tion or statute to be a resident of his county to hold such office, that such office is not abandoned where such officer becomes a member of the armed forces of the United States or is temporarily absent from his county, as long as he intends to return to such county to live.

State ex rel. Kopinski v. Grzeskowiak (1945), — Ind. —, 59 N. E. (2d) 110;
Yonkey et al. v. State (1866), 27 Ind. 236;
1943 Ind. O. A. G. 91;
1934 Ind. O. A. G. 346.

Based upon the foregoing authorities, it is my opinion that since the person in question is absent from the county of his residence in Indiana solely because of his membership in the armed forces of the United States and since he intends to return to Delaware County to live, such person would be eligible to hold the office of Judge if elected at the next election.

OFFICIAL OPINION NO. 90
September 30, 1946.

Mr. LeRoy E. Yoder, Chairman,
Public Service Commission of Indiana,
State House,
Indianapolis, Indiana.

Dear Mr. Yoder:

I have your letter of recent date in which you ask my official opinion upon the following statement of facts.

On July 23, 1946 the Public Service Commission of Indiana approved an order in Docket No. 2990-A2 in the matter of the joint application of Evansville Suburban and Newburg Railway Company, seller, and Sylvester H. Schnepper, d/b/a Schnepper Truck Line, purchaser, for approval of the sale and transfer of Certificate No. 276-A,1 intrastate denying said application.

The undisputed facts were that the seller was issued the above named certificate on July 17, 1935, authorizing the
transportation of passengers and property for hire between certain points and over certain highways within the State of Indiana; that from the date of issuance the seller has been engaged in the transportation of passengers but has never engaged in the transportation of property. In denying the application for sale and transfer of the right to transport property under the certificate, the Commission was of the opinion that where a carrier has never exercised the rights granted him in a certificate, that is, where he has never conducted any operation or where operations have been discontinued for a substantial period of time, that the owner of such certificate has no saleable asset. The parties in this proceeding contended that the only question involved under the provisions of the Indiana Motor Carrier Act in a sale and transfer proceeding is the financial responsibility of the purchaser, which fact is not disputed in the instant case.

Based upon the foregoing facts you ask whether on a petition asking the Commission for approval of the sale and transfer of the right to transport property under a certificate, the Commission may deny the petition on the grounds that petitioner has not exercised his rights thereunder or has abandoned them for a substantial period of time.

The applicable provision of our law concerning the transfer and sale of certificates of public convenience and necessity is Section 47-1219 of Burns' 1940 Replacement, which provides as follows:

"Any certificate owned, held or obtained by any such carrier may be sold, assigned, leased, bequeathed or transferred as other property upon approval by the commission, and the commission may inquire into the responsibility of the person obtaining or seeking to obtain ownership or control of any certificate and, if it finds such person to be irresponsible or unable to render satisfactory and adequate service under said certificate the commission may enter an order denying the transfer: Provided, however, That no certificate may be sold, assigned, leased, bequeathed or transferred except after a public hearing before the commission and after notice as required for other hearings before the commission. (Acts 1935, ch. 287, § 9, p. 1412.)"
There is nothing mentioned in the foregoing section of the statute as to whether the Commission should hear evidence on public convenience and necessity on a petition for sale and transfer, and the foregoing section expressly provides that the Commission may inquire into the responsibility of the purchaser and whether the purchaser will be able to render satisfactory and adequate service.

There is another section of the law specifically dealing with the matter of revocation of certificates of public convenience and necessity either by the Commission or upon complaint being filed. This is Section 47-1233 of Burns' 1940 Replacement, and it provides as follows:

"Any certificate or permit, upon application of the holder thereof, in the discretion of the commission, may be amended or revoked in whole or in part, or may, upon complaint or on the commission's own initiative, after notice and hearing, be suspended, changed or revoked in whole or in part for wilful failure to comply with any provision of this act, or with any lawful order, rule or regulation prescribed by the commission, or with any term, condition or limitation of such certificate or permit. (Acts 1935, ch. 287, § 23, p. 1412.)"

There has been a definite split in the authorities, both in this state and in other states, as to whether the Public Service Commission of a state may consider evidence of convenience and necessity upon a petition for the sale and transfer of certificates of convenience and necessity. In 1926 the Indiana Public Service Commission, in the case of Re Anderson Bus Corporation, P. U. R. 1926 B, p. 830, held that the issue of public convenience and necessity was not an issue on a petition for the sale and transfer of a certificate, but was disposed of at the time said certificates were originally issued. The Commission said on this matter at page 832:

"(1) The law under which certificates of public convenience and necessity are granted vests in the owner a property right, which carries with it the power and authority to dispose of and sell same.

