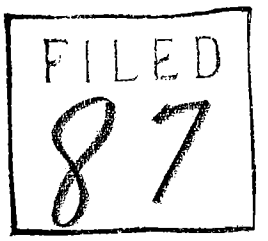
ELECTIONS--Expense account: Expense statements required by Section 11790, R.S.Mo. 1939, must be filed by every candidate after both the primary and general elections. Such statement after a primary election may be filed later than 30 days thereafter, but within a reasonable time before the general election.



September 25, 1950

Honorable Homer L. Swenson
Prosecuting Attorney
Wright County
Mountain Grove, Missouri

FILED 87

Dear Mr. Swenson:

The following is the opinion requested in your recent letter to this department.

Your letter reads:

"In the primary election of August 1, 1950, there were several Democratic Candidates on the ballot, all unopposed, and of course nominated by default. As for myself I was a candidate for the nomination for Prosecuting Attorney. No expenses were incurred by any of us except the $5.00 filing fee.

"I have received word that the County Clerk of this County plans to keep our names off of the general election ballots for the reason none of us have filed statements of expenditures in the said primary campaign, as required by Section 11790, R.S.Mo. 1939, within 30 days subsequent to the primary election.

"Section 11790 as I read it states that every person who shall be a Candidate before any caucus or convention or at any primary election or at any election for any State, County, City, Township, District or Municipal office etc., shall within 30 days after the election held to fill such office or place, make out

and file with the officer empowered by law to issue the certificate of election to such office or place, and a duplicate thereof with the recorder of deeds for the County in which such Candidate resides, a statement in writing * * * setting forth in detail all sums of money, * * * contributed, disbursed, expended or promised by him etc., * * *. No Officer authorized by law to issue Commission or Certificate of election shall issue a Commission or Certificate of election until such statement shall have been made, verified and filed by such persons with said Officer.

"Section 11792 provides that no person shall enter upon the duties of any elective office until he shall have filed the statement and duplicate provided for in Section 11790 of this Article, nor shall he receive any Salary or emolument for any period prior to the filing of the same.

"Speaking for myself and not for the other Candidates I have had the knowledge of the above Sections quoted and have always been of the opinion that the legislative intent in passing such a law was to prevent corrupt practices in election and not to disqualify persons elected to office on mere technicalities. Also the Courts have held these statutes to be strictly penal as to corrupt practices.

"Due to the fact that a primary election is not an election held to fill such office or place, but an election to decide who shall compete for such office or place in the general election, a Candidate is not required to file statement of expenditures until 30 days after the general election.

"Section 11792 bears out this contention as it even contemplates taking office and serving but takes away any salary or emolument until such statement is filed.

"Also nothing is mentioned about a late filing of such a statement, but it appears that it is not prohibited.

> "I desire an opinion in regard to the above, first, if it is proper to file after the general election only and not the primary, second, if filing is required after the primary if there is anything to prevent a late filing of such statement and third, if a County Clerk can refuse to certify names of Candidates to be placed on the general election ballot by reason of failure to file or a late filing of such statement.
>
> "Your opinion is respectfully requested and would appreciate it very much if it can be sent to me at your earliest convenience."

You submit three questions:

1. Must the expense statement of a candidate be filed after both a primary and a general election;

2. If a statement must be filed after the primary election, may it be filed on a date later than thirty days after that election, and,

3. May a county clerk refuse to certify names of nominees of a political party, nominated at a primary election, by reason of their failure to file, or a later filing of, such statements.

