449). Perhaps at the time of that ruling, the legislature appropriated the money for such commitments to the account of the institution rather than to the sheriffs' account. At the present time, however, in my opinion, the expense of transportation should be charged to the sheriffs' appropriation the same as any other commitment made by a sheriff in which the State bears the expense of commitment. The department of institutions would only be charged with the expense of treatment of such a person.

I believe you will find that the finance division's policy is consistent with this opinion.

CHARLES E. GIBSON, JR., *Attorney General*

LEGISLATIVE LETTERS

No. 26

February 4, 1963

Legislative Letters

Committee on State and Court Expenses, House of Representatives, Montpelier:

This office has been requested to give its opinion concerning the residency of Clarence H. McCandless in the Town of Windham. This question has been raised by virtue of a petition submitted to the Speaker of the House on January 9, 1963, by one Cecil Landon. On January 24, 1963, H.R. 7 was passed by the House instructing your committee to investigate, ascertain and report to the House whether Clarence H. McCandless is entitled to sit as the representative from Windham.

On January 31, 1963, your committee held a hearing in pursuance of H. R. 7. At that time Mr. McCandless and Mr. Landon presented evidence concerning the residency or lack thereof of Mr. McCandless in the Town of Windham.

Under the provisions of 3 VSA 158, it is the duty of the attorney general, when required by either branch of the general assembly, to advise and assist in the preparation of legislative business. It is in pursuance of the terms of that statute that I act in compliance with your request. It should be made clear, however, that Chapter II, section 14 of the Vermont Constitution gives to the House the sole power to judge the elections and qualifications of its members. Therefore, my opinion can be only advisory to you and the House in its deliberations upon the issue presented.

FACTS

In the general election held on November 11, 1962, Clarence H. McCandless and Cecil Landon were candidates for representative in the Town of Windham. In that election, Mr. McCandless received 35 votes and Mr. Landon received 24 votes. Prior to, at the time of, and after the election a question was raised in Windham concerning the residency of Mr. McCandless.

As detailed facts are necessary in determining residency, I will go into some discussion concerning Mr. McCandless' prior activities.

Mr. McCandless purchased property in Windham around 1935. At that time he resided in Garden City, New York. Mr. McCandless and his family stayed in Windham during the summer months from 1935 until 1959. He maintained his residence in New York State during this period.

Some time in July, 1960, Mr. McCandless retired from his employment in New York and moved his belongings to his Windham property. Since that time his mail has been forwarded to his Windham address, which is apparently through the Chester post office. From July of 1960 until the winter of 1960-61, Mr. McCandless and his wife were actually present in Windham residing at their property.

In November, 1960, Mr. McCandless travelled to New York and cast his vote for presidential electors in that State. Mr. McCandless denied that he had voted for any other candidates in that election. Mr. McCandless testified that he had no house, apartment or personal property in New York after July of 1960.

Some time in December, 1960, Mr. McCandless and his wife left their home in Windham to visit their daughter in Kansas. They left all of their belongings in Windham, except for some personal property which was carried in suitcases. They were not physically present in Windham on April 1, 1961 and did not return to Windham until some time thereafter. Upon returning to the East, Mr. McCandless took a six weeks teaching assignment in Troy, New York. The McCandlesses continued to leave most of their property in Windham during this period.

The listers in the Town of Windham did not list Mr. McCandless as a poll taxpayer in the year 1961 and there was no request to list him as such taxpayer. It is the best recollection of the town clerk of Windham that he received a personal letter from Mr. McCandless in December, 1961, requesting that his name be added to the poll tax list. Mr. McCandless was thereupon listed on the 1962 poll list.

Some time before April 15, 1961, Mr. McCandless filed a Vermont State income tax form paying Vermont taxes from August through December, 1960. He paid New York income taxes

from January through July, 1960. On the Vermont tax form, he stated that he became a resident of Vermont on August 1, 1960.

Mr. McCandless first registered his motor vehicle in Vermont on June 2, 1961 and he first took out a Vermont operator's license on September 15, 1961. At the hearing Mr. McCandless stated that it was his intent to become a resident of Windham on August 1, 1960.

ISSUE

Was Clarence H. McCandless a resident of Vermont on November 11, 1960?

CONCLUSIONS OF FACT AND LAW

Under the Vermont Constitution no person can be elected a representative until they have resided in Vermont for two years prior to their election.

Chapter II, section 15 reads:

> "No person shall be elected a Representative until he has resided in this State two years, the last of which shall be in the town for which he is elected."