"(2, 3) The question of public convenience and necessity was disposed of at the time such certificates
were issued and the protest in this proceeding raising that question will be overruled.

"The Commission finds that the vendors are the rightful and proper owners of the certificates sought to be sold, and the Commission further finds that the proposed purchaser is the owner of equipment of such a class that the service to the public, now dependent upon the routes being served, should be improved; that the issue of public convenience and necessity is not a question to be decided in this cause and that, judging from the financial setup submitted in the evidence, the purchaser is capable of assuming responsibility and rendering service under certificates it proposes to buy."

Ten years later, however, the Attorney General of Indiana in 1936 Ind. O. A. G., p. 443, held that the Commission had a right to consider evidence of convenience and necessity in passing upon a petition for the sale and transfer of a certificate. He said in part at pages 445 and 446:

"* * * It has been suggested that the Commission is limited by Section 9 to an inquiry into the responsibility of the one to whom the certificate or property is to be transferred to continue the carrier service. I do not believe the Commission is so limited. That is one of the things the Commission should inquire into, but that is not all. It must keep in mind the larger interest of the state, the effect such a transfer might eventually have in the entire field of transportation, and, for example, whether the income of the state would be diminished, having in mind that the highways used by the motor carrier were built and are maintained at public expense.

"It is my opinion, therefore, that when an application is presented to your Commission for a transfer or lease of a certificate which has been granted an intrastate or interstate motor carrier, you should consider all relevant facts having a bearing on the proposed transfer, and whether or not the public interest would be served by such transfer."
An analysis of the court decisions and commission decisions in other states also reveals a definite difference of opinion on this question. In the following decisions the courts and commissions held that on a petition asking approval for the sale and transfer of a certificate the Commission had authority to consider the question of public convenience and necessity.

Application of Calhoun (1937), 51 Wyo. 448; 68 Pac. (2d) 591;
Re Southern California Freight Lines (Cal.-1939), 30 P. U. R. (N. S.) 514;
Re John S. Lennerton (Mass.-1939), 27 P. U. R. (N. S.) 119;
See also: Cases cited in P. U. R. Digest, Certificates of Convenience and Necessity, Section 143.

In the following decisions it was held that the Commission was not authorized to consider convenience and necessity on a petition for approval of the sale and transfer of a certificate, but that such matter should be heard in a proceeding brought to revoke the certificate because of abandonment of a failure to provide service under the certificate.

Ramsey v. Public Utilities Commission of Ohio (1926), 115 Ohio State 394; 154 N. E. 730;
University City Transfer Co. v. Florida Railroad Commission (Fla.-1936), 168 Southern 413;
Union Transfer & Storage Co. v. Huber & Huber (Ky.-1936), 97 S. W. (2d) 609;
Re Cronkite Application No. 780-A, Decision No. 7638 (Colo.-May 18, 1936);
Congdon v. Scott, XFC 12 (Maine-May 6, 1938);
Harmony Shortline Company v. Grimm, Application No. 34977 (Pa.-June 29, 1937);
The foregoing cases clearly indicate the divergent views on this question, and it is therefore necessary to determine which view is the correct one. It is my opinion that the correct statement of the law on this question is that set forth in the case of Ramsey v. Public Utilities Commission of Ohio, supra, where the Supreme Court of Ohio, in considering statutes similar to those of our state, said as follows at page 731 of 154 N. E.:

"However, this proceeding involved only the question of the transfer of the certificate for an agreed price. That was the only question before the commission and that was the only relief sought, of which notice was given by publication. Upon the hearing of that feature, the commission had full power to determine the nature of the contract involving the sale of the certificate, the character and responsibility of the new owner, its ability to give proper and adequate public service, and any other feature materially affecting the sale of the certificate to the vendee. In such a proceeding the abandonment by the original certificate holder, or the furnishing of adequate service by it, was not germane under the application made and the published notice given. Were it otherwise, the Public Utilities Commission would, in every case involving the transfer of certificates, be required to enter into an extended hearing relating to the adequacy of service between competing transportation companies, which can be done only under a different statutory authorization and after due notice."

As indicated in the case just above cited, the only issue which is presented to the Commission, and which is included in the publication of notice of hearing issued by the Commission, is whether the certificate should be transferred for an agreed price. Under the statute in the above case, as under the statute in our state, the Commission has full power to determine the nature of the contract of sale, the character and responsibility of the purchaser, its ability to give proper and adequate public service and any other feature materially affecting the sale of the certificate to the purchaser. The question of the abandonment by the seller or the quality of
the service furnished by the seller is not germane, for otherwise, as pointed out by the Supreme Court of Ohio, the Commission in every case of sale and transfer would again have to go into the question of convenience and necessity which should have been disposed of when the certificate was originally granted.