Section 11790, R.S.Mo. 1939, reads as follows:

> "Every person who shall be a candidate before any caucus or convention, or at any primary election, or at any election for any state, county, city, township, district or municipal office, or for senator or representative in the general assembly of Missouri, or for senator or representative in the congress of the United States, shall, within thirty days after the election held to fill such office or place, make out and file with the officer empowered by law to issue the certificate of election to such office or place, and a duplicate thereof with the recorder of deeds for the county in which such candidate resides, a statement in

> writing, which statement and duplicate shall be subscribed and sworn to by such candidate before an officer authorized to administer oaths, setting forth in detail all sums of money, except all sums paid for actual traveling expenses, including hotel or lodging bills, contributed, disbursed, expended or promised by him, and , to the best of his knowledge and belief, by any other persons or person in his behalf, wholly or in part, in endeavoring to secure or in any way in connection with his nomination or election to such office or place, or in connection with the election of any other persons at said election, and showing the dates when and the persons to whom and the purposes for which all such sums were paid, expended or promised. Such statement shall also set forth that the same is as full and explicit as affiant is able to make it. No officer authorized by law to issue commissions or certificates of election shall issue a commission or certificate of election to any such person until such statement shall have been so made, verified and filed by such persons with said officer."

The provisions of this section as to these particulars have never been before the Supreme Court of Missouri for construction. The courts of last resort of other States, however, which have statutes similar in their terms to those, including said Section 11790, of our Corrupt Practice Act, have passed upon such statutes, the construction of which arose out of the precise questions submitted to us here.

The two first questions in your letter, we believe, resolve themselves into the one, whether the filing of the expense statement following both the primary and the general elections required by said Section 11790 is mandatory or directory, and, if mandatory, is the statute mandatory or directory as to the time for filing the statement within thirty days after the primary election.

The third question submitted does not depend upon whether any of the provisions of Section 11790 are mandatory or directory. It involves entirely different principles of law and different facts.

The Corrupt Practice Act of the State of Kentucky contains one section very similar to our Section 11790 requiring the filing of an expense statement by every candidate before both a primary and a general election not later than the fifteenth day before the date of each of such elections in that State. The Kentucky statute was before the Court of Appeals of that State for construction, on like grounds to those before us, in the case of Sparkman, et al. vs. Saylor, 202 S.W. 649. The Court held the Kentucky Act requiring the statement to be filed before both elections was mandatory, but that the date upon which the pre-election statement is required to be filed is directory, and not mandatory. The opinion, upon a complete discussion of the Corrupt Practice Act of that State, and of the facts and issues as to the filing, and when the expense statement may be filed, so holding, l.c. 650, 651, says:

> "The purposes of the act are thus clearly stated in its title: 'An act to promote pure elections, primaries and conventions, and to prevent corrupt practice in the same; to limit the expenses of candidates; to prescribe the duties of candidates and providing penalties and remedies for violations, and declaring void, under certain conditions, elections in which these provisions or any of them have been violated'--which is conclusive, as is the act as a whole, of a legislative intent to insure fair and pure elections, free from corrupting influences, at which the voluntary choice of the majority or plurality of the qualified electors might be ascertained; and it, of course, was not the purpose of the act to defeat the free will of the majority of plurality after a fair election, free from corrupting influences, had been held; nor ought we to presume that the Legislature, in prescribing rules intended to accomplish its purposes, meant to sacrifice substance for mere forms. Unquestionably, the act is mandatory, in so far as it provides for the filing by all candidates of a true and accurate statement of expenses, covering every specified item, both before and after the election, because, until he does so, the successful candidate cannot get a certificate of election, qualify, or receive the emoluments of his office. And the legislative intent therefor was doubtless twofold: First, that voters, from an inspection of the pre-election

statement which was required to be open to public inspection, might understand the influences being exerted on behalf of the several candidates; and, second, that an election might be annulled upon a contest under certain conditions which had been procured by corrupt practices, evidence of which would be disclosed or indicated by one or the other or both of the required statements. And it is quite apparent that the pre-election statement, in so far as it is intended to enlighten the voter, is reduced in value in proportion to the time its filing precedes the election, so long as time is allowed in which to give publicity to its contents throughout the district for which the election is held; and that, in an election for an office such as is involved here, a statement filed on the fifteenth day before the election could be of no additional practical value whatever, either to the voter in determining how he should vote, or to avoid the consequences of corruption upon the part of a successful candidate by contest instituted thereafter, over a statement filed a less number of days before the election, because in a magisterial district election corrupting influences would scarcely ever have been inaugurated that far in advance of the election, even where they were contemplated, and but a few days would suffice to give publicity to a statement throughout the district; while, in an election for a state office, such influences, if they are to be effective, might by that date have been manifested in part, at least, by such a statement, and a much longer time would be required for effective publicity than in a smaller district. Yet, the Legislature made the same provisions as to time of filing the statements with reference to all candidates, whether running in the whole state or in the smallest subdivision thereof. So, it seems to us the provision as to the time for filing the pre-election statement cannot be held to be mandatory upon any theory of the purposes intended to be accomplished thereby, and every reason exists for holding it directory merely in such respect if the terms of the act will permit, since, in the absence of corrupt practices, after a reasonable and substantial compliance with the

