

Opinion No. 18-2137

October 10, 1918

BY: C. A. HATCH, Assistant Attorney General

TO: Mr. H. G. Ramby, McIntosh, N.M.

"Residence" Defined.

OPINION

We have your letter of recent date, wherein you ask whether or not you qualified to hold the office of probate judge. You state that you bought a stock of goods in the State of New Mexico the 16th day of October, 1917. At this time you declared your intention of becoming a resident of the State of New Mexico and entered into a contract to begin invoicing and take possession of the stock of goods purchased by you not later than the 16th day of November, and that pursuant to said declared intention you returned to the State of Texas, your former home, and commenced making preparations to move to the State of New Mexico on the 16th day of November, and did in fact carry out your declared intention to take up your residence in the State of New Mexico on the date above mentioned. Under the foregoing state of facts you desire information upon two questions. First, will you be a qualified voter at the election to be held November 5th this year. Second, are you qualified to hold the office of probate judge.

Section 1, Article VII, of the Constitution provides that every male citizen of the United States over the age of twenty-one, and who has resided in New Mexico for twelve months, in the county ninety days, and in the precinct in which he offers to vote for thirty days, is a qualified voter. The question of your qualifications is determined by whether or not you have been within the state twelve months prior to November 5, 1918, that is, if you have been a lawful resident of the state. The meaning of the word "residence" has been given as follows:

"Where he is habitually present, and to which, when he departs, he intends to return."

In election laws it is almost synonymous with "domicile." There are two things necessary to the abandonment of an old domicile and the establishing of a new one. A person must intend to remove to the new place and must consummate that intention by actual removal. The mere intention to remove at some future date neither changes the old residence nor acquires a new one. After a residence has once been established it is not lost by temporary abandonment, and bodily presence is not essential to the continuance of that residence, but to establish a new residence, and until it is established, bodily presence is essential and necessary.

People v. Turpin, 49 Colo. 234, 112 Pac. 539;

Amm. Cs. 1912 A 724;

33 L. R. A. (N. S.) 766 and note;

State v. Savre 129 Ia. 122;

105 N. W. 387;

113 A. S. R. 452, 3 L. R. A. (N. S.) 455;

State vs. McGearry, 69 Vt. 461;

38 Atl. 165, 45 L. R. A. 346.

The general rule in this regard is stated in 9 R. C. L. page 543, section 6, as follows:

"The general rule is that domicile is changed from one place to another, or one state to another, only by the abandonment of a person of his first place of domicile with the intention not to return, and by taking up his residence in another place with the intention of permanently residing in that place. In other words, to effect a change of residence or domicile, there must be an actual abandonment of the first domicile, coupled with an intention not to return to it, and there must be a new domicile acquired by actual residence in another place or jurisdiction, with the intention of making the last acquired residence a permanent home; and the acts of the person must correspond with such purpose."

In view of the prevailing weight of authority, and as applied to the facts in your case, it is the opinion of this office that your residence in New Mexico did not commence until the date of your actual removal to New Mexico, which, according to your letter, was November 16th last year; therefore you will not have resided in New Mexico for twelve months prior to November 5th this year, and will not be a qualified voter at the coming election.

This brings us to your second question, that is, whether or not you may hold office as probate judge whether or not you are a qualified voter. In this connection, you are advised that under our constitutional provision every male citizen of the United States who is a legal resident of the State and a qualified elector therein is qualified to hold any public office in the state, except as otherwise provided by the constitution. This provision will be found in Section 2 of Article II of the constitution. It may occur to you that this section only permits qualified electors to hold office and does not prohibit other persons, as the constitution does not say that no person except qualified electors shall hold office. This is true. The constitutional provision itself is not a prohibition, but the right to hold office is not an inherent right. The only persons qualified to hold public office are those persons upon whom the privilege is conferred by statute or constitutional provision. In this state the framers saw fit to only grant the privilege to hold office to qualified electors, therefore in accordance with the general rules of law, no

other persons are qualified to hold office. This being true, you are advised that not being a qualified elector as previously determined, you will not be eligible nor can you hold office as probate judge.