NOTARIES PUBLIC * - Acknowledgments attached to intoxicating liquor and non-intoxicating beer applications for license shall be received in a court of record as prima facie evidence where the same are regular on their face: Second, should the evidence warrant, a notary public could be removed from office through a quo warranto proceeding: Third, the office of notary public could be forfeited and the notary removed under Sec. 12828 R. S. Mo. 1939, should the evidence warrant.

June 27, 1941

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Hon. Wilson D. Hill
Prosecuting Attorney
Ray County
Richmond, Missouri

Dear Sir:

We are in receipt of your request for an opinion upon the following statement of facts:

> "In this term of the Ray County Circuit Court, I had occasion to try one Edith Van Meter Sexton, charged with making a false affidavit in connection with an application for a liquor license. The certificate on the affidavit was that of Paul White, Notary Public of Ray County, Missouri. When called before the Grand Jury, and when giving testimony upon which the indictment on which Mrs. Sexton was preferred, Mr. White testified that he had sworn her to the application, administering the oath on the bottom of the application provided for that purpose. When called upon to testify in Circuit Court, and after the jury had been sworn, Mr. White testified definitely that he had not sworn her to the application, but that all that transpired was that she had brought the application filled in and signed, into his office, placed it before him, that he had placed his seal on it and signed his name to the certificate and told her she owed him fifty cents (50¢). Since I could not prove any swearing, I was forced to nolle pros this case and the defendant went free.

> "Mr. White has certified most of the liquor applications in this County, and I am of the opinion that they are worthless as far as any guarantee of their verity is concerned.
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> "I think I shall probably prefer charges against this Notary under Section 4585 for affixing a false jurat, and I would like to know how to proceed to take away his commission, as the officers are powerless to keep undesirable persons from making applications and falsifying their answers as to their prior convictions and revocations if they can not be prosecuted for making false affidavits."

From reading your request we think that perhaps the primary difficulty that you are anticipating is in the prosecution which might arise in the future on similar bonds given by individuals in your county, wherein, either the named notary or some other notary affixed his acknowledgment, or jurat, as the case may be. Therefore, we shall endeavor to take up questions which may present themselves in the future.

Section 13360 R. S. Missouri, 1939, designates how a notary is appointed, and reads as follows:

> "The governor shall appoint and commission in each county and incorporated city in this state, as occasion may require, a notary public or notaries public, who may perform all the duties of such office in the county for which such notary is appointed and in adjoining counties. Each such notary shall

> hold office for four years, but no person shall be appointed who has not attained the age of twenty-one years, and who is not a citizen of the United States and of this state. It shall be the duty of every such notary when he performs an official act outside his or her own county to state in his or her certificate that the county in which such act is performed adjoins the county within and for which he was appointed and commissioned."

Section 13364 R. S. Missouri, 1939, provides for the oath of office and the bond. This Section we are not copying in this opinion, for brevity sake.

In 1 C. J., P. 810, Par. 124, we find this statement, in part:

> "In some jurisdictions it is held that the act of the officer in taking and certifying an acknowledgment is judicial, or, as it is sometimes called, quasi judicial, in its nature. * * * "

In 1 C. J., P. 810, Par. 125, the following is found:

> "The preponderance of authority favors the view that the act of an officer in taking an acknowledgment is of a merely ministerial nature. * * * For if the act be judicial it would seem to follow that the officer could not be held liable for negligence in the performance of it; * * * ."

From viewing authorities, the Courts in Missouri apparently follow the latter view and hold that the taking of an acknowledgment is of a merely ministerial nature. Stevens v. Hampton, 46 Mo. 404.

In the case of State to use v. Plass, 58 Mo. App. 148, l. c. 150, the court said:

> "The duties of a notary public in taking acknowledgments of deeds and certifying thereto are ministerial not judicial."

In the case of State ex rel. v. Balmer, 77 Mo. App. 463, l. c. 473, the court said:

> "* * * It was an official act, such an one as business men every day and everywhere must rely upon in the transactions of their business, and they are not required to doubt the truth of such certificate and go out to verify it, before acting on it; on the contrary the law makes a notary's certificate evidence of the fact contained in it, and if it turns out to be false, the notary -- not his confiding victim--should suffer the consequences. * * * "

See State v. Ryland, 163 Mo. 280, Vol. 1 C. J., Pars. 293 and 294.

