigan Statute to provide this method of appointment for the reason the state must appoint as a body politic and must act as a unit and could not delegate authority to subdivisions of the State created for that purpose; and it was claimed the appointment of Electors by the Two Districts was not an appointment by the State because all of its citizens otherwise qualified would not be permitted to vote for all the Presidential Electors.

Answering these arguments the Federal Supreme Court (146 U. S. R. l.c. p. 35) said:

> "'A State in the ordinary sense of the Constitution,' 'is a politidal community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed.'
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> "The State does not act by its people in

> in their collective capacity, but through such political agencies as are duly constituted and established.*****
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> "In other words, the act of appointment is none the less the act of the State in its entirety because arrived at by districts, for the act is the act of political agencies duly authorized to speak for the State, 'and the combined result is the expression of the voice of the State, a result reached by direction of the legislature, to whom the whole subject is committed.*****'"

The Constitution does not provide that the appointment of Electors shall be by popular vote nor that the Electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone name the Electors.

"It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object."

The historic setting of the Federal constitutional clause commanding the States to name Presidential Electors sustains the construction thereof by the Federal Supreme Court. In the Federal constitutional convention, members thereof proposed various different Methods of Selecting the President.

Gerry proposed the choice should be made by State executives; Hamilton that the election be by electors chosen or elected by the people; James Wilson and Gouverneur Morris were strongly in favor of a popular vote; Ellsworth and Luther Martin preferred the choice by electors elected by the Legislatures; Roger Sherman wished to have appointment by Congress.

And as the Federal Supreme Court says:

> "The final result seems to have reconciled contrariety of views by leaving it to the state legislatures to appoint directly by joint ballot or concurrent separate action, or through popular election by districts or by general ticket, or as otherwise might be directed."

It is not surprising therefore that various modes of choosing Presidential Electors were pursued in early days of our nation's existence.

At the first Presidential Election, presidential electors were appointed by the Legislatures of the States of Connecticut, Delaware,

Georgia, New Jersey and South Carolina. Pennsylvania provided for election of electors on a general ticket. Virginia divided the State into districts and then elected Electors by Districts. Massachusetts divided the State into districts and the people voted for two candidates in each District and from the two persons in each District having the greatest number of votes, the general court by Joint Ballot elected one as Elector and in the same way selected two Electors at large. In Maryland, five Electors from West Shore and five from East Shore were elected on a general ticket.

Fifteen States participated in the Second Presidential Election and there was a similar variety in modes of electing Presidential Electors.

Sixteen States took part in the Third Presidential Election.

> "In Tennessee an act was passed August 8, 1796, which provided for the election of three electors, 'one in the district of Washington, one in the district of Hamilton, and one in the district of Mero,' and 'that,the said electors may be elected with as little trouble to the citizens as possible,' certain persons of the counties of Washington, Sullivan, Green, and Hawkins were named in the act and appointed electors to elect an elector for the district of Washington; certain other persons of the counties of Knox, Jefferson, Sevier, and Blount were by name appointed to elect an elector for the district of Hamilton; and certain others of the counties of Davidson, Sumner, and Tennessee to elect an elector for the district of Mero."

Here we find an instance where the legislature of a State named by a legislative act certain persons who were given the power to designate the Presidential Electors in each of their three respective districts.

Story in his commentaries on the Constitution first ed. par. 1466, says:

> "In some states the Legislatures have directly chosen the Electors by themselves;

> In others they have been chosen by the People by a General ticket throughout the whole State; and in others by the people by Electoral Districts, fixed by the Legislature a certain number of Electors being apportioned to each District,**** No question has ever arisen as to the constitutionality of either mode except that by a direct choice by the Legislature. But this, though often doubted by able and ingenious minds (3. Elliott's Deb. 100-101) has been firmly established in practice ever since the Adoption of the Constitution and does not now seem to admit of controversy, even if a suitable tribunal existed to adjudicate upon it."

In 1874, Senator Morton of Indiana as Chairman of the Senate Committee on Privileges and Elections recommended in a report to the Senate that a majority vote of the People of each District should give the candidate one Presidential Vote but the Senate failed to adopt such a proposed constitutional amendment; but in the Report, Senator Morton said:

> "The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several States. They may be chosen by the legislature, or the legislature may provide that they shall be elected by the people of the State at large, or in districts, as are members of Congress, which was the case formerly in many States; and it is, no doubt, competent for the legislature to authorize the governor, or the Supreme Court of the State, or any other agent of its will, to appoint these electors. This power is conferred upon the legislatures of the States by the Constitution of the United States, and cannot be taken from them or modified by their State constitutions any more than can their power to elect Senators of the United States. Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated." Senate Rep. 1st Sess. 43 Cong. No. 395.