> provisions of the act by the candidate, no reason whatever exists for denying to him the fruits of such a victory, nor to the voters the officer of their choice; and we are extremely reluctant to do so upon doubtful or less than clear and unmistakably authority.
>
> * * * * * * * * * * * * * * *
>
> "While the section of the statute now before us provides that the pre-election statement 'shall' be filed on the fifteenth day before the election, and while it is a general rule of construction that, when used in a statute, 'the words "shall" and "must" are imperative, operating to impose a duty which may be enforced' (36 Cyc. 1160) it is apparent from the authorities cited above that there are many exceptions to this general rule, depending upon the intention of the Legislature to be ascertained from a consideration of the entire act, its nature, its object, and the consequences that would result from construing it one way or the other. In our judgment, upon such consideration of the statute, the word 'shall' as here used, is mandatory as to filing of the statement, but directory only as to the time when it shall be filed."

Our Supreme Court in numerous cases has defined the rules of construction to be applied whereby statutes, or parts of statutes, are to be held mandatory or directory, in matters relating to elections and other subjects, as cases have required. One of such cases is State ex rel. Ellis vs. Brown, Judge, 33 S.W.(2d) 104. The proceeding was one to test the right of a voter to appear for registration on a date later than that fixed by the amended Act of 1921, Laws of Missouri, 1921, page 351. The Court, l.c. 107, quoted the text in 25 R.C.L., Section 14, pp. 766, 767, as a rule by which a statute may be held to be mandatory, or directory, where the Court said:

> "'A mandatory provision is one the omission to follow which renders the proceeding to which it relates illegal and void, while a directory provision is one the observance of which is not necessary to the validity of theproceeding. Directory provisions are not intended by the legislature to be disregarded, but where the

consequences of not obeying them in every particular are not prescribed the courts must judicially determine them. There is no universal rule by which directory provisions in a statute may, in all circumstances, be distinguished from those which are mandatory. In the determination of this question, as of every other question of statutory construction, the prime object is to ascertain the legislative intention as disclosed by all the terms and provisions of the act in relation to the subject of legislation and the general object intended to be accomplished. Generally speaking, those provisions which do not relate to the essence of the thing to be done and as to which compliance is a matter of convenience rather than substance are directory, while the provisions which relate to the essence of the thing to be done, that is, to matters of substance, are mandatory.' 25 R.C.L. sec. 14 pp. 766, 767.

"Said section 30 provides that qualified voters who were absent on the regular registration days may file applications in the office of the election commissioners to have their names registered; that such application shall be filed not later than the fourteenth day preceding said election; that the election commissioners shall sit specially to hear such applications on Monday, Tuesday, and Wednesday of the first week prior to the election; and that said applicants shall appear in person before the commissioners on one of said days. The statute does not prescribe the consequences of the failure of an applicant either to file his applications not later than the fourteenth day preceding the election or to appear before the election commissioners on Monday, Tuesday, or Wednesday of the first week prior to the election; it does not declare that a failure of an applicant in either of the two respects mentioned shall preclude his right to be registered. Now every person having the qualifications prescribed by the Constitution has the right to vote, and the sole objective of the statute is to determine the individuals who possess those qualifications and make a public record thereof. Such record when made, tends to prevent repeating,

> colonization, and other fraudulent abuses of the franchise. The making of the record and the truthfulness of its recitals are the essence of the thing the statute requires to be done and not the time in which it is to be done, except that it be within the period between the election and the beginning of the sixth week preceding it. Sections 22 and 35. The board of election commissioners is required to maintain an office and keep it open during business hours of every day except Sundays and holidays. Section 3. It would seem, therefore, that the provisions with reference to the time for the filing of applications by absentees and for their hearing by the board were intended merely to promote the convenient and orderly dispatch of the public business."