With these fundamental principles of law before us, we shall now attempt to review some of the authorities, to determine the validity and credence that shall be given an acknowledgment in a court of law, when the instrument to which it is attached is at issue before the court. In this connection, we call your attention to Section 3435 R. S. Missouri, 1939, which reads as follows:

> "Every instrument in writing, conveying or affecting real estate, which shall be acknowledged or proved, and certified as hereinbefore prescribed, may, together with the certificates of acknowledgment or proof, and relinquishment, be read in evidence, without further proof."

Then, the court in the case of Wintz v. Johannes, 56 S. W. (2d) 109, l. c. 115 ruled as follows:

> "As shown by the testimony of William Wintz, Albert J. Michel, and Frank H. Michel, the contesting defendants plant themselves behind the notary's certificate of the acknowledgment of the deed in question. Our statute, of long standing, now section 3050, R. S. 1929 (Mo. St. Ann. sec. 3050), says: 'Neither the certificate of the acknowledgment nor the proof of any such instrument nor the record nor the transcript of the record of such instrument, shall be conclusive, but the same may be rebutted.' Under this statute a notary's certificate of an acknowledgment is only prima facie evidence of the facts recited therein."

See State v. Page, 332 Mo. 89, 58 S. W. (2d) 293.

It will be noted in reviewing the cases, supra, that in no incident are they cases in which the notary's acknowledgment is identical in character to the one referred to in your request, and in most instances grow out of acknowledgments taken under the Married Woman's Act, now repealed. It will also be noted that the courts in some instances have reasoned that due to the existence of a specific legislative act prescribing the manner and method of taking the acknowledgment of a married woman that the statute must be strictly complied with. There-

fore these cases are only beneficial for the general proposition of law declared therein. Further, it will be noted that affidavits, or acknowledgments taken under Article 1, Chapter 32, R. S. Missouri, 1939, are executed on prescribed blanks and printed forms prepared by the Supervisor of Liquor Control, made in pursuance to Section 4889 R. S. Missouri, 1939. Whereas, under Article 2, of Chapter 32, R. S. Missouri, 1939, they are made in pursuance to Sections 4959 and 4960. We do not find any specific section similar to Section 3435 R. S. Missouri, 1939, or Section 3437, R. S. Missouri, 1939, pertaining to acknowledgments attached to applications for intoxicating liquor and non-intoxicating beer. We are unable to find any specific case in Missouri identical with the facts as stated in your request. Therefore, we cannot cite in this opinion any Missouri precedent as to how the higher courts would treat an acknowledgment attached to an application, such as the one above described; nor, can we say what the court's views would be on the degree of evidence which would be necessary to make a substantial case of impeachment of an acknowledgment of this character. Neither can we say, with certainty, that such an acknowledgment must be received in evidence with the same degree of proof as is required in proving an acknowledgment attached to a conveyance of real estate, and as contemplated in Sections 3435 and 3437, supra.

Now we consider some of the authorities which have to do with the method of impeaching an acknowledgment. We call attention to the case of Lancaster v. Whaley Lbr., Co., 18 S. W. (2d) 796, l. c. 798, wherein the court had this to say:

> "The appellants challenge as error the action of the trial court in permitting the witness J. O. Green to testify, over objection, that it was his custom, at the time of taking the acknowledgment of S. E. Lancaster, not to permit the husband to remain in the room while the wife's acknowledgment was being taken, and that he thought he followed that custom on that occasion, because such

testimony was hearsay and an opinion of the witness. The witness testified:

"'I recall the time that J. S. and S. E. Lancaster came to my office to acknowledge a contract between them and M. T. Daniell. My recollection is that they came to the office, and that the contract and note and transfer had already been prepared; that they came into my room together, and that both of them signed the instrument in said room. I don't remember whether Mr. Lancaster was in the room at the time his wife acknowledged or not, but it was my custom at that time not to permit the husband to remain in the room while the wife's acknowledgment was being taken, and think I followed that custom; but I will not say whether he was in the room or not. I would not state that he was not in the room, or that I requested him to leave the room on this occasion.'

