OFFICERS: CIRCUIT CLERK:- Section 3945, R. S. Mo. 1929, makes misconduct or abuse of authority in office a misdemeanor; Section 11681, R. S. Mo. 1929, makes a wilfull act contrary to duties a misdemeanor; whether or not Clerk wrongfully issuing subpoenas is guilty under either section depends upon full development of facts.

FILED 69

September 12, 1934.

Mr. John B. Owen,
Prosecuting Attorney,
Clinton, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

> "We have a grand jury called in this county for the middle of September. The order was made and turned over to the sheriff two days before the August 7th primary. The Circuit Judge wrote all judges of election and cautioned them to be on the alert and be prepared to get information if possible, to present before said body of any election irregularities that might come to their attention. This was a few days prior to said primary. On the night before the primary the Circuit Clerk issued some 60 subpoenas for all judges and many of the election workers in the City of Clinton to appear before the grand jury which the Sheriff had not even selected or summoned. Said subpoenas were issued under the signature of said clerk and his official seal and had the general effect of checking all activities of workers at the polls on primary day so subpoenaed. Subpoenas were not ordered issued by Circuit Judge but solely on the Circuit Clerk's initiative and to aid in his own political ends. Is there, in your opinion, any liability, civil or criminal, on the part of the clerk for such act? Also is the Sheriff entitled to fees on these subpoenas served which were issued without authority or order?
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> "There is considerable feeling over the transaction in the county and the matter is bound to be called to the attention of the grand jury. Will you therefore kindly advance this request on your file and give me an early opinion."

You inquire what civil or criminal liability arises where the Circuit Clerk, of his own motion, and without being requested by any proper officer, issues subpoenas for witnesses to appear before a grand jury before the grand jury is even subpoenaed, called or impaneled. In attempting to solve your problem we shall first call your attention to the sections which involve the issuing of subpoenas by the Circuit Clerk.

Section 3525, R. S. Mo. 1929, provides as follows:

> "Whenever thereto required by any grand jury, or the foreman thereof, or by the prosecuting attorney, the clerk of the court in which such jury is impaneled shall issue subpoenas and other process to bring witnesses to testify before such grand jury: Provided, that after the finding and returning of any indictment by said grand jury, such foreman, prosecuting attorney, or jury, shall not have the right to cause any subpoena or other process to be issued for any person who is known or believed by such foreman, prosecuting attorney or jury to be a witness in behalf of the person or persons so indicted, or who has been subpoenaed as a witness in behalf of such person or persons, or whom such foreman, prosecuting attorney or jury may have reason to believe will be summoned as a witness in behalf of such person or persons, in regard to the matter or matters charged against said person or persons in such indictment, except upon the written order of the judge of the court into which such indictment is returned."

Section 3545, R. S. Mo. 1929, provides as follows:

> "It shall be the duty of the circuit clerk, or clerk of any court having criminal jurisdiction, to issue subpoenas in vacation for witnesses to be and appear before the grand jury at the ensuing term of the circuit court thereafter, at the instance of the prosecuting attorney, whenever it shall be shown that such witnesses are about to absent themselves to avoid

being subpoenaed before the grand jury in term time."

It appears that under Section 3525 the Clerk of the Court in which the grand jury is impaneled shall issue subpoenas and other process to bring witnesses to testify before such grand jury whenever required by any grand jury, or the foreman thereof, or by the prosecuting attorney. Under Section 3545, it is the duty of the Clerk to issue subpoenas in vacation to witnesses to appear before the grand jury at the instance of the prosecuting attorney whenever it is shown that such witnesses are about to absent themselves in order to avoid being subpoenaed. We have diligently searched the Statutes and have been unable to find any section in the Statutes which authorizes the Circuit Clerk to issue subpoenas or other process to witnesses to appear before a grand jury, unless directed to by the Judge, the grand jury, the foreman of the grand jury, or by the prosecuting attorney. You state in your letter that no officer authorized by law directed the Circuit Clerk to issue the subpoenas which he did issue, but that such subpoenas were issued without authority by the Circuit Clerk and for the purpose of furthering his own political ambitions. We must conclude, therefore, that the Circuit Clerk was not authorized to issue the subpoenas in question. There is no Statute that we know of which would authorize him to issue subpoenas under the circumstances, and when he issued subpoenas without any authority of law, then it appears to us that he has committed an illegal act.

Section 11681, R. S. Mo. 1929, provides as follows:

"If any clerk shall knowingly amd willfully do any act contrary to the duties of his office, or shall knowingly and willfully fail to perform any act or duty required of him by law, he shall be deemed guilty of a misdemeanor in office."

