

undue advantage, merely because the witnesses who attest the signature of the mortgagor and the notary public taking his acknowledgment are stockholders of, but not otherwise interested in the corporation named in said mortgage as grantee.

2. In taking and certifying an acknowledgment, as provided in said Section 4106, the act of the notary public or other officer taking and certifying the same is a ministerial and not a judicial act."

Your attention is also directed to the case of *Horton vs. Columbian Building and Loan Society*, 6 Bull., 141, decided by the District Court of Mahoning County, in which it was held:

"That the notary before whom a mortgage to a corporation is acknowledged is a stockholder and also an officer, being the secretary and treasurer of the corporation, does not disqualify him or invalidate the mortgage."

Specifically answering your first question, it is my opinion that the word "broker", as used in Section 121, General Code, relates to a dealer in moneys, notes, bills of exchange, etc., that is, a broker doing a banking business or a business of a like nature, and does not include a real estate broker as that term is defined by Section 6373-25, General Code.

With reference to your second question it is my opinion that:

1. In Ohio the act of a notary public taking and certifying an acknowledgment is a ministerial and not a judicial act.

2. As a general proposition an officer, who is a party to an instrument or interested therein, is disqualified from taking an acknowledgment. For this reason, a grantee is disqualified, on grounds of public policy, to act in an official character in taking and certifying the acknowledgment of the grantor. However, under the holding of the Supreme Court of Ohio in the case of *Reid vs. Toledo Loan Co.*, 68 O. S. 280, an instrument properly executed is not invalid and cannot be impeached, in the absence of fraud and undue advantage, for the reason that the notary public taking the acknowledgment of the grantor is a stockholder of, but not otherwise interested in, a corporation named as grantee.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2045.

TOWNSHIP TRUSTEES—FUNDS FROM WHICH THEY MAY PURCHASE
REPLACEMENT MACHINERY—FUNDS FROM WHICH THEY MAY
PURCHASE ADDITIONAL MACHINERY.

SYLLABUS:

1. *Township trustees may purchase machinery to replace machinery worn out in the operation of a stone quarry owned and controlled by the township from the following funds:*

(a) *The general fund, to the extent that there are moneys in said fund available for said purpose.*

(b) *A tax levy within the fifteen mill limitation for current expenses, if it be possible to make such levy.*

(c) *A tax levy outside of the fifteen mill limitation, for current expenses, authorized by a vote of the electors under the provisions of Section 5625-15, et seq., General Code.*

(d) *The proceeds of a bond issue, the authority to issue such bonds having been first obtained by vote of the electors pursuant to the provisions of Sections 2293-19, et seq., General Code.*

2. *Township trustees may purchase additional machinery for use in the operation of a stone quarry owned by the township out of the levy of a tax or an issue of bonds, as provided in Section 3298-20, General Code. The authority to levy such tax must first be obtained by a vote of the electors and the question of levying such tax must be submitted to the electors in the manner prescribed by Sections 5625-15, et seq., General Code. The authority to issue such bonds must first be obtained by a vote of the electors and the question of issuing such bonds must be submitted to the electors in the manner prescribed in sections 2293-19, et seq., General Code.*

COLUMBUS, OHIO, May 2, 1928.

HON. ALBERT T. STROUP, *Prosecuting Attorney, Van Wert, Ohio.*

DEAR SIR:—Receipt is acknowledged of your communication of recent date, which reads as follows:

“Will you kindly inform me how Township Trustees are to proceed in buying replacement and additional machinery for a stone quarry which is owned by said Trustees?”

The law seems to provide how a new stone quarry owned by a Township can be equipped with an all new outfit of machinery but does not provide how additional and replacement machinery may be purchased when needed.”