"Wigmore on Evidence, vol. 1, p. 335, sec. 98, says: 'Thus a notary may testify that his habit is always to mail a notice of protest, and this habit alone (apart from or in the absence of a minute of the sending) would be receivable to indicate the probability that a specific notice was sent.'

"In State v. Day, 108 Minn. 121, 121 N. W. 611, the Supreme Court of Minnesota says: 'A similar question was raised in Komp v. State, 129 Wis. 20, 108 N. W. 46, where the notary testified that to the best of his belief and judgment he administered the oath to Komp on or about the date of the jurat; that he was a busy man and administered many oaths; that his testimony was based on the fact that he made a practice not to put his name to the jurat unless he swore the affiant, and upon the fact that he found his name to the jurat and Komp's name to the affidavit; that he had

> no recollection independent of the papers, but to the best of his judgment the oath was administered. The court remarked, in the course of the opinion, that the mere want of present recollection as to the exact circumstances under which the oath was taken did not necessarily control the presumption of fact arising from the official certificate.' And the testimony was held admissible. * * * * * * *
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> "See, also, Gurley v. Pilgrim Oil Co. (Tex. Com. App.) 285 S. W. 283; Leonard v. Mixon, 96 Ga. 239, 23 S. E. 80, 51 Am. St. Rep. 134.
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> "The acknowledgment of the notary public is in statutory form and states that 'the said Mrs. S. E. Lancaster, wife of the said J. S. Lancaster, having been examined by me privily and apart from her husband,' etc. The testimony of the other witnesses on this issue was conflicting. * * *
>
> "In our opinion, it was not error to admit the testimony objected to, and the sufficiency of the evidence to support the finding of the jury is not questioned, and, in our opinion, warrants the finding that J. S. Lancaster was not present at the time the notary took the acknowledgment of his wife, S. E. Lancaster. * * "

It will be noted that this is a Texas case, but would, no doubt, be authority in Missouri, should a person be forced to call the notary to testify as to what took place when he executed the acknowledgment attacked in the proceeding. The court, in the case of Barrett v. Davis, 104 Mo. 549, l. c. 555, said:

> "In our state, in view of the obvious meaning of the statute on this subject, the courts have felt constrained to hold that such certificates may be avoided by evidence aliunde showing their falsity

> Mays v. Pryce (1888), 95 Mo. 603; Pierce v. Georger (1891), 103 Mo. 540; 15 S. W. Rep. 849. That construction has been too long accepted as settled law to require re-examination now. But, in applying it, in view of the recognized presumption of correctness attaching to the acts of public officials, we are of opinion that there should be a clear and decided preponderance of evidence to warrant discarding as false any such certificate. * * "

The case of Mays v. Pryce, 95 Mo. 603, holds officer competent to either support or impeach certificate. See Wannell v. Kem, 57 Mo. 478, Commings v. Leedy, 104 Mo. 454, Drew v. Arnold, 85 Mo. 128.

The cases seem to uniformly hold that a notary public cannot contradict his own acknowledgment. However, in Missouri, there are certain exceptions. In this connection we call attention to the case of Commings v. Leedy, supra, Mays v. Pryce, supra, and the case of Stiffen v. Bauer, 70 Mo. 399.

For other cases see 1 C. J. 896, Note 63, and 1 C. J. S. 901. 1 C. J. P. 894, Par. 277, reads as follows:

> "The presumption being in favor of the truth of the certificate, it follows that one who seeks to impeach it has the burden of proof as to the matters relied on to invalidate it."

See Missouri Cases, Note 48 C. J., supra.

From the review of the foregoing statutes and cases herein enumerated, one must conclude that an acknowledgment, regular on its face, attached to an instrument, wherein, such instrument becomes the subject of legal inquiry, the person relying upon said instrument has the right to have the acknowledgment attached thereto admitted in evidence.