Under the foregoing section it is provided that; "If any clerk shall knowingly and willfully do any act contrary to the duties of his office, he shall be deemed guilty of a misdemeanor in office." Upon the facts stated in your letter it was certainly not the duty of the Circuit Clerk to issue the subpoenas in the manner in which he did. As a matter of fact, the issuing of those subpoenas were not authorized by law because he was not directed to issue them by an officer which the law empowers to direct the issuance of subpoenas. Although we have not been able to find any

decision which directly holds that a ministerial officer who does the acts which were committed by the Circuit Clerk is a misdemeanor, yet the plain terms of the Statute makes it a misdemeanor in office when the Circuit Clerk commits any act contrary to the duties of his office. The duties of his office are set out by Statute and among other duties it is his duty, when directed by the proper official, to issue the subpoenas in question. If he issues subpoenas for witnesses to appear before the grand jury when not directed by the officers specified in the Statute, then it appears to us that he has committed an act contrary to the duties of his office, within the meaning of the above Statute. Under Section 11682, R. S. Mo. 1929, and the following sections, which we shall not quote because they are merely incidental to your inquiry, the method of trying a Circuit Clerk for a misdemeanor in office is fully set out. Section 11687, R. S. Mo. 1929, provides as follows:

> "If any clerk against whom charges shall be exhibited as aforesaid shall be found guilty thereof, he shall be removed from his office, and be fined at the discretion of the court in any sum not exceeding one thousand dollars to the use of the county of which he was clerk; or, if a clerk of the supreme court, for the use of the state; and he shall pay all the costs of the proceedings."

Under the foregoing section, if the clerk has been found guilty of a misdemeanor in office, it provides for his removal and that he may be fined at the discretion of the court in any sum not exceeding one thousand dollars, to the use of the county. It would appear, therefore, that if the court should find him guilty of a misdemeanor in office he would have a right to fine him. If, however, the court finds him not guilty of a misdemeanor in office he would be subject to a fine under the foregoing section.

Under Article 3 of Chapter 30, R.S. Mo. 1929, which deals with the offenses of persons in office, we find the following sections. Section 3945, provides as follows:

> "Every person exercising or holding any office of public trust who shall be guilty of willful and malicious oppression, partiality, misconduct or abuse of authority in his official capacity or under color of his office, shall, on conviction, be deemed guilty of a misdemeanor."

Section 3947, R. S. Mo. 1929, provides as follows:

> "Every person who shall be convicted of any of the offenses mentioned in the preceding sections of this article shall be forever disqualified from holding any office of honor, trust or profit under the Constitution and laws of this state, and from voting at any election; and every officer who shall be convicted of any official misdemeanor or misconduct in office, or of any offense which is by this or any other statute punishable by disqualification to hold office, shall, in addition to the other punishment prescribed for such offenses, forfeit his office."

Under Section 3945 above a person who is guilty of willful and malicious oppression, partiality, misconduct or abuse of authority or under color of his office, is guilty of a misdemeanor.

Section 3947 provides that if he is convicted under the above section he shall be disqualified from holding any office under the Constitution and laws of this State and from voting, and shall forfeit his office.

In State v. Gardner, 2 Mo. 22, a Justice of the Peace was prosecuted for a misdemeanor in office for illegally issuing a summons against the defendant. The point raised in that case was whether or not the indictment was sufficient. the Indictment did not include the word "corruptly." The court says:

> "And the circuit attorney insists that it being clearly a void summons, is a misdemeanor; and it having been alleged to be willful, the statute is satisfied and the indictment good. I am of a contrary opinion. In this case two things are required. First. That the indictment should show such facts as would amount to a misdemeanor independent of the word willful, and to make this out the indictment should charge the act to have been done knowingly and corruptly; and secondly, that the fact should be alleged to be willful."

In that case the Court held that the indictment was bad.

In State v. Flynn, 119 Mo. App. 712, a police

officer was prosecuted for neglect of duty in failing to prevent interference with voters at an election. The case was reversed because the indictment was held to be defective in that it did not contain the word "corruptly." The Court, in discussing the matter, says:

> "The rule that a corrupt motive must be alleged and proved, applies where the misconduct related to judicial or quasi-judicial duty. In cases where the rule was applied, the reasoning of the opinions and the authorities cited, show it pertains only to acts which, in the nature of things, would not be criminal unless they were inspired by a corrupt intent; and this was the view adopted in State v. Ragsdale. That case was a prosecution of the mayor of a city for oppression in office and was founded on the same statute involved in this prosecution. The information accused the mayor of having acted corruptly; but the trial court refused to charge the jury that they must find he corruptly, knowingly and willfully, was guilty of oppression in office. The court struck the word 'corruptly' out of the instructions. At common law indictments of judicial officers for misconduct in the performance of duty were always required to charge they acted corruptly. The ancient and modern precedents, and the forms of criminal pleadings given by approved text-writers, conform to that rule. On the other hand indictments for official misconduct in the performance of executive and ministerial duties usually do not contain an averment that the misfeasance was corrupt; and many convictions have been sustained without an averment or proof of that kind, though the point was distinctly made that it was necessary. (Citations omitted). The underlying principle of the distinction appears to be that when the official act complained of is of doubtful legality, and the official enjoyed a discretion in the performance of his duties, he cannot be convicted of acting wrongly unless he acted corruptly. But

> when the legality of the act is palpable, then willful and intentional delinquency on the part of an official, whether it be a non-feasance or a mis-feasance, is indictable even though his motive was not corrupt in the sense that he sought personal profit."

