OPINION 12

OFFICIAL OPINION NO. 12

April 18, 1967

ELECTIONS—SECRETARY OF STATE—Issuing Certificate of Election and Commission of Office—Victorious Candidate Not Filing Expense Account Statement within Statutory Period.

Opinion Requested by Hon. Edgar D. Whitcomb, Secretary of State.

Your letter of February 23, 1967, poses the following questions:

> "I am requesting an official opinion as to whether this office can issue a Commission of Election to a duly elected County Clerk who filed his expense account with the present County Clerk thirteen (13) days after the statutory filing date of forty-five (45) days?
>
> "Does the failure to file this expense account as required by Burns Statutes 29-5708 within the forty-five (45) day period disqualify the person for office?"

Burns § 29-5708, which is section 373 of the Indiana Election Code, Acts 1945, ch. 208, § 373, as amended by Acts 1965, ch. 179, § 5, requires every candidate for public office to file with the clerk of the circuit court of his residence, within forty-five days after the election, a statement commonly referred to as a statement of campaign expenses. It then provides:

> "No person shall be deemed elected to any elective office . . . until he shall have filed the statement provided for in this section of this article; and no officer au-

> thorized by the laws of this state to issue commissions or certificates of election shall issue a commission or certificate of election . . . until such statement . . . shall have been . . . filed by such person with such clerk. Upon the filing of such statement, the clerk shall issue to the candidate a certificate showing the filing of such statement, and the date of such filing, which certificate shall be presented by the candidate to the officer authorized by law to issue his commission, and such certificate shall be the only evidence of the filing of such statement which may be required by the officer authorized to issue such commission. . . ."

The above quoted sentences are the only provisions of the statute which relate to withholding recognition as an elected candidate, denial of certificate of election or denial of commission. Nothing in these sentences purports to permanently deny to any person the right to "be deemed elected" or to deny him permanently the right to a commission or certificate of election or to permanently prohibit any officer from issuing a commission or certificate of election. The denials and prohibitions are expressly stated to be "*until* such statement . . . shall have been . . . filed. . . ." (Emphasis added.) Nothing in the statute says that the statement cannot be filed at *any* time after the election. (The only reason it cannot be filed before the election is that it could not be a "full" statement until the period of candidacy has ended.) Nothing in the statute says that the clerk cannot accept it whenever filed. On the contrary, it says: "*Upon the filing* of such statement, *the clerk shall issue* to the candidate a certificate showing the filing of such statement, and the date of such filing. . . ." (Emphasis added.) Had it been the legislative intent that the clerk issue the certificate only on statements filed within forty-five days after the election, it would have been so easy and so logical to express that intent by saying, "upon the *timely* filing . . ." or "Upon the filing *within the time hereinabove limited.* . . ." or "Upon the filing *within forty-five days after the election.* . . , the clerk shall issue."

To interpret the statute as forever barring an otherwise successful candidate from office because his statement of

campaign expenses was filed late, it is necessary to read into the statute words which are not there.

This statute is a penal statute and must be strictly construed. It is a penal statute not merely because failure to file is made a misdemeanor, but also because of the very provision now under discussion. The following definition is found in *Lagler v. Bye,* 42 Ind. App. 592, 594, 85 N.E. 36, 37 (1908):

> "A penal statute is one which inflicts a forfeiture for transgressing its provisions. Anderson's Law Dict., 763. It involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by civil or criminal procedure. *United States v. Chonteau,* (1880) 102 U.S. 611, 26 L. Ed. 246."

The case goes on to hold that, with a single exception not presently applicable, a penal statute must be strictly construed.

Penal statutes will not be construed to include anything beyond their letter and beyond the spirit of the words employed by the statute. 3 Sutherland on Statutory Construction (3rd Ed., Horack) § 5605, p. 54.

As a part of his discussion of the interpretation of statutes which are both remedial and penal, Sutherland says, at page 73 of volume 3, "Still others [courts] have separated the penal portions from the remedial, giving the provisions establishing penalties a strict construction, and the remainder of the act a liberal construction. This position is sound. . . ."

No matter what may be the purpose of this statute, or the evil to be remedied by it, this penalty provision must be so construed that its penalizing effect is no greater nor more severe than the strict letter thereof requires. Since it directs the withholding of indicia of elections and emoluments of office "until such statement . . . shall have been . . . filed" without stating any date after which it cannot be filed and without directing the withholding of any benefit after the statement has been filed, it can only be read as directing withholding *until* the statement has been filed. (Not: "until the statement has been *timely* filed.")

As is pointed out in 3 Sutherland, Statutory Construction, (3rd Ed., Horack) § 5606, p. 56, the rule of strict construction of penal statutes is merely an additional, single factor to be considered in determining the intent of the Legislature. With the aid of this rule of strict construction, it becomes quite obvious that the intent of the Legislature as expressed in this statute, and in this clause in particular, was to coerce the filing of compaign expense statements before allowing successful candidates to take office, and not to create a forfeiture of title to the office.

Since it is so clear that the statute makes no attempt to add a qualification for office, or to create a disqualification or forfeiture of title, it becomes unnecessary to explore the question of the constitutionality of any statute which might attempt to disqualify a candidate elected to a constitutional office for failure to file his statement of campaign expenses within forty-five days of his election. For any one who may wish to pursue the question of whether such a statute (or such a construction of this statute) would be constitutional, I cite the Constitution of Indiana, Article 6, §§ 2 and 4, and *In re Petition of Justice of Peace Ass'n.*, 237 Ind. 436, 157 N.E. 2d 16 (1958). At page 442 of 237 Ind., the court said in the Justice of the Peace case:

> "We believe it was beyond the constitutional power of the Generaly Assembly to provide qualifications for the office of justice of the peace in addition to those which were prescribed by the Constitution of Indiana....
>
> "That part of § 7 of Ch. 322 of the 1957 Acts which purports to provide additional qualifications for eligibility for justices of the peace is unconstitutional and void."

It follows, therefore, that the provisions of Acts 1945, ch. 208, § 513, Burns § 29-5708 do not constitute a valid reason for refusal to issue a certificate of election "to a duly elected County Clerk who filed his expense account with the present County Clerk thirteen (13) days after the statutory filing date of forty-five (45) days."