In Pierce v. Goerger, 103 Mo. 540, l. c. 544, the court said:

> "* * * This statute has been in existence since 1845 and possibly longer. The rule adopted has stood, through several revisions of the statute, without statutory change, and it must be regarded as in accord with the policy of the state. * * * "

Section 3435, supra, provides that any person who desires to attack said acknowledgment on any grounds must do so through a direct proceeding. We think that if an attack is made it must be proved through competent witnesses and substantial evidence that such acknowledgment is, in fact, a purported acknowledgment and is untrue and this must be proved through clear, cogent and convincing evidence, leaving no doubt in the minds of the court but what such acknowledgment is false.

It was reasoned in the case of Kennedy v. Ten Broeck, 11 Bush (Ky.) 241, 1 C. J. S. 900, as follows:

> "Since the officer will not be allowed to stultify himself by impeaching his certificate, ex parte statements made and signed by him in the form of affidavits are inadmissible to show the falsity of the certificate of acknowledgment."

Now we shall turn to that part of your request which makes inquiry as to the method of revoking a commission given to a notary public in accordance with Section 13360, supra.

In reading the aforesaid Section it will be noted that the Section provides, in part, as follows:

> "Each such notary shall hold office for four years, * * * ."

In the case of The People ex rel Finlay v. Jewett, 6 Calif. 291, the court had before it a case wherein the question was presented whether the Governor of the State can remove from office a notary appointed under the provision of an act of the legislature. In refusing the right to the Governor to remove said notary, the court reasoned as follows: (l. c. 293)

> "* * * * But when the duration of the office is fixed by the law creating it, and where there is a provision for removal during the time limited for the continuance in office, it would seem to me that the officer is not removable, except in the manner prescribed by the law. This incidental power of removal is not expressly given by the Constitution, and it extends only by necessary implication to such offices as the Governor possesses exclusively the power of appointment to, under the Constitution, or the power is granted to him by the law creating the office, where there is no restriction on the power of removal.'
>
> "The Supreme Court of Illinois has gone further, and decided in Field v. The People, 2 Scam., 79, 'that when the Constitution creates an office, and leaves the tenure undefined and unlimited, the officer holds during good behavior, and until the Legislature by law limits the tenure to a term of years, or authorizes some functionary of the government to remove the officer at will, or for good cause.'
>
> "The soundness of this decision may be questioned, but I apprehend that there can be no doubt that the power of removal by the executive of this State

> has been circumscribed, and can only exist in the cases enumerated in the Constitution, section 7, Article XI, which provides as follows: 'Where the duration of any office is not provided for by this Constitution, it may be declared by law, and if not so declared, such office shall be held during the pleasure of the authority making the appointment; nor shall the duration of any office, not fixed by this Constitution, exceed four years.' The obvious meaning of which is, that in those offices the term of which is not fixed by law, the incumbent may be removed at the pleasure of the appointing power; but where the tenure is defined, then the officer shall hold for his full term. * * * "

We have not been able to find a case wherein a contrary view has followed. Therefore, on the authority of this case, it is our opinion that the Governor could not remove a notary for the reasons set forth in the Jewett case, Supra. The only other way that suggests itself is through a quo warranto proceeding. After a diligent search, we have not found a case in any jurisdiction wherein this method was attempted. The foremost authority to substantiate this method in Missouri, is the case of State ex rel McKittrick v. Wymore, 119 S. W. (2d) 941, l. c. 943, wherein, the court said:

> "* * * The writ is not directed against the individual claiming the office. It is directed against his right to hold the office. It is not an action in the interest of any individual. It is an action to protect the public against usurpation. 22 Stan. Ency. of Procedure, p. 25. The dominant issue in quo warranto is title. It proceeds on the theory that the office has been for-

feited by an act of misconduct on the part of the official. On the other hand, removal concedes title and proceeds on the theory that the official either has not 'forfeited by the act forbidden' or has committed a criminal offense and subjected himself to punishment and forfeiture of the office on conviction. The courts are without authority to create and declare a forfeiture of office. Absent forfeiture at common law, the forfeiture can be created and declared only by either the constitution or valid legislative enactments. The rule is stated by standard texts as follows:

