

ELECTIONS: Clerk of election who was not a legal voter  
at such election does not invalidate the election.

April 21, 1938

Honorable Chas. E. Murrell, Jr.,  
Prosecuting Attorney,  
Adair County,  
Kirksville, Missouri.



Dear Mr. Murrell:

This is to acknowledge receipt of your letter of April 15th, in which you request the opinion of this department on the questions therein set forth, your letter is as follows:

"I would like to have your opinion on the following matter. The town of Brashear, Missouri, which is located in Adair County, recently held an election for the purpose of electing a Board of Trustees. The present Board appointed three judges, and the judges in turn appointed two clerks. It now appears that one of the clerks had, approximately one week prior to the date of the election, which was April 5, moved outside of the corporate limits of the town. She took the matter of her acting as a clerk at the election up with the Board of Trustees, who advised her to go ahead and act. It appears that her residence outside of the corporate limits has been made with her intention of that being her home. Brashear, Missouri, is a town governed by a Board of Trustees of five. It has a population of approximately five hundred.

"The question is this. 1. Was the clerk whose residence was outside the corporate limits of the town qualified to act as clerk of the election? 2. What effect does this have upon the persons elected and can they qualify? 3. If the new member of the Board of Trustees are not elected and can not qualify, do the old trustees retain their membership on the Board of Trustees.?"

"I wish to call your attention to sections 10207 and 7140, R. S. Mo., 1929.

"By an ordinance of the City of Brashear, these trustees are required to be sworn in on or before the 25th of this month, that is, April, and I therefore must have an opinion on or before that date.

"I would appreciate any special effort that your office may make in this matter to immediately notify me."

We shall answer questions in your letter in the order in which they are submitted.

I.

Was the clerk whose residence was outside the corporate limits of the town qualified to act as clerk of the election?

The town of Brashear, according to your letter is organized as a village under the provisions of Article 9, Chapter 38, R. S. Mo. 1929. Section 7136 of said Article provides:

" \* \* \* for the appointment of three qualified voters as judges of the election, to superintend and conduct all elections for trustees, \* \* \*"

and Section 7140 provides that:

"That judges of election shall appoint a clerk of the election \* \* \*."

Section 10207, under the general election laws, provides:

"No person shall be qualified to act as a judge or clerk of any election unless he shall be legally entitled to vote at such election and, shall moreover be able to read and write."

CONCLUSION

It is, therefore, our opinion that the person, mentioned in your letter, who acted as clerk of the election held in the

village of Brashear on April 5th, who was not a resident of the town on the date of the election, and not legally entitled to vote at such election, was not qualified to act as such clerk.

## II.

What effect does this have upon the persons elected to the Board of Trustees, that is, are they duly elected and can they qualify?

Assuming that the clerk of election was not qualified to serve as clerk at the election held April 5th, we are of the opinion that that fact alone would not invalidate the election held at that time. The general rule of law with regard to irregularities is stated in *Bowers vs. Smith*, 111 Mo. 1. c. 61, in the following language:

"If the law itself declares a specified irregularity to be fatal, the courts will follow that command irrespective of their views of the importance of the requirement. \* \* \* In the absence of such declaration, the judiciary endeavor as best they may to discern whether the deviation from the prescribed forms of law had or had not so vital an influence on the proceedings as probably prevented a free and full expression of the popular will. If it had, the irregularity is held to vitiate the entire return; otherwise it is considered immaterial."

and in *Horsefall vs. School District*, 143 Mo. App. 541 1. c. 545, it is said:

"\* \* \* that when a statute expressly declares any particular act to be essential to the validity of an election, then the act must be performed in the manner provided or the election will be void. \* \* \* but if the statute merely provides that certain thing shall be done and does not prescribe what results shall follow if these things are not done then the provision is directory merely, and the final test as to the

legality of either the election of the ballot is whether or not the voters have been given an opportunity to express, and have fairly expressed their will. If they have, the election will be upheld, or the ballot counted as the case may be." (Cases Cited)

and it is held in *Sanders vs. Lacks*, 142 Mo. 1. c. 255, that no voter should be disfranchised on account of a mere irregularity occasioned by the neglect or misconduct of election officers, over whose conduct he has no control, unless the legislature has declared such irregularity fatal.

The St. Louis Court of Appeals in *O'Laughlin vs. City of Kirkwood*, 107 App. 302, announced the rule that, in order to annul the result of an election, it must be shown that some mandatory statute was violated or that the election was conducted in such an irregular manner that the true sentiment of the voters was not expressed by it or that it was impossible to know whether the true sentiment was expressed.

In *State ex rel. Thompson vs. Arnold*, 278 Mo. 1. c. 684, the Supreme Court said:

" \* \* \* The well established rule, here applicable, is that an election irregularity is not fatal to the validity of the whole return of the precinct unless made so by the statute on the subject or unless the irregularity is such as 'probably prevented a free and full expression of the popular will.' (*Bowers v. Smith*, 111 Mo. 45, 1. c. 61-62; *Hehl v. Guion*, 155 Mo. 76, 1. c. 83; *Nance v. Kearbey*, 251 Mo. 374, 1. c. 383; *McCrary on Election* (4 Ed.), p. 171; 9 R. C. L. p. 1093, par. 102; 15 Cyc. 372, 373)"

We do not find that the section of the statute, which provides that the clerk of the election shall be legally entitled to vote at such election, is mandatory, nor do we find that such fact invalidates the election.

Applying the rules, as stated above, we come to the conclusion that the irregularity of one of the election clerks,

not being a legal voter of the town of Brashear on the day of the election, did not of itself invalidate the election of the officers elected at that time, absent any fraud.

It is, therefore, our opinion that the persons who were elected by the voters of Brashear on April 5th, under the facts stated in your letter, if otherwise qualified, were duly elected.

III.

Since it is our opinion that the new members of the Board of Trustees were duly elected and can qualify, it is unnecessary to answer your third question.

Respectfully submitted,

COVELL R. HEWITT  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
(Acting) Attorney-General

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