Unfortunately, no Supreme Court case or attorney general's opinion could be found which defined the residency requirement set forth in this section of the Constitution. Therefore, it becomes necessary to look to cases defining "residency" for other purposes.

The Vermont statutes define "residency" for the purpose of voting as follows:

> "The residence of a person for the purpose of voting at a general election shall be deemed to be in the town where his family resides, if he has one within this state which he supports. If he has no family which he supports, his residence shall be in the town in which he actually spent his time during the ninety days preceding such election or, if such person was a member of the armed forces of the United States during the year or any part thereof, next preceding such election, in the town where, in the opinion of the board of civil authority, he is entitled to vote."

Title 17 VSA 64.

It was the uncontradicted evidence at the hearing that Mr. McCandless moved all of his property to Vermont in July of 1960. He had no property in any other state after that time, other than personal items in his suitcase while on trips. I can find no evidence which would tend to show that his trip to Kansas in December, 1960, and his teaching assignment in Troy, New York were anything more than a temporary absence from this state. The provisions of 17 VSA 64 might well settle the question of Mr. McCandless' residence were it not for a large body of law which has been built up over the years defining "residence" as physical presence, plus an intent to remain.

Thus, an attorney general's opinion given in 1938 indicates that the fact of moving and the intent must concur.

> " 'The person's purpose to change, unaccompanied by actual removal or change of residence, does not constitute a change of domicile. The fact and the intent must concur. He must remove without the intention of going back. To constitute domicile, the fact of residence and the intent to make the place of residence the home of the party must concur.' "

1940 AGO 345, 346, 347.

In an attorney general's opinion in 1936, it is said:

> "* * * Hence the right to vote in a certain town requires the concurrence of two things—the act of residing coupled with the intention to do so.
>
> Domicile embraces the fact of residence at a place with intent to regard it and make it his home. The act and intent must concur, and the intent may be inferred from declarations and conduct."

1936 AGO 502, 504.

Therefore, Mr. McCandless' physical presence in Vermont is not enough to establish residence unless facts show that he intended to become a resident at that time. The intent must be more than mere declarations of a party after the question of residence has become an issue and his future depends upon how that issue is resolved. The case of *Fulham v. Howe* (1888), 62 Vt. 386,

dealt with evidence to show intent on the question of residence for tax purposes. In that case the plaintiff brought a replevin action against the tax collector claiming he was not a resident of the Town of Ludlow. The plaintiff was a native of Ludlow but had left there to practice law in New York in 1864. In 1876 he returned to Vermont to care for his father who was in poor health. His father died shortly thereafter but the plaintiff stayed on in Ludlow until 1887, allegedly for the purpose of settling his father's estate. The court charged the jury as follows:

> " 'In all cases it is safe to say that the question of residence is a complex one, made up not only of a mental purpose and intent on the part of the person himself to have his home in a particular place, but coupled with certain acts indicating that intent; a man cannot have a residence simply by having an intent to have it in a particular place, if the acts which are disclosed manifest that that intent has not been carried out.
>
> It is true everybody is free to come and go as they please and to choose their home as they please; it is true that the place of their residence is to be determined with a view to their own mental purpose respecting it, as well as the acts that are shown, but it is not enough to prove what their mental purpose is, to show what they say about it, necessarily.
>
> A man may say, "I intend to live in Woodstock," but if he goes down to White River Junction and stays there continuously and brings about him all the indicia of a home, and votes there or does any other acts signifying an intent to live there it is very evident his declared intent to live in Woodstock is over-rode by his proved intent by living at White River Junction.
>
> In this case the plaintiff insists that he, all the time along during 1884, and for years previous, had had a mental purpose to make New York his home, and that he frequently so declared his purpose. That would be sufficient unless there are facts in the case that prove a contrary intent.
>
> In other words, what I mean to say is that proof of a party's declaration of intent to live in one place is

not conclusive of what that intent is; the intent may be proved by unequivocal acts that are stronger, in the judgment of the jury, than the declaration by himself. But it is also true, as claimed by the plaintiff, that a man cannot have a home in any place against his own will. He cannot be forced to have a home in a town if his actual mental purpose is not to have a home there.' "

Fulham v. Howe, 62 Vt. 386, 388, 389.

The Supreme Court thereupon affirmed a jury verdict for the defendant and held that the plaintiff was a resident of Ludlow in spite of the plaintiff's declarations that he intended to keep his New York residence.