In Burkharth v. Stephens et al., 117 Mo. App. 425, the county court was prosecuted for a misdemeanor in office. The court, in discussing the word "corruptly" at page 435, says:

> "In the use of the words 'corruptly' and 'corruption' we do not mean them to be understood in the sense of bribery or other benefits received by the county judges. Those words, while including such benefit within their meaning, do not necessarily mean that the officer charged with doing an act corruptly did it for gain to himself. He may be guilty, though no personal advantage is thus received from the act. If he does an official act intentionally and knows that it is a wrongful and unlawful act, he does it corruptly. The word, or words, have been held necessary to a proper description of a charge against an officer in criminal proceedings for misconduct in office, but the cases so holding disclose that neither bribery nor personal gain was intended to be charged. State v. Gardner, 2 Mo. 23; State v. Hein, 50 Mo. 362; State v. Pinger, 57 Mo. 243."

In State v. Grassle, 74 Mo. App. 313, an indictment was returned against the chairman of a Board of Trustees, alleging a misdemeanor in office. The Court at page 316 says:

> "The word 'willful' must be restricted to such acts as are done with an unlawful intent, and implies tort, wrong; it implies legal malice,--that is, that the act was done with evil intent, or without reasonable grounds to believe that the act was lawful. (Citations omitted). To constitute the offense

> the act must have been done willfully, maliciously and with a wrongful intent, and where the indictment is brought against a judicial officer, as in this case, the act must be charged to have been knowingly and corruptly done."

This opinion may have become unduly long but we have tried to point out all of the Statutes and some of the decisions dealing with the matter. The cases quoted from contain the citations of other cases which may be useful to you in determining what action to take. Apparently, the Clerk had no authority to issue the subpoenas which he did. There seems to be two sets of Statutes that deal with misdemeanors in office and whether or not you can make your case come under either depends, of course, upon what you may ultimately be able to prove. The removal of an official from public office is a serious matter, especially where there is no moral turpitude involved. We hesitate, in view of the fact that we do not find a case directly in point, to definitely rule that the Clerk is guilty of a misdemeanor in office, not knowing what facts may be developed. We have submitted to you all of the Statutes of which we are cognizant that might apply, and have pointed out to you some decisions construing those Statutes, which may be of value to you. Whether or not you can remove this Clerk from office depends upon the facts which you may be able to establish.

You also inquire whether the Sheriff is entitled to fees on the subpoenas which he served. No officer is entitled to receive fees unless the Statute authorized the payment of such fees, and such Statute must be strictly construed. In State ex rel. v. Brown, 146 Mo. l. c. 406, it is said;

> "It is well settled that no officer is entitled to fees of any kind unless provided for by statute, and being solely of statutory right, statutes allowing the same must be strictly construed. State ex rel. v. Wofford, 116 Mo. 220; Shed v. Railroad, 67 Mo. 687; Gammon v. Lafayette Co., 76 Mo. 675."

Of course, it will be admitted that the Sheriff, under the statute, is entitled to fees for serving writs of the court. In the instant case, however, it appears to us that the subpoenas issued by the Clerk were without authority of law and were not writs of the court, but were merely a personal matter upon the part

of the Clerk. This is not a situation where the Court had jurisdiction to issue the writs and for some reason it has been attacked as being illegal. Here is a situation where the writs were not issued by any court within its jurisdiction, but were issued by the Clerk as an individual without any authority. We do not believe that under such circumstances the Sheriff is legally entitled to his fees.

It is therefore the opinion of this Department that the acts of the Circuit Clerk in issuing the subpoenas in question may be a misdemeanor in office and illegal, depending upon what facts are finally developed. The decisions quoted above advise you as to whether or not the act must be corruptly done and what is meant by the word "corruptly." Whether or not the unauthorized acts of the Clerk make him guilty of a misdemeanor we do not believe is material in determining whether or not the Sheriff may collect his fees. We are of the opinion that since the subpoenas were issued without authority and not from a court in exercising its jurisdiction, the Sheriff cannot collect his fees.

Very truly yours,

FRANK W. HAYES,
Assistant Attorney General.

APPROVED:

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(Acting)
Attorney General.

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