Moreover, there is a procedure provided by statute for raising the question of abandonment of the service included under the certificate proposed to be sold. As already pointed out, Section 47-1233 of Burns' 1940 Replacement, specifically authorizes the Commission to revoke or suspend any certificate after notice and hearing, either upon its own motion or upon a complaint being filed by any person before it. Also, even after a petition for sale and transfer of a certificate has been filed, there is no reason why a petition to revoke such certificate for abandonment of the rights thereunder would not be in proper form and would be the correct procedure to raise this question before the Commission.

Based upon the foregoing authorities it is therefore my opinion that on a petition for the sale and transfer of the right to transport property under a certificate of convenience and necessity, the Commission is not authorized to consider evidence on abandonment of service, but should consider such question only in connection with a petition to revoke or suspend the certificate for that reason.

However, there is suggested in the statement of the facts in this case another reason upon which the petition for sale and transfer of a part of the certificate should be denied. You state that the seller originally received from the Commission a certificate for the transportation of passengers and property, and that all that is sought to be sold in this proceeding is the right to transport property, and that the seller will continue to transport passengers. This would indicate that the petitioner is asking authority of the Commission to sell a part of his certificate.

Under the decisions, it is my opinion that such a sale can not be made, for one may not transfer a part of a certificate only. Section 47-1219 of Burns' 1940 Replacement, herefore set forth in this opinion, provides in part that "any certificate" may be sold or transferred. There is no provision for the transfer of any part of a certificate. The following
cases hold that a part of a certificate may not be sold or transferred.

Re Indianapolis and Southeastern Railroad Co. (Ind.-1932), P. U. R. 1933 A, 293;
Braddock v. Public Utilities Commission (1940), 187 Ohio State 59; 27 N. E. (2d) 1016;
Re Braddock (Ohio), 31 P. U. R. (N. S.) 171;
Re Wythe (Cal.-1937), 22 P. U. R. (N. S.) 203;
Re Eaton (N. Y.-1933), P. U. R. 1933 C, 281;
Re Cooper, Application No. 2611, P. P. A. (Colo.-March 15, 1937), Decision No. 9609.

In the case of Re Indianapolis and Southeastern Railroad Company, supra, the Indiana Public Service Commission held that where a company owned a certificate to transport passengers and property by motor vehicles, it could not transfer the right to haul property to another person. In the recent case of Braddock v. Public Utilities Commission, supra, the Supreme Court of Ohio likewise held that an interpretation of their statutes (which statutes are substantially the same as ours) would not permit the sale and transfer of a part of a certificate. The court said in part at page 1018 of 27 N. E. (2d):

"Nowhere in these sections is there to be found language which as much as suggests that anything less than an entire certificate may be transferred. In Section 614-87a, General Code, authorizing the Public Utilities Commission to consent to the transfer, the article 'a' precedes the word 'certificate,' the provision reading: 'In all other cases a certificate of public convenience and necessity may be transferred with the consent of the commission after a public hearing had thereon.'

"No other language, either preceding or following the word 'certificate,' expresses or indicates an intent of the Legislature to include within the meaning of the words 'a certificate' anything less than a whole certificate. Had such been the legislative intent, words such as 'or any part thereof,' or language of similar
import would and could have been used to modify the word 'certificate.'

"* * *

"We therefore hold that under the provisions of Sections 614-87 and 614-87a, General Code, the Public Utilities Commission of Ohio is not vested with authority, express or implied, to consent to the transfer of a part of a certificate of convenience and necessity to a purchaser thereof."

Based upon the authorities last stated above, it is my opinion that the Commission would have no authority to approve a petition asking for a sale and transfer only of a part of a certificate.

OFFICIAL OPINION NO. 91

October 1, 1946.

Hon. Austin R. Killian, Commissioner,
Division of Public Safety of the
State Police Department,
State House,
Indianapolis, Indiana.

Dear Sir:

I have your letter of September 11, which I quote:

"I desire an official opinion touching upon the following matters. Par. (a), Sec. 9 of Chapter 175 of Acts of 1943 provide:

"(a) The clerk of a court or the judge of a court which has no clerk, in which any person is convicted of any offense under the laws of this state which requires or authorizes the commissioner to suspend or revoke the operator's or chauffeur's license of any person shall, when, such conviction has become final, or in such other event as stated in Section 5 (e) hereof, forthwith forward to the commissioner a certified record of such conviction or of the proceedings upon such charge."