In Mr. McCandless' case there is a sharp division in the testimony concerning facts which go to show intent on his part to become a resident of Vermont two years prior to his election. The facts that he was not listed for poll taxes until 1962, that he voted in New York for President in November, 1960, that he first registered his car in Vermont in June, 1961, and first obtained a driver's license here in September, 1961, all tend to show that he did not manifest an intention to become a Vermonter on or before November, 1960. On the other hand, the fact that he actually moved to Windham in July, 1960, and that he paid State income taxes for the last six months of 1960, tend to show his intention to become a Vermonter before November of that year.

Our Supreme Court has discussed the effect of the action of listers in listing or failing to list a person and its effect on the question of residence. In the case of *Preston v. King, Admr.* (1889) 61 Vt. 606, the listers determined that the defendant at his death was a resident of a certain school district. The court held that the action of the listers was not conclusive.

"* * * the action of the listers in setting a person's list in a particular school district cannot upon sound principles be held conclusive."

Preston v. King, Admr., supra, p. 607.

In *Gregory v. Bugbee* (1869), 42 Vt. 480, the Supreme Court held that neither the grand list nor the decision of the listers was evidence on the question of residence.

"* * * In order that adjudications should be thus conclusive, it is necessary that the tribunal should have jurisdiction of the *person* as well as the subject. It is difficult to see how the listers can have jurisdiction of the person unless that person be an inhabitant of the town. When that question is made as in this case, to invoke the decision of the listers as concluding the question would seem to be an easy mode of disposing of it, but at the same time not quite clear in its grounds or processes. It would seem to be an arbitrary assumption of jurisdiction when the very fact on which it depends is denied and not proved, and then to conclude the party as to that fact by the judgment under such assumed jurisdiction. The practical results of holding as is claimed would be likely to complicate the subject of one's liability to taxation as between different towns beyond any precedent, and certainly should not be adopted while principle and practice and reason are against it. The truth is that the setting of a person in the list concludes nothing as against him on the question whether he was so an inhabitant of the given town as to be liable to be listed and taxed in such town."

Gregory v. Bugbee, supra, p. 482, 483.

If the Board of Listers had jurisdiction over the person of Mr. McCandless, they should have listed him as their only jurisdiction is over inhabitants of the town. By their failure to list Mr. McCandless, they are saying in effect he was not an inhabitant and, therefore, they would have no jurisdiction over his person. Without jurisdiction over Mr. McCandless, the decision of the listers cannot be used to show his alleged lack of residence.

Of course, if Mr. McCandless had given his list to the listers, it would have been evidence to show where he considered his residence to be, although it would not be conclusive. His failure to give his list anywhere can give no additional right to any town to list him.

"If the plaintiff had given in his list in Danville or any other town, it would have been a circumstance tending to show where he considered his residence to be, but it would not be conclusive; he might still be a resi-

dent, and liable to be listed as such, in another; but his omission to give in his list anywhere, can give no additional right to any town to list him."

Hurlburt v. Green (1868), 41 Vt. 490, 496.

Should Mr. McCandless' action in voting for presidential electors in New York be conclusive as to his alleged lack of intent to be a Vermont resident at that time? Under 17 VSA 1751, a person can vote for presidential electors in Vermont only if he meets the qualifications for voting for State officers. Title 17 VSA 62 requires a person to reside in Vermont for one year before he can vote in a general election. Therefore, Mr. McCandless would not have been eligible to vote in Vermont in November, 1960, as he had only been in Vermont on any permanent basis since July of the same year.

Under 17 VSA 67, a Vermonter who becomes a nonresident may still cast his vote in Vermont for presidential electors up to fifteen months after he has moved from the State.

"A person who has qualified to vote at a general election in a town or city in this state and has removed permanently to another state shall retain his right to vote for electors for president and vice-president of the United States, and not otherwise, in the town or city from which he has removed for a period of fifteen months after such removal, provided he shall not during such period have become qualified to vote for such electors for president and vice president in another state, and provided that prior to his departure he files with his town or city clerk a written declaration of his intention to retain such residence, for such purpose, and his name shall not be removed from such check list of voters until the expiration of such fifteen months or until such voter notifies his town or city clerk that he has gained a new residence in the new state, whichever time is earlier. Such votes shall be cast by absentee ballot in the form and manner prescribed in chapter 5 of this title, except that the application for such absentee ballot shall be in the form prescribed by the secretary of state."

Title 17 VSA 67.

