NOTARIES PUBLIC: Acknowledgments executed by said notary in the name in which she was commissioned, but who was at the time married, are legal, valid and binding.

OPINION NO. 26

April 26, 1934

FILED
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Honorable John A. Eversole
Prosecuting Attorney
Washington County
Potosi, Missouri

Dear Sir:

This is to acknowledge your request for an opinion on the following facts:

> "There was a woman resident of this county who was duly qualified and commissioned a notary public. She was single at the time, her commission being in her maiden name. After being so commissioned and entering upon her duties, she married. She kept her marriage secret for some time. During this time (that she was married) she notarized and took acknowledgments to many deeds, deeds of trust, and other papers.
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> "The opinion I would like to have from your department is whether or not the fact that these deeds, deeds of trust and affidavits were acknowledged by such person as above stated, and in her maiden name, makes the acknowledgments illegal or affects the validity of such instruments."

I.

Chapter 80, R. S. Mo., 1929, relates to notaries public, and Section 11738 of that chapter provides, among other things, that the Governor shall appoint and commission notaries public; that each such notary shall hold office for four years, and in order to be appointed one must possess the qualification of being twenty-one years of age or over, and a citizen of the United States and of the State of Missouri.

Section 11742 provides that a notary public, before entering upon his (her) duties, shall subscribe to an oath and file a bond. Thus, one being appointed and being commissioned a notary public, holds an office, with the powers and duties of administering oaths and taking acknowledgments.

> "Women in Missouri have been licensed as attorneys at law by the Supreme Court. They have for years been recognized as eligible to hold office as notary public."
> State ex rel. Crow v. Hostetter, 137 Mo. 636, l.c. 648.

The question for determination being, does the mere fact that a woman who is commissioned as notary public forfeit her commission by marriage?

We do not find any decisions of our courts on this question.

In Elizabeth Heights Realty Company v. Schaffer (Court of Chancery of New Jersey), 147 A. 541, l.c. 542, the courts said:

> "The affidavits relating to service of notices to redeem appear to have been taken before one Mabel Seibert, who, by such name, was commissioned a notary public of New Jersey. She was married on August 16, 1919. The jurat to the affidavits purporting to be proofs of service and nonredemption were signed by her as Mable Seibert Graff, notary public. In the absence of statutory authority the person commissioned as notary public under the name of Mabel Seibert was unauthorized to sign her name to jurats to affidavits as 'Mabel Seibert-Graff, Notary Public,' and consequently the purported affidavits must be regarded as a nullity. Women may be appointed and commissioned as notaries public (3 Comp.St. 1910, p. 3761, par. 211), but they can only act as such in their name as appointed and commissioned. I am constrained to consider that, if the Legislature contemplated the continuance of authority of a <u>feme sole</u> appointed notary public, after her marriage, legislation would have been enacted such as relates to women appointed and commissioned as masters in chancery and/or attorneys or counsellors at law."

The same case was appealed to the Court of Errors and Appeals of New Jersey, 158 A., 402, and that court overruled same, having this to say as concerning notaries public.

> "The other point is that the affidavit itself was vitiated because the notary public who signed the jurat, and happened to be a woman, had married subsequent to being commissioned as an unmarried woman, and therefore (so runs the argument) was disqualified at the time of taking the affidavit from so doing. We consider that both these points are entirely without substance.
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> " * * * However, it may be well to say with respect to the married notary that we are unable to follow the argument of counsel to the effect that where a married woman has been commissioned as a notary, she vacates that commission by marriage. In the absence of some statute in that regard, we should say that such a doctrine is unwarranted in law, especially in these modern days."
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> " * * * This conclusion leads to a reversal of the decree and a dismissal of the bill so far as affecting the tracts now in dispute."

Section 11741, R. S. Mo. 1929, provides, in part, the following:

> "Every notary public shall provide a notarial seal, on which shall be inscribed his name, the words 'notary public', the name of the county or city, if appointed for such city. * * * * No notary public shall change his seal during the term for which he is appointed."

We assume that the notary public in question had a seal, in accordance with the above section, i.e. had her name on such. You state that when she notarized these papers, after her marriage, she signed her maiden name, and/or the name in which she was commissioned.

II.

In Wilson v. Kimmel, 109 Mo. 260, l.c. 263, the court said:

> "Although Mr. Bonney was an alien, and, therefore, did not possess the qualifications to hold the office of a notary public, still it does not follow that his acts as such officer are void. * * * * The law is well settled that

> the acts of an officer de facto are valid so far as they concern the public or the rights of third persons who have an interest in the things done. Their official acts cannot be impeached collarterally.
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> " * * * Here Mr. Bonney was duly commissioned a notary public, and he qualified by giving bond as the law required; he, therefore, had color of title to the office, and though he did not possess the qualifications to hold the same still he was a de facto officer, and his acts as such officer are valid. Any other rule would undo official acts, upon the validity of which the parties interested therein had and have a right to rely, and would produce the most disastrous results. The objection to the acknowledgment is, therefore, overruled."

Also in Willimas v. Lobban, 206 Mo. 399, l.c. 407, the court said:

> "But even if timely objection had been made, we think there is no merit in the point. The official seal of the notary was attached to the deed and it is said in Devlin on Deeds (2 Ed.), section 501: 'An abbreviation of the official name of the officer taking the acknowledgment is sufficient. . . . The letters 'N.P.' are sufficient to show that the officer beside whose name they are written, is a notary public.' And we may add, especially where the officer, as in this case, certified that he affixed his official seal at his office, etc. And that seal shows he was a notary public."

In Kansas City & Southeastern Railway Co. v. the Kansas City & Southwestern Railway Co. et al., 129 Mo. 62, l.c. 68, the court held:

> "Neither of the points made are, in our opinion, sound, as legal propositions. The fact that a notary does not certify when his term will expire, nor where he lives, does not, in the least, destroy the effectiveness of the deed, to which he certifies an acknowledgment."

Corpus Juris, Vol. 46, p. 506, Art. 15, has this to say concerning the notaries de facto:

> "Generally a person acting as a notary under color of authority with public acquiescence is held to be a notary de facto, and as to the public and third persons his acts are valid and cannot be attacked collaterally. The principle that ineligibility to hold an office does not prevent the ineligible incumbent, if in possession under color of right and authority, from being an officer de facto, with respect to his official acts, in so far as third persons are concerned, has been applied to one who is appointed and acts in good faith as notary, but who is ineligible or disqualified to act as such by reason of alienage, sex, or interest, or by acceptance of another office, even though his office as notary is hereby 'vacated' under the statute, or by reason of being an officer or stockholder in a corporation in violation of a statute; or one whose commission is defective, or who is holding over after expiration of his term, or who has failed to file his bond, take the oath of office, or otherwise comply with directory provisions of the statute; but in general no one can be a notary de facto without color of authority. It is well settled that a mere usurper is not an officer de facto; and the position depends upon a continuing exercise of the office, a single official act not being enough."

III.

From the above and foregoing, it is our opinion that the acknowledgments executed by said notary in the name in which she was commissioned, but who was at the time married, are legal, valid and binding.

Respectfully submitted,

JAMES L. HORNBOSTEL
Assistant Attorney General

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APPROVED_____

ROY McKITTRICK
Attorney General