ABSENTEE VOTING --Authority and method in City Election.

September 22, 1933

Mr. Alfred L. Rottman, Chief Assistant
Board of Election Commissioners for the
City of St. Louis
208 South Twelfth Boulevard
St. Louis, Missouri

Dear Sir:

Your request for an opinion of the Attorney General under date of September 6, 1933, has been received, such request being as follows:

"There are several matters pertaining to the absentee voting law passed by the 1933 Legislature(Pages 218 to 225 Laws of Missouri) concerning which we would like to have your opinion:

First. The Board of Aldermen of this City is now contemplating the passage of ordinances providing for a special election at which there will be submitted to the voters a bond issue proposition, and a proposition concerning the method of street widening assessments. We believe that under the authority of Section 10181 absentee voting will be permitted at such local election. Is this correct?

Second. Section 10181 provides that: 'Any person being a duly qualified elector of the State of Missouri, who expects in the course of his business, or duties, to be absent from the County* *' Sections 10183 and 10184 set forth the forms of affidavit in which the voter is required to state: 'My business or duties are. . . . . employer. . . . . .' Section 10188c. 'Purpose of act.- This act shall be deemed to provide a method of voting by voters absent from their county on the day of election * *' Our understanding of these sections is that an elector absent from the city for any reason whatsoever, is entitled to cast a ballot. Is this correct?

Third. Section 10182 provides that a voter must make application for a ballot in person. May he make his request by mail, using the proper form of application, or must he appear in person at this office to do so, not more than thirty days, nor less than five days prior to the election?

Fourth. Becuase of the form of affidavit as set forth

in Section 10184 and the provisions of Section 10185, we believe that a voter must be within the State of Missouri to cast his ballot. Is this correct?

Fifth. Who is 'an officer authorized by law to administer oaths' as provided by Section 10185?"

Answering Paragraph First of your inquiry, Laws of Missouri 1933, page 219, Section 10181 provides as follows:

"Sec. 10181. Who may cast absentee ballot. - Any person being a duly qualified elector of the State of Missouri, who expects in the course of his business or duties to be absent from the county in which he is a qualified elector on the day of holding any special, general or primary election at which any presidential preference is indicated or any candidates are chosen or elected, for any congressional, state, district, county, town, city, village, precinct or judicial offices or at which questions of public policy are submitted, may vote at such elections as hereinafter provided."

It is the opinion of the Attorney General that "a bond issue proposition, and a proposition concerning the method of street widening assessments" are propositions a vote on which would be an "election * * * at which questions of public policy are submitted" within the meaning of this statute, and that absentee voting would be allowed under this statute for such election.

Answering Paragraph Second of your inquiry, it is the opinion of the Attorney General that your understanding that "an elector absent from the city for any reason whatsoever, is entitled to cast a ballot" is not correct for the following reasons:

Section 10181 above quoted allows an elector "who expects in the course of his business or duties to be absent from the County" to vote by absentee ballot. Section 10183 of Laws of Missouri 1933, page 218, requires the applicant for an absentee ballot to make an affidavit as a part of which affiant must fill in the following blanks:

"That my business or duties are _____ for _____ (employer) _____ of _____ street, in the City of _____, state of _____"

and Section 10184 of the same Act provides that an affidavit is to be made by each absentee voter on the envelope in which the absentee ballot is to be mailed to the polls, as a part of which affiant must fill in the following blanks:

"That my business and (employer) of _____ Street, in the City of _____ and state of _____, and that in the course

of my business or duties I expect to be absent from the said county of my residence, on the date of said election."

The above statutory references to an absentee voter's employer, business and duties show a clear intention of the Legislature not to allow a person to vote by absentee ballot who has not some legitimate business or duty which is responsible for his being outside of the county on election day. Thus, if a voter would refuse to fill in the blanks of the affidavits as above set out, or if such blanks should be filled in in such a way as to indicate that the prospective absentee voter had no legitimate business or duties which would call him or had called him out of the county for election day, or if such blanks were filled out with statements which the judges of election should know to be untrue, then the ballot should not be issued or the vote counted, as the case might be.

Section 10181 of Revised Statutes Missouri 1929 enacted as Laws of Missouri 1913, page 323 and repealed by Laws of Missouri 1933, page 218 provided as follows:

> "Sec. 10181. Qualified voters - absent - may vote- when.- It shall be lawful for any employe of any railroad company, traveling salesmen, student in any college of the state, state officer, or other person, being a qualified elector of the state of Missouri, who may, on the occurrence of any general or primary election be unavoidably absent from the county in which he resides and is a qualified elector therein, because his duties, occupation or business requires him to be elsewhere within the state on the day of such general or primary election, to vote for county, district and state officers, members of the legislature, members of congress and electors for the president and vice-president of the United States at any voting precinct within the state of Missouri where he may present himself for that purpose, on the day of said general or primary election, under the conditions and regulations hereinafter prescribed."

Admittedly, the omission in the new corresponding Section 10181 enacted in 1933 of the words "unavoidably absent"and "requires" which were contained in the repealed Section 10181 is significant, but it will be observed that the words "duties" and "business" are present in the new section, and unless the construction above submitted is correct these words, as well as the provisions of the affidavits above set out are meaningless.

Therefore, it is the opinion of the Attorney General, as to Paragraph Second of your inquiry, that a ballot should be furnished to and the vote counted of any person who can make out a prima-facie case for his legitimate absence from the county in the course of his business or duties on the day of election. The word "prima-facie" is used because the words "business" and "duties" are rather vague and would not seem to demand a thorough investigation by the judges of election as to the exact type of business or duty which would qualify an elector as a proper absentee voter,

but unless the construction herein adopted is adopted they are wholly meaningless.