> "From this review, ****************************** ** ****************** it is seen that from the formation of the government until now the practical construction of the clause has

> conceded plenary power to the state legislatures in the matter of the appointment of electors.*******
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> "In short, the appointment and mode of appointment of electors belong exclusively to the States under the Constitution of the United States. They are, as remarked by Mr. Justice Gray in 'In re Green,' 134 U. S. 377, 379, 'no more officers or agents of the United States than are the members of the state legislatures when acting as electors of Federal Senators, or the people of the States when acting as the electors of representatives in Congress.' Congress is empowered to determine the time of choosing the electors and the day on which they are to give their votes, which is required to be the same day throughout the United States, but otherwise the power and jurisdiction of the State is exclusive, with the exception of the provisions as to the number of electors and the ineligibility of certain persons, so framed that Congressional and Federal influence might be excluded.
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> "The question before us is not one of policy but of power, and while public opinion had gradually brought all the States as matter of fact to the pursuit of a uniform system of popular election by general ticket, the fact does not tend to weaken the force of contemporaneous and long continued previous practice when and as different views of expediency prevailed. The prescription of the written law cannot be overthrown because the States have latterly exercised in a particular way a power which they might have exercised in some other way. The construction to which we have referred has prevailed too long and been too uniform to justify us in interpreting the language of the Constitution as conveying any other meaning than that heretofore ascribed, and it must be treated as decisive."

We see therefore so far as the Method of Selecting Presidential Electors is concerned, the Federal Supreme Court holds the Legislature of the State have the supreme power by reason of Clause 2. of Section 1. Article II. of the Federal Constitution.

The Federal Supreme Court held the Michigan Statute valid.

The contention was also made in McPherson vs. Blacker that the Michigan Statute as to election of Presidential Electors Violated the Fourteenth and Fifteenth Amendments to the Federal Constitution, in that all of the Voters of Michigan could not vote for all of the Presidential Electors as the State was divided into Two Districts for election of Presidential Electors at Large. But the Federal Supreme Court said: (146 U.S. l.c. pp. 38-39).

> "*****, that the right of suffrage was not necessarily one of the privileges or immunities of citizenship before the adoption of the Fourteenth Amendment, and that that amendment does not add to these privileges and immunities, but simply furnishes an additional guaranty for the protection of such as the citizen already has; that at the time of the adoption of that amendment, suffrage was not coextensive with the citizenship of the State; nor was it at the time of the adoption of the Constitution; and that neither the Constitution nor the Fourteenth Amendment made all citizens voters.
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> "The Fifteenth Amendment exempted citizens of the United States from discrimination in the exercise of the elective franchise on account of face, color or previous condition of servitude. The right to vote in the States comes from the States but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States, but the last has been. United States v. Cruikshank, 92 U. S. 542; United States v. Reese, 92 U. S. 214.
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> "If because it happened, at the time of the adoption of the Fourteenth Amendment, that those who exercised the elective franchise in the State of Michigan were entitled to vote for all the presidential electors, this right was rendered permanent by that amendment, then the second clause of Article II has been so amended that the States can no longer appoint in such

> manner as the legislatures thereof may direct; and yet no such result is indicated by the language used nor are the amendments necessarily inconsistent with that clause.*****
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> "*****Whenever presidential electors are appointed by popular election, then the right to vote cannot be denied or abridged without invoking the penalty, and so of the right to vote for representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof. The right to vote intended to be protected refers to the right to vote as established by the laws and constitution of the State. There is no color for the contention that under the amendments every male inhabitant of the State being a citizen of the United States has from the time of his majority a right to vote for presidential electors." ***

The Federal Supreme Court holds in above cited case that there is no Federal constitutional right given to voters to vote for Presidential Electors and this meets the question of right of the General Assembly of Missouri to insert the Provision in Senate Bill No. 82. removing the names of Presidential Electors from the Ballot. This case decides, the Federal Constitution gives the Missouri General Assembly the power to designate the Method by which Presidential Electors shall be named and therefore the Legislature of Missouri could provide as they did that the Names of the candidates for President and Vice-President should be Printed on the Ballot and that a vote for any such candidate for President and Vice-President shall be a vote for the Presidential Electors of the Party by which such candidates were named.

I have, for the purpose of comparison, assumed Amendments of Missouri Statute proposed by Senate Bill No. 82 to be in effect and have compared the Missouri Statute with the Federal Statute as to Election of Presidential Electors and I find no conflict between the two Statutes.

It is true, Section 9, Article II. of the Missouri Constitution provides as follows:

> "ELECTIONS MUST BE FREE AND OPEN.-- That all elections shall be free and open; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."

And under above quoted Provision of Missouri Constitution, it might be argued that as the Federal Supreme Court holds Presidential Electors are not Federal officials that all the voters of the State of Missouri would have the right to vote at least for the Presidential Electors at large and therefore the Missouri Legislature could not remove from the Presidential Ballot the names of the Presidential Electors at Large. But the all sufficient legal answer to this argument is That the Power to fix the Method by which the Presidential Electors are named is given to the Missouri Legislature by the United States Constitution and cannot be taken from the Missouri Legislature by the State Constitution.

It is my opinion, Senate Bill No. 82. violates no Provision of the United States or State constitution nor is it in conflict with the Federal Statutes.

Yours very respectfully,

EDWARD C. CROW

APPROVED: ____________________
ROY McKITTRICK
Attorney-General

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