"'Quo warranto will also lie for the purpose of ousting an incumbent whose title to the office has been forfeited by misconduct or other cause. And in such a case it is not necessary that the question of forfeiture should ever before have been presented to any court for judicial determination, but the court, having jurisdiction of the quo warranto proceeding, may determine the question of forfeiture for itself. The question must, however, be judicially determined before he can be ousted. "And if the alleged ground for ousting the officer is that he has forfeited his office by reason of certain acts or omissions on his part, it must then be judicially determined, before the officer is ousted, that these acts or omissions of themselves work a forfeiture of the office. Mere misconduct, if it does not of itself work a forfeiture, is not sufficient. The court has no power to create a forfeiture, and no power to declare a forfeiture where none already exists. The forfeiture must exist in fact before the action of quo warranto is commenced."' Mechem, Public Officers, Sec. 478, p. 308. * * * "

If it could be said that the language of the court in this case is strong enough in reasoning to give this right, then this remedy would be the proper remedy in Missouri. However, we doubt very seriously whether the courts would uphold a quo warranto proceeding against a notary public unless the relator (who would have the burden of proof) would have to bring forth evidence of a sufficient amount and character, which would convince the court that the public interest could only be served through the ouster of the named defendant, for the court said further in this case, at l. c. 943:

> " * * * The court which has original jurisdiction in quo warranto may determine the question of right or the question of forfeiture for itself, unless the statute provides that forfeiture shall follow a criminal prosecution and sentence, and if the act complained of does not ipso facto create a forfeiture, and is only a misdemeanor in office on account of which the law provides the manner in which the vacancy is to be declared, it is held that quo warranto will not lie.' Ency of Pleading & Practice, Vol. 17, p. 400. * * * "

It will be noted in the same opinion at l. c. 944, the Court, in interpreting Section 11202 R. S. Missouri, 1929, (now Section 12828 R. S. Missouri, 1939) said that the Section, through the use of the word "may" makes it permissible only, and an offending official, within the meaning of this Section may also be removed, should the Courts declare a forfeiture under said Section. This Section reads, as follows:

> "Any person elected or appointed to any county, city, town or township office in this state, except such

> officers as may be subject to removal by impeachment, who shall fail personally to devote his time to the performance of the duties of such office, or who shall be guilty of any willful or fraudulent violation or neglect of any official duty, or who shall knowingly or willfully fail or refuse to do or perform any official act or duty which by law it is his duty to do or perform with respect to the execution or enforcement of the criminal laws of the state, shall thereby forfeit his office, and may be removed therefrom in the manner hereinafter provided."

In the case of Bakersfield News v. County, 338 Mo. 519, 92 S. W. (2d) 603, the court held that a public officer who is guilty of any wilful or fraudulent violation or neglect of any official duty may be removed from office by the method provided in this Section.

Section 1886 R. S. Missouri, 1939, reads as follows:

> "In all cases in which an oath or affirmation is required or authorized by law, every person swearing, affirming or declaring, in whatever form, shall be deemed to have been lawfully sworn, and to be guilty of perjury for corruptly and falsely swearing, affirming or declaring, in the same manner as if he had sworn by laying his hand on the gospels and kissing them."

It will be noted in the case of State v. Privitt, 337 Mo. 1194, 39 S. W. (2d) 755, l. c. 757, the court said:

> "* * * It is true that, by uniform decisions of our courts and by our statutes, no set formula is required to

constitute an oath or to impose the obligation of an oath. * * * "

See also Silver v. K. C. St. L. & C. Ry. Co., 21 Mo. App. 5.

CONCLUSION.

In conclusion, first, we are of the opinion that an acknowledgment, or jurat, attached to an application for a liquor license, or a non-intoxicating beer license, when the same is at issue in a court of record, should be received by the court as prima facie evidence of all the matters and things set forth in the acknowledgment or jurat, if the same is regular upon its face, notwithstanding the fact that there is no specific statute as there is in the case of conveyance of real estate.

Secondly, we are of the opinion that should the evidence warrant, a notary public could be removed from office through a quo warranto proceeding.

Thirdly, we are of the opinion that the office of notary public could be forfeited and the notary removed under Section 12828 R. S. Missouri, 1939, should the evidence warrant.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

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