Answering Paragraph Third of your inquiry, Section 10182 of Laws of Missouri 1933, page 218, provides as follows:

> "Sec. 10182. May apply for official ballot. - - Any elector as defined in the foregoing section expecting to be absent from the county of his residence on the day of such election may, not more than thirty nor less than five days prior to the date of such election, make application in person, to the county clerk, or where existing, to the board of election commissioners, or other officer or officers charged with the duty of furnishing ballots for such election in his voting precinct, for an official ballot for said precinct to be voted at such election."

It is the opinion of the Attorney General that the phrase "make application in person" in such section would not be complied with by a request by mail for an absentee ballot.

Answering Paragraph Fourth of your inquiry, it is believed that an absentee voter must be within the state of Missouri to participate in an election held therein.

There has been much judicial doubt as to the right of a legislature to allow absentee voting in any form, and absentee voting laws have been declared invalid in the following cases:

> Re Right of Electors, 41 R. I. 118, 102 Atl. 913 (1918);
> Re Opinion of Justices, 113 Atl. 293 (N. H. 1921);
> Bourland v. Hildreth, 26 Cal. 161 (1864);
> Chase v. Miller, 41 Pa. 403 (1862);
> Opinion of Judges, 37 Vt. 665 (1865);
> Re Contested Election in Fifth Ward, 126 Atl. 199 (Pa) (1924);
> Clark v. Nash, 192 Ky. 594, 234 S. W. 1 (1921).

The general right of the legislature to provide for absentee voting within the state was upheld in Straughan v. Meyers, 268 Mo. 580, 187 S. W. 1159 (1916) in which case the Supreme Court of Missouri upheld the election law of 1913 (R. S. Mo. 1929, Sections 10181-10188) which was repealed in 1933. In that case, the court said:

> "It is next urged by respondent that the act violates that part of section 2, article 8, of the State Constitution, which reads as follows:
>
> 'Every male citizen * * * possessing the following qualifications shall be entitled to vote at all elections by the people * * * He shall have resided in the county, city or town where he shall offer to vote at least sixty days imme-

diately preceding the election.'

It is clear that this section does not undertake the prescribe the manner in which a choice shall be expressed, or a vote cast, or the ballots prepared, deposited or counted; but merely the qualifications of the voters. It is true, under this provision, a person can vote only in the place of his residence, but this constitutes no inhibition against any particular method the Legislature may provide to enable him to so vote. The word 'vote' means suffrage, voice or choice of a person for or against a measure or the election of any person to office. It is not synonymous with 'ballot', which is merely the means or instrument by which the person votes, or rather expresses his choice or exercises his right of suffrage. (Clary v. Hurst, 138 S. W. 566; State ex rel. v. Blaisdell, 119 N. W. 360; State v. Custer, 66 Atl. 306; Gillespie v. Palmer, 20 Wis. 544; Davis v. Brown, 34 S. E. 839).

Had this measure provided that such absent voter could vote, that is, could exercise a right of choice for or against matters relating to the place where he did not reside, for instance, candidates of a county or district other than that of his residence, there would be no doubt of its invalidity; but it does not so undertake. The act specifically provides that the ballot shall not be deposited in the ballot box, nor entered upon the poll books, but that same shall, under certain safeguards and regulations, be transmitted to the clerk of the county where the voter resides, and be there counted. The act of legally voting, as the term is understood in law, embodies theright to have the vote counted. This act does not undertake to authorize a person to vote in a place other than that of his residence, but merely provides a system or method through which he may vote in the place of his residence."

In the case just quoted, the language seems applicable equally to an absentee voting law which might allow voting by one outside the state, but such a law was not before the court for the absentee voters' law of 1913 did not provide for votes to be cast at any other place than a "voting precinct within the state of Missouri." (R. S. Mo. 1929, Sec. 10181).

However, in 1924 an amendment to the Constitution of Missouri was adopted such amendment being Section 9 of Article VIII, which provides as follows:

"Qualified electors absent from the state on military or naval service shall, and qualified electors absent from their counties but within the state may, be enabled by law to vote at general or special elections."

No cases have been decided construing this constitutional provision, but it

is the opinion of the Attorney General that the use of the phrase "within the state" by implication, especially in view of the case of Straughan v. Meyers above cited would put it beyond the power of the Legislature to allow voters outside of the state on election day or at the time of executing their ballots to vote, and that therefore the forms of affidavit provided for in Laws of 1933, page 218, Sections 10184 and 10185 would not be material, and that a voter must be within the state of Missouri on the day of election to vote.

Answering Paragraph Fifth of your inquiry the phrase "an officer authorized by law to administer oaths in this state" contained in Section 10185 of Laws of Missouri 1933, page 218 is referable to R. S. Mo. 1929, Section 1720, which provides as follows:

> "Sec. 1720. Officers authorized to administer oaths.- Every court and judge, justice and clerk thereof, and all justices of the peace, shall respectively have power to administer oaths and affirmations to witnesses and others concerning any thing or proceeding depending before them, respectively, and to administer oaths and take affidavits and depositions within their respective jurisdictions, in all cases where oaths and affirmations are required by law to be taken."

and also that such oath could be administered by a Notary Public under Revised Statutes of Missouri 1929, Section 11738.

Very truly yours,

Miller

ASSISTANT ATTORNEY GENERAL

APPROVED:

ATTORNEY GENERAL.