The purpose of 17 VSA 67 is to prevent a person from being disenfranchised in voting for President because of a change in residence. Thus, the fact that a person voted for President in a particular state does not necessarily establish his residency there. On this point our Supreme Court stated in *Fulham v. Howe* (1888), 62 Vt. 386, at page 389:

"* * * but the fact of his voting in New York, and of his return there from time to time is not enough for the court to lay down as a proposition of law that he did not acquire a home in Vermont."

The question, therefore, becomes whether or not Mr. McCandless' action in voting in New York should be used to show a lack of intent to become a Vermonter. It is my opinion that it would be bad public policy to hold that a man is to be penalized by exercising his franchise under these circumstances. He did not have the choice of voting for President in Vermont or in New York. His only choice was to vote in New York or not to vote at all. I do not feel that this action by Mr. McCandless in voting in New York showed an intent to remain a citizen of New York. I find that Mr. McCandless was in Vermont on a permanent basis on August 1, 1960 and that his trips away from Vermont thereafter were only of a temporary nature, although there is evidence to show lack of intent to become a Vermonter, such as the dates he obtained his registration and his operator's license. I believe this is outweighed by other evidence showing a contrary intent. The fact that he declared his intent to become a Vermonter on his 1960 income tax return is important. This gains added importance when we realize that the tax return was made out early in 1961, long before he was elected to public office.

Every person must have a residence. If Mr. McCandless was not a resident of Vermont in August, 1960, where was his residence? He certainly was not still a resident of New York because he had taken everything he owned from New York and had nothing left there to return to. Perhaps this is the most conclusive point in determining Mr. McCandless' residence.

In *Cyr v. Cyr* (1955), 118 Vt. 445, the question of residence arose in relation to the jurisdiction of the court. In discussing intent, the court held:

"It is said that in considering the question of intention it is always important to consider whether the party has anything to return to. If he has, he may well be supposed to have the intention to return. But if he has not, he may more reasonably be thought to carry his home with him."

"* * * intention alone cannot retain a residence, every vestige of which is gone, with no place left to which the party has a right to return."

Cyr v. Cyr, supra, p. 447.

In *Mann v. Clark* (1860), 33 Vt. 55, the court expressed the same view:

"He left Randoph without any intention of returning and with the intention of removing to and living in Braintree for the year ensuing. He left nothing in Randoph to return to. His family, his goods, his all, went with him or had preceded him. Such a departure extinguished his domicil in Randolph from that date.

* * *

It is a well settled principle of the law of domicil that every person must have a domicil somewhere. Every taxable inhabitant of the State must have a residence for the purpose of taxation somewhere in the State. He may not receive the protection of the laws, and enjoy the blessings of civil government, and yet evade the payment of his share of the taxes that sustain them, by keeping up an indefinite and shifting residence. So for one and the same purpose, as in this case for taxation, he can have only one residence."

Mann v. Clark, supra, p. 59.

In *Barton v. Irasburg* (1860), 33 Vt. 159, the question was the residence of a pauper.

"A householder who has a family and a house to return to, a single person who has an accustomed home, or personal effects and worldly goods to go back to, may well be supposed to have the intention of returning. Hence in many cases the place where one keeps his effects, his chest, etc., is said to be his home. If he take his all with him and leaves no home behind him, then he may be thought more reasonably to carry his home with him. * * *"

Barton v. Irasburg, supra, p. 162.

The question of residency was discussed in *State v. McGeary* (1897), 69 Vt. 461. The court held that residency was changed when the defendant actually ceased to occupy his old residence.

"* * * For a year or more he had been intending to make the new house his home at some future time, but the intention alone, or with preparations added, did not make it his home. The final act which transferred his home from the rooms in ward four to the new house in ward five was when he ceased to occupy the rooms with his wife, as a place of abode on January 6, 1897, and took up his abode in his new house in ward five."

State v. McGeary, supra, p. 466.

Mr. McCandless should have registered his motor vehicle here and obtained a Vermont driver's license before he did so. However, it should be remembered that Vermont law is somewhat different than New York law and it is often confusing for a new resident to do the proper thing at the proper time. Certainly, I do not feel that these facts should be used conclusively against him in light of the fact that he actually moved out of New York into Vermont during July of 1960.

Taking all of the evidence into consideration, I feel that Mr. McCandless became a resident of Vermont prior to November of 1960 and that he meets the constitutional requirement of two years residency. Therefore, it is my opinion that Clarence H. McCandless is the legally elected representative of the Town of Windham and is legally qualified to represent said town in the House of Representatives.

CHESTER S. KETCHAM, *Deputy Attorney General*