In your communication you undoubtedly refer to Section 3298-20, General Code. Prior to its amendment by the 87th General Assembly in The Uniform Bond Act (112 O. L. 364, 368), Section 3298-20, General Code, contained the authority for the purchase by township trustees of real estate containing suitable stone and gravel and the necessary machinery for operating the same. Prior to said amendment said section provided in part:

“The trustees of a township may levy a tax in such amount, as they determine, to purchase real property, containing suitable stone or gravel, and the necessary machinery for operating the same, when deemed necessary for the construction, improvement, or repair of the public roads within the township, to be under the control of the trustees or a person appointed by them. The question of levying such tax, for such purpose, and the amount asked therefor shall be submitted to the qualified electors of the township at a general election * * *.”

As amended by the Legislature, and as it now reads, Section 3298-20, General Code, provides:

“No tax shall be levied or bonds issued by the trustees of a township to purchase real property containing suitable stone or gravel and the necessary machinery for operating the same, unless approved by a vote of the people in the manner provided by law.”

It will be observed that as it now stands Section 3298-20, General Code, no longer contains specific authority to purchase real estate containing stone or gravel and the

necessary machinery for operating the same, except as such authority may be implied from the limitation that no tax shall be levied or bonds issued by township trustees for such purpose unless the same be approved by a vote of the people. However, from your communication, I assume that the township trustees acquired the stone quarry in question prior to the recent amendment of Section 3298-20, General Code.

In both forms of Section 3298-20, General Code, that is, before and after its amendment in The Uniform Bond Act, the inhibition against township trustees levying a tax or issuing bonds without a vote of the people is on the purchase of real estate *and* machinery. This section is clearly limited to the initial expenditure, that is, the original acquisition of real estate and the machinery necessary to quarry stone or gravel, and does not cover the operation of the stone quarry or gravel pit, once it has been acquired, or the repair or replacement of machinery necessary to such operation. A favorable vote of the people authorizing the purchase of real estate and machinery for operating the same establishes a definite policy, that is, it authorizes the purchase of said real estate and authorizes the trustees to purchase machinery and operate the quarry. Once this policy has been established the authority to operate continues and carries with it the power to replace parts of machinery that have been broken and to purchase new machinery to replace that which has become worn out in the course of such operation. In my opinion, therefore, Section 3298-20, General Code, has no application to the purchase by township trustees of machinery for the operation of a stone quarry to replace worn-out machinery originally acquired for that purpose, pursuant to and in accordance with the authority contained in the statutes.

There is no specific authority in Section 3298-20, General Code, either in its original or amended form, for township trustees to purchase machinery to replace worn-out machinery in a stone quarry owned and controlled by said township trustees, nor do I find such authority in any other section of the code. However, both the old and new Sections, 3298-20, speak of "necessary machinery for operating the same." Obviously, if the township trustees have power to purchase real estate for a stone quarry and necessary machinery for operating the same, such operation would carry with it the authority to repair broken parts and replace machinery that has been worn out in such operation.

The question then presents itself as to the source from which the funds with which to purchase machinery to replace worn-out machinery in a stone quarry owned and controlled by township trustees shall be obtained. As pointed out above, the authority to purchase real estate for a stone quarry and the necessary machinery for operating the same carries with it a continuing authority so to operate and, if in the course of such operation, it becomes necessary to replace broken parts or worn-out machinery, the cost of such replacements may be included in the cost of operation. Such cost of operation is a current operating expense or current expense, as defined in Section 5625-1, General Code (112 O. L. 391), hereinafter referred to, and must be paid out of the general fund. If, therefore, there are in the general fund moneys available for that purpose, I am of the opinion that township trustees may use such moneys to purchase machinery to replace that worn out in the operation of stone quarries owned and controlled by such trustees. In this connection, your attention is directed to Section 3298-24, General Code, which authorizes township trustees to make sales of stone, crushed stone, stone screenings, dirt, gravel, sand or other similar material produced in the operation of a stone quarry or gravel pit. Section 3298-24, General Code, provides:

"From any real estate purchased and controlled, under and by virtue of Sections 3298-20 to 3298-23, inclusive, of the General Code, stone, crushed stone, stone screenings, dirt, gravel, sand or other similar material may be sold by the township trustees in control thereof to residents of the county or counties in which is situated the township or townships owning such real estate. Any of such materials needed in the construction, reconstruction,

improvement, maintenance or repair of a public school house, public road or any other public improvement, located in the county or counties in which is situated the township or townships owning such real estate, may be sold for use in such construction, reconstruction, improvement, maintenance or repair by the board or joint board of township trustees. Such materials shall be sold at prices fixed by the board or joint board of township trustees in control thereof, which prices shall not be less than the full cost of producing such materials. The moneys arising from such sales in excess of the actual cost of production shall be placed in the pike repair fund of the township or townships."