Declaring that statute directory, as to the time of registering by the voter, the Court, l.c. 108, further said:

> "For the reasons heretofore indicated, we are of the opinion that the provision of said section 30 that persons applying to be registered who were absent on the regular registration days shall appear before the board of election commissioners on one of the days therein designated is directory and not mandatory, * * * * * * * *."

We stated hereinabove that this section has never been construed by our Supreme Court as to whether its provisions relating to the filing of the statement and when it is to be filed are mandatory or directory. That is true. The Supreme Court, however, commented upon the provisions of the section, requiring the expense account of a candidate to be filed, and held that, being penal, it should be strictly construed, in the case of State ex inf. Burgess, Pros. Atty., ex rel. Hankins vs. Hodge, 8 S.W. (2d) 881, where the Court, noting the section, then Section 5031, R.S.Mo. 1919, now Section 11790, R.S.Mo. 1939, l.c. 883, 884, said:

> "* * * Our attention is directed only to that part of section 5031, R.S. 1919, which provides that, within 30 days after election, such statement shall be filed with the officer empowered by law to issue the certificate of election and a duplicate with the recorder of deeds; to section 5032, which provides for the assessment of a

> fine in event of failure so to do; and to section 5033, which provides that no person shall enter upon the duties of any elective office until he shall have filed such statement and duplicate. It must be noted that none of these provisions state that such person shall forfeit title to his office by reason of failure to comply with this statute. This provision is a part of what is generally known as the Corrupt Practice Act. It is strictly penal in its nature, and should be strictly construed. Nothing should be regarded as included in it which is not clearly described in its very words. * * *."

The making and filing of the statement of expense is the very essence and substance of Section 11790 and of the whole Act. The section provides that every person who shall be a candidate "at the primary election," or at "any election for any office," shall file such statement "within thirty days after the election to fill such office or place."

We believe it is clear that the Legislature, by the choice of such words, intended that two statements, one after a primary election, or a convention, or a caucus, for the nomination, as the case might be, and one after the general election, should be filed. We believe, because the making and filing of such statements constitute the substance of and basis for the efficiency and value of the Corrupt Practice Act, that that part of Section 11790 requiring the making and filing of the expense statement by every candidate after both primary and general elections is mandatory, but that the provision requiring the filing of the statement within thirty days after the primary election, not being of the substance of the section, but being a provision merely of form and convenience of procedure in filing the statement, is directory, and that the statement may be filed after the 30 day period named in the statute, but within a reasonable time, prior to the general election, so that the contents of the statement may become publicized for the information of voters at the following general election.

Following the cited cases from our own Supreme Court and giving attention to the cited analogous cases from other states, and considering the section itself, that is our construction and conclusion respecting the provisions of said

Section 11790.

We will now consider the third question submitted.

A county clerk does not have any judicial or discretionary powers, such as would have to be exercised in determining the qualifications or eligibility of persons as candidates for public office. The duties of the office of county clerk are entirely ministerial. Our Supreme Court so held in State ex rel. Attorney General, Plaintiff, vs. Bowen, Defendant, 41 Mo. (217), reprint page 146. The Court (220), reprint l.c. 148, on this rule of law, said:

> "* * * The office of the clerk of the County Court is essentially ministerial in its character. So far as the entry of the orders of the court are concerned, or the performance of any other act or thing which may be legally and properly required of him by the court, he is without discretion; he has no power to judge of the matter to be done and must obey the mandates of the tribunal whose officer and servant he is."

