ELECTIONS -- Temporary absence with continuous intention to return will not deprive persons of their residence even though they have no particular spot which they call "home."

September 16, 1938

FILED
37

Honorable John H. Hardin, Chairman
Board of Election Commissioners
Jackson County
Independence, Missouri

Dear Sir:

We wish to acknowledge your request for an opinion, wherein you state in part as follows:

> "Will you kindly give our Election Board an opinion on the following questions touching our Election laws:
>
> > "FIRST: A man and wife who own a home in a certain precinct are registered as voters therefrom, but leave the home for employment elsewhere. They continue on the registration books and vote by mail. Later the home is lost by foreclosure sale so that they have no tangible place in the precinct as a domicile or residence. They still intend and desire to continue as residents of the precinct. Are they rightfully on the registration books or should the names be stricken from the books?"

Section 10178, R. S. Mo. 1929 provides the qualifications of voters in part as follows:

> "Every male citizen of the United States and every male person of foreign birth who may have declared his intention to become a citizen of the United States according to law, not less than one year nor more than five years before he offers

> to vote, who is over the age of twenty-one years, possessing the following qualifications, shall be entitled to vote at all elections by the people: First, he shall have resided in the state one year immediately preceding the election at which he offers to vote; second, he shall have resided in the county, city or town where he shall offer to vote at least sixty days immediately preceding the election; and each voter shall vote only in the township in which he resides, or if in a town or city, then in the election district therein in which he resides: *** "

Section 18, Laws Mo. 1937, p. 304, relating to registration of voters in all cities of 300,000 to 700,000 inhabitants, which includes Kansas City, Missouri, and to which we assume your facts refer, declares who shall be entitled to vote as follows:

> "Who shall be entitled to vote.-- Every citizen of the United States who is over the age of twenty-one years, who has resided in the state one year next preceding the election at which he offers to vote, and during the last sixty days of the time shall have resided in the city where such election is held, who has not been convicted of bribery, perjury or other infamous crime, or of a misdemeanor connected with exercise of the right of suffrage, nor while kept at any poorhouse or other asylum at public expense except soldiers and sailors homes or hospitals, nor while confined in any public prison, shall be entitled to vote at such election, for all officers, state or municipal, made elective by the people, or at other elections held in pursuance of the laws of the state, but shall not vote elsewhere than in the precinct where his name is registered, and whereof he is registered as a resident."

20 C. J., Section 28, page 71, declares the following rule with respect to change of residence:

> "In order to work a change of residence there must be both in fact and intention an abandonment of the former residence and a new domicile acquired by actual residence, coupled with an intention to make it a permanent home. Thus an absence for months or even years, if all the while the party intended it as a mere temporary arrangement, to be followed by a resumption of his former residence, will not be an abandonment of such residence or deprive him of his right to vote thereat, the test being the presence or absence of the animus revertendi. *** "

In the instant case, the facts reveal that there never was an intention on the part of the husband and wife to abandon their former residence. By force of circumstances they were required to leave their home in search of work, and subsequently lost their property by foreclosure. They desire to continue as residents and vote in the precinct in which they were registered. Can it be said that by reason of their temporary absence and the fact that there is no particular spot in the precinct which they can now call "home", that their names must be stricken from the registration books?

We have made an extensive search of the authorities and have found few cases in point. The court, in the case of Ison vs. Watson, 183 S. W. (Ky.) 468, l.c. 469, was considering an election contest, and made the following statement with respect to the temporary absence of voters:

> "While there is evidence to the effect that both James Smith and Nathan Osben were absent from the subdistrict for quite a while, it appears from their evidence and the evidence of other witnesses that they always claimed their homes in the subdistrict in question; that they were

absent for temporary purposes only and always had the intention of returning to the subdistrict. We conclude that they had the right to vote."

The case of In re Rooney, 159 N. Y. S. 132, l.c. 136, dealt with a cemetery caretaker who, although he owned the premises from which he registered, did not occupy same, but rented same to a tenant. He had moved with his family to a house furnished by the cemetery association, and the court, in holding that since he did not intend to make the cemetery his home, his former domicile continued his residence, said:

"So far as John Donohue is concerned, he appears to have been the owner of the premises from which he registered, although they were occupied at the time by a tenant. He formerly resided at this place, and it may be fairly inferred from his testimony that he still regarded the premises at 445 Sixth avenue, Watervliet, as home. He says that he had voted from these premises for 20 years or more; that he did not hardly think it was right to vote in Colonie; it was too far from home: 'it was more to home than where I was.' At the time of his registration he was the caretaker of a cemetery in the town of Colonie, and occupied the caretaker's house within the cemetery grounds. It may be assumed that he did not intend to make the cemetery his permanent home; that he intended to remain there only so long as his job as caretaker should continue, for upon the termination of that employment the cemetery association would require the house for his successor. If this was the situation, and nothing different appears in the record, then he would not be deemed to have gained a residence in the cemetery at Colonie. He had a residence in Watervliet; he owned the property which had been his legal residence,

> and, having once had a residence, he could not lose it until he had gained a new one, for a man can have but one residence in the sense of a domicile (Cincinnati, Hamilton & Dayton R. R. Co. v. Ives, 3 N. Y. Supp. 895; Bell v. Pierce, 51 N. Y. 12, 17), and the law does not recognize the possibility of a man being without a domicile."