You will note that under the provisions of the above quoted section the moneys arising from such sales in excess of the actual cost of production shall be placed in the pike repair fund of the township or townships owning such real estate. This provision would clearly prohibit township trustees owning and controlling a stone quarry from building up a fund out of profits resulting from the sale of the products of such stone quarry to be used for the replacement of wornout or broken machinery. However, I see no reason why, in calculating the actual cost of production, the township trustees should not include, as a part of such cost, a charge for depreciation based upon the estimated life of such machinery. The proceeds from such charge would, of course, have to be placed in the general fund, and if at the time it becomes necessary to replace such machinery the township trustees have in the general fund sufficient funds to purchase replacement machinery, I see no reason why such fund could not be lawfully used for such purpose.

If, on the other hand, the township trustees have no funds in their hands from which such machinery may be purchased, it will, of course, be necessary to levy a tax or to issue bonds to cover the cost thereof. The provisions for levying taxes by townships and other subdivisions are found in House Bill No. 80 of the 87th General Assembly (112 O. L. 391). In Section 1 of that act (Section 5625-1, General Code), the following definition appears:

"The following definitions shall be applied to the terms used in this act:

* * *

(f) 'Current operating expenses' and 'current expenses' shall mean the lawful expenditures of a subdivision, except those for permanent improvements, and except payments for interest, sinking fund and retirement of bonds, notes and certificates of indebtedness of the subdivision.

* * *"

Section 4 of said act (Section 5625-4, General Code), provides, in part, as follows:

"The taxing authority of each subdivision shall divide the taxes levied into the following separate and distinct levies:

* * *

2. The general levy for current expenses within the fifteen mill limitation.

* * *"

Under the provisions of the above quoted sections, the purchase of machinery to replace that worn out in the operation of a stone quarry would come under the head of current operating expenses or current expenses, and if the township trustees do not have any funds in their hands from which to purchase machinery to replace that worn out in the operation of a stone quarry owned by such trustees, such trustees may, if they find it possible so to do, levy a tax within the fifteen mill limitation to provide such funds.

Should it be found impossible to levy a tax within the fifteen mill limitation, the authority to make such levy must be obtained by a vote of the electors in accordance with Sections 5625-15, et seq., General Code (112 O. L. 397).

If the township trustees determine that bonds should be issued to provide funds with which to purchase replacement machinery, your attention is directed to Section 2293-17, General Code (112 O. L. 364, 372), which provides:

"The net indebtedness created or incurred by a township, exclusive of the bonds excepted in Section 2293-13 of the General Code, and exclusive of county bonds issued in anticipation of township tax levies shall never exceed two per cent of the total value of all property in such township as listed and assessed for taxation; and no such indebtedness with such exceptions shall be incurred unless authorized by vote of the electors."

You will note that under the provisions of the above quoted section township trustees have no authority to issue any bonds unless authorized by vote of the electors, except such bonds as are specifically excepted in Section 2293-13, General Code. The latter section defines "net indebtedness" and provides that certain bonds shall not be considered in calculating such net indebtedness. Among the bonds so excepted are the following township bonds: Bonds issued in anticipation of the collection of special assessments, either in original or refunded form, and bonds issued to pay final judgments. It follows that if the township trustees desire to issue bonds to purchase replacement machinery for use in a stone quarry owned by the township, authority to issue such bonds must be first obtained from the electors. Such elections are now controlled by Sections 2293-19, et seq., General Code (112 O. L. 364, 372).