Our Supreme Court has not had occasion to pass upon the question of a county clerk, as such, refusing to place on the November election ballot the names of candidates of a political party because of the failure of such candidates to file the expense statements provided for in Section 11790. The Court has, however, decided, in similar cases, that a ministerial officer has no power to determine the qualifications or eligibility of a candidate for public office. The Court so held in State ex rel. Frank H. Farris vs. Roach, Secretary of State, 246 Mo. 56. The then secretary of state had refused to certify the relator's name as a presidential elector-at-large to be printed on the Democratic ticket, on the ground that the State Democratic Committee had removed his name from the party's ticket, declaring the place vacant, and had named another person to fill such vacancy, because the relator, at the time of the nomination by the Democratic Convention beforehand, was a state representative from Crawford County, Missouri, and was ineligible to serve as such elector, under the terms of Section 12 of Article 4 of the Constitution of Missouri, 1875, upon such facts being certified to him. Mandamus followed on behalf of relator to compel the secretary of state to certify relator's name as such nominee.

The Court, in deciding the case for relator, on the ground that the duties of the secretary of state are ministerial and that it was his duty to certify relator's name, l.c. 64, said:

> "By the provisions of the statute (Secs. 5849 and 5850, R.S. 1909), when the certificate of nomination by the convention held on February 20, 1912, was filed with respondent, and no objections filed thereto, it became his duty to certify the name of relator as such nominee to the proper county officials. Section 5849 provides that all certificates of nomination which are in apparent conformity with the provisions of law shall be deemed to be valid, unless objections are filed thereto within three days. In the absence of such objections, the validity of such nomination stands unquestioned, and the duty of the Secretary of State to certify same is purely ministerial. * * *."

In its discussion of the merits of the case and in holding that the eligibility of the relator to serve as such elector could not be question in the proceedings, the Court, l.c. 71, further said:

> "In the case before us the relator is not asking that the respondent be required to give him a title to the office. He has not been elected to the office, and may not be elected. A convention of his party has seen fit to nominate him as a candidate. This is but the first step. The law may prescribe, and has prescribed, qualifications for office-holders. It has also undertaken in recent years to regulate the manner in which candidates shall be nominated, but we are not aware of any law which undertakes to define the qualifications of candidates for nomination. So far as the law is concerned, the people may nominate and vote for an ineligible candidate at their risk. When such candidate seeks to be inducted into office, or even to secure the final act which recognizes his title, then the objection that he is ineligible may be interposed."

The Court in concluding its opinion, l.c. 73, held:

> "If we were to hold that, upon a mere certificate of nomination, the eligibility of a candidate may be challenged, as was done in this case, and an adjudication by the court be invoked thereon, we should have established a dangerous precedent for the assumption of judicial functions by ministerial officers and central committees.
>
> "We hold that the question of the eligibility of relator is not before us for decision, and that, regardless of his qualifications, it is the duty of respondent to certify out the nomination of relator. It is ordered that the peremptory writ issue."

The Supreme Court, in State ex rel. Cameron vs. Shannon, 133 Mo. 139, held that the duties of the city comptroller of Kansas City, Missouri, Shannon, were ministerial only and that he had no power to refuse to approve the bond of Cameron as superintendent of waterworks on the ground, as taken by Shannon, that Cameron had not been legally appointed as such superintendent. The Court so holding, l.c. 165, on this point, says:

> "But we are of the opinion that the right of relator to the office can not be inquired into in this proceeding. No authority or power is conferred on the comptroller of the city to pass upon or decide the validity of relator's claim to the office. His duty with respect to the approval of the bond of the superintendent of waterworks, is purely ministerial. * * *."

The Court, ordering mandamus against Shannon, l.c. 168, held:

> "The bond seems to be in proper form and the sureties entirely responsible for the amount of its penalty, and as no sufficient reason is shown by the return why respondent should not perform an act purely ministerial, and

> which he alone is clothed with power to perform, the demurrer must be sustained, and peremptory writ awarded."