In the case of Smith vs. Thomas, 52 Pac. (Cal.) 1079, l.c. 1080, the court, in holding that a woodchopper who had no home, but who had made a particular place in a ward his home whenever in town or out of work, and who never voted in any other place for eleven years, was a legal voter in such ward, said:

> "The remaining error claimed by appellant is in the finding 'that one George Phoebus voted at said election in the Third ward precinct, but said Phoebus was a legal voter therein at said time, and voted for the defendant for the office of supervisor.' The only testimony as to this vote was given by Phoebus himself. He testified in part as follows: 'Whenever I came into town, I had one certain place to go to. I went there whether I had money or not. I made that my home. That was the Noel Place *** I registered in the Third ward. *** I never voted anywhere else than in Visalia for eleven years. *** I never voted any place except in the Third ward in any years. *** I have been a wood chopper for eleven years. *** When I was out of a job, I came back to Visalia, and went to Noel's to live. That has been my practice for over five years. *** I took contracts. At the present time I am cutting by the cord. *** I voted there (in the Third ward) because I

> considered I lived there. I intended to make Noel's my home. *** I have been sick at Noel's three different times. 'If I got sick in the country, I was always taken to Noel's. I considered it the only home I had.' We think the evidence was sufficient to justify the finding of the court as to this voter. He belongs to a class of persons whose place of residence must be deemed to be in the city, town, or village, where they choose in good faith to establish it. Because this voter has not a home, such as wife and children can give, he should not be deprived of rights of the highest value to the citizen. The judgment is affirmed."

The closest case in point that we have been able to find is Langhammer vs. Munter, 31 Atl. (Md.) 300, l.c. 301, which was an appeal from an order of the court of common pleas of Baltimore, dismissing the petition of appellant praying that the names of James Bosley and Charles Williams be stricken from the registry of voters of the fifth precinct of the first ward of Baltimore city. The testimony of a witness who resided at the place Bosley had stated as his residence in the ward and district, was that neither of the alleged voters had ever lived there, but that he knew them, and had at their request permitted them to sleep on various occasions in the kitchen. The court, in holding that a voter need not have any particular spot which he calls home, provided he makes his residence (in the sense of having no other home) anywhere or in however many places, for the required times, within the limitations of the state and voting district, said:

> "That section prescribes, as the qualification of a voter, that he shall be a resident of the state for one year, and a resident of the district six months. There is no requirement that the proposed voter shall have some particular spot which he calls his home, provided he makes his home (in the sense

> of having no other home) anywhere, or in however many places, for the required times, within the limits of the state and the voting district. Probably, it was borne in mind that numbers of citizens, through misfortune or otherwise, were without dwelling places, but there is no evidence to be found in any part of the constitution that these were to be denied the privilege of the elective franchise."

From the foregoing, we may conclude that temporary absence, with a continuous intention to return, will not deprive persons of their residence though it extends over a period of time, and this is true even though they have no particular spot which they call "home" when they return, provided they make their residence (in the sense of having no other home) anywhere or in however many places within the limits of the state and voting precincts from which they registered as voters.

Under the above circumstances, we are of the opinion that the names are rightfully on the registration books.

Your second question reads as follows:

> "If a voter is challenged as to party affiliation in a Primary Election and makes the affidavit required by law, should such affidavit be written or printed and signed by the voter? Also, can such affidavit be kept and produced by the judges at the following general election and the elector be required to vote in accordance with his affidavit formerly made?"

In answer to the above question, we are enclosing copy of an opinion rendered by this department under date of July 29, 1938 to the Honorable Lloyd C. Stark, Governor of Missouri, wherein we held that a verbal oath meets the full requirement of the statute when a voter is challenged, and that there is no provision in the law requiring any voter

to sign an affidavit. Any attempt by the judges to determine whether an elector has voted in accordance with his former affidavit would of course violate Article VIII, Section 3 of the Missouri Constitution, which provides for secrecy of the ballots.

Your third question is as follows:

> "If a voter requests the judges of election to assist him in preparing his ballot because he is not sufficiently informed or instructed so that he can properly prepare it himself, should he be required to declare under oath that he 'cannot read or write, or that by reason of physical disability he is unable to mark his ballot' (Sec. 10313, Rev. St. 1929)? "

In answer to your third question, we enclose copies of opinions rendered under date of March 15, 1938 and March 19, 1938, to the Honorable W. W. Graves, Prosecuting Attorney of Jackson County, Kansas City, Missouri, wherein we held that the oath required of a voter under Section 10313, R. S. Mo. 1929 meant an oral oath, and that the voter could inform the judges of election in any manner he chooses, how he wants his ballot prepared.

Respectfully submitted

MAX WASSERMAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

MW:FE
Enc.