The above discussion has been limited to the purchase of machinery to replace that worn out in the operation of a stone quarry owned and controlled by township trustees. However, you inquire both as to replacement and *additional* machinery. For the purposes of this opinion I assume that by additional machinery you mean machinery not for replacement purposes but to increase the output of the stone quarry. Under such circumstances, it is my opinion that Section 3298-20, General Code, would apply; and if it becomes necessary to levy a tax or to issue bonds to purchase such additional machinery a favorable vote of the people is a necessary incident and condition precedent to the levying of such tax or the issuance of such bonds. I do not wish to be understood as holding that Section 3298-20, General Code, applies to purchases of replacement machinery, which, because of later design and better construction, is more efficient than the old machinery which is being discarded, and thereby increases the output of the quarry, but that said section applies to purchases of additional machinery only. If the township trustees determine to issue bonds for the purpose of purchasing additional machinery for use in the stone quarry, the discussion above as to the effect of Section 2295-17, General Code, is also applicable.

Answering your question specifically, it is my opinion that:

1. Township trustees may purchase machinery to replace machinery worn out in the operation of a stone quarry owned and controlled by the township from the following funds:

(a) The general fund, to the extent that there are moneys in said fund available for said purpose.

(b) A tax levy within the fifteen mill limitation for current expenses, if it be possible to make such levy.

(c) A tax levy outside of the fifteen mill limitation, for current expenses, authorized by a vote of the electors under the provisions of Section 5625-15, et seq., General Code.

(d) The proceeds of a bond issue, the authority to issue such bonds having been first obtained by vote of the electors pursuant to the provisions of Sections 2293-19, et seq., General Code.

2. Township trustees may purchase additional machinery for use in the operation of a stone quarry owned by the township out of the levy of a tax or an issue of bonds, as provided in Section 3298-20, General Code. The authority to levy such tax must first be obtained by a vote of the electors and the question of levying such tax must be submitted to the electors in the manner prescribed by Sections 5625-15, et seq., General Code. The authority to issue such bonds must first be obtained by a vote of the electors and the question of issuing such bonds must be submitted to the electors in the manner prescribed in Sections 2293-19, et seq., General Code.

Respectfully,

EDWARD C. TURNER,
Attorney General.

2046.

COUNTY COMMISSIONERS—AUTHORITY TO WIDEN INTER-COUNTY
HIGHWAYS—SECTIONS 1191 AND 6860, GENERAL CODE, CONSTRUED.

SYLLABUS:

Where an application for state aid for the improvement of an inter-county highway, as a part of the state highway system, is made by the county commissioners of a county, under the authority of Section 1191, General Code, prior to the effective date of the Norton-Edwards Act (112 v. 430), amending said section, and said application is approved by the Director of Highways, the county commissioners of such county may widen the road to be improved and acquire the necessary land therefor under the authority of Section 6860, et seq., as amended in said Norton-Edwards Act, which section inter alia requires the approval of the Director of Highways when roads on the state highway system are concerned.

COLUMBUS, OHIO, May 2, 1928.

HON. SETH PAULIN, *Prosecuting Attorney, Painesville, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication in which you request my opinion upon a certain question therein stated. Your communication is as follows:

“In November, 1927, the county commissioners of Lake County, Ohio, made application under Section 1191 of the General Code to the Director of Highways of the State of Ohio, to improve an inter-county highway now designated as the Wickliffe-Madison Road S. H. No. 563, and shortly thereafter the Director of Highways approved the application and set aside certain funds to pay the state's share of the cost of said improvement. It was discovered in January, 1928, that part of this road was only 40 feet in width and the Commissioners of Lake County thereupon started proceedings to locate the center line of said road and widen said portion of said road to 60 feet under authority of Section 6860, General Code, as enacted by the 87th General Assembly.

The question has now arisen as to whether the Commissioners can properly proceed to widen this road under the provisions of Section 6860 as re-