The Corrupt Practice Act of the State of Idaho is almost identical in its provisions, and its apparent purpose, with the Corrupt Practice Act of this State. In the State of Idaho it appears that county auditors are the officials performing the duty to print the names of nominees on general election tickets. That duty is imposed upon county clerks in this State. The identical question we are here considering was before the Supreme Court of Idaho for decision. The case is reported in 110 Pac. 1035. The reported decision is not lengthy. It is so nearly identical, in both its recital of the facts and the applicable rules of law, to our question here that we quote the opinion in that case. The opinion, l.c. 1035, 1036, states:

> "This is an application for a writ of mandate against the auditor of Fremont County, compelling him to cause the name of petitioner, Hiram G. Fuller, to be printed on the official ballot as the Republican candidate for county treasurer of Fremont county to be voted on at the general election in November. It is alleged by the petitioner that he was duly and regularly nominated by the Republican party at the primary election held in August as the nominee of that party for the office of county treasurer. It is further alleged that the county auditor refuses to have the petitioner's name printed on the official ballot, for the reason that petitioner did not file his expense account, as required by sections 25 and 26 of the primary election law (Sess. Laws 1909, pp. 204, 205), within 10 days after the date on which the primary election was held.
>
> "Section 25 of the act provides that every candidate for nomination under the terms of the act shall not more than 10 days after holding the primary election file an itemized statement in writing, duly sworn to as to its correctness, setting forth the items of expenditures made by him for the purpose of securing or influencing or in any way affecting his nomination.

Section 26 of the act provides that any candidate who shall fail, neglect, or refuse to file with the proper officer the statement provided for by section 25, within the time provided therein, or to fully set out in detail the sums expended by him, etc., shall be guilty of a misdemeanor, and then prescribes the penalties, among which is that of ineligibility to become a candidate for the office to which he was nominated.

"The only question with which we have to deal at this time is that of the power of the county auditor to refuse to have the name of a candidate printed on the official ballot where he has been declared by the canvassing board to be the nominee of his party. On this question there can be but little doubt. The duty of the auditor is purely ministerial. He is vested with no judicial powers or functions in the matter. He cannot sit in judgment on the candidate and without a hearing declare him guilty of a misdemeanor and inflict the penalties. Miller v. Davenport, 8 Idaho, 593, 70 Pac. 610. It is clearly the duty of the auditor to perform the duties required of him by law, and until the candidate has been judicially declared ineligible to have his name placed upon the ticket the auditor has but one duty to perform, and that is to cause the candidate's name to be printed on the official ballot along with all the other nominees for the respective offices.

"A peremptory writ of mandate will issue to Ira N. Corey, auditor of Fremont county, directing him to place the name of the petitioner, Hiram G. Fuller, on the official ballot as the Republican nominee for the office of county treasurer to be voted upon at the ensuing general election. Costs awarded in favor of plaintiff."

Honorable Homer L. Swenson

Considering, as we do, that the authorities herein cited are decisive of this question, it is plain that a county clerk, being a purely ministerial officer, cannot pass upon or determine the eligibility of nominees as candidates of a political party, and that such officer has no power to refuse to certify their names as candidates of their political party to be placed on the general election ballot because such nominees have failed to file, or file later than thirty days after the primary election, the expense statements required by the provisions of said Section 11790.

CONCLUSION.

It is, therefore, the opinion of this department, considering the facts and the authorities cited herein, that:

1. It is mandatory, under the provisions of Section 11790, R.S.Mo. 1939, that the expense statement of every candidate at both the primary election and the general election be made and filed.

2. The time of filing the expense statement required by said section, after the primary election, by every candidate, is directory only and may be filed after the 30-day period after the primary election, but within a reasonable time before the ensuing general election.

3. A county clerk may not refuse to certify the names of nominees of a political party to be printed on the following general election ballot by reason of their failure to file their expense statements, or because of a later filing thereof than within the 30-day period after a primary election, fixed by Section 11790, for filing such statements. His duties are purely ministerial. He cannot pass upon the eligibility or qualifications of such nominees.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General