2044.

NOTARY PUBLIC—CERTIFYING AN ACKNOWLEDGMENT IS MINISTERIAL AND NOT JUDICIAL ACT—RULE AS TO INTERESTED PARTIES TAKING ACKNOWLEDGMENTS—"BROKER" AS DEFINED IN SECTION 121, GENERAL CODE.

*SYLLABUS:*

1. *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.*

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

3. *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.*

COLUMBUS, OHIO, May 2, 1928.

HON. RALPH E. HOSKOT, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of recent date reading as follows:

> "Our opinion has been requested in the following matter and we should appreciate very much having your opinion on the subject.
>
> The question is, is a real estate broker disqualified under Section 121 of the General Code of Ohio from acting as Notary Public on instruments involving transactions between parties he may be representing or instruments involving transactions for his own company?
>
> Also does this same section disqualify a director or other officer from acting as Notary Public when his company is one of the parties to the instrument?"

Section 121 of the General Code, to which you refer, provides that:

> "No banker, broker, cashier, director, teller, or clerk of a bank, banker or broker, or other person holding an official relation to a bank, banker, or broker, shall be competent to act as notary public in any matter in which such bank, banker, or broker is interested."

This section was originally enacted as Section 7 of an act passed March 13, 1856 "Concerning Notaries Public and Commissioners, and prescribing their duties" (55 v. 13). As then enacted this section read:

> "No banker, broker, or officer, attorney, stockholder, clerk or agent, of any bank, banker, or broker, shall be appointed to, or shall hold the office of notary public in this state."

The section was amended on April 6, 1866 (63 v. 161) to read as follows:

> "No banker, broker, officer or clerk of any bank, banker or broker, shall hold the office of notary public in this state; nor shall any stockholder, attorney, or agent of any bank, banker or broker be competent to act as notary public in any manner to which such bank, banker or broker *shall be a party in interest;* and in every instrument of protest, the notary making the same shall certify that he has no interest in the instrument protested." (Italics the writer's.)

The section under consideration was again amended on April 11, 1876 (73 v. 206), the principal changes being the omission of the word "officers" in the first line and the insertion of the words "cashier, teller" in its stead, and changing the phrase "nor shall any stockholder, attorney, or agent of any bank, banker or broker" to read "nor shall any director, stockholder, attorney, agent or other person holding any official relation to any bank, banker or broker."

On March 23, 1893, the section was amended to read:

> "No banker, broker, cashier, director, teller, or clerk of any bank, banker or broker or other person holding any official relation to any bank, banker, or broker, shall be competent to act as notary public in any matter to which said bank, banker, or broker is in any way interested."

(90 vs. 119), and as then enacted was carried into the General Code as Section 121 in its present form.

The statutory history of this section above set forth throws little light upon the meaning of the word "broker" except that the last clause in the section as enacted on April 6, 1866 and April 11, 1876 (63 v. 161 and 73 v. 206) to the effect that "in every instrument of protest, the notary making the same shall certify that he has no interest in the instrument protested" would seem clearly to indicate that the Legislature had in mind brokers doing a banking business or a business of a like nature.

It is plain that Section 121, General Code, is a restrictive statute and, in disqualifying any person holding an official relation to a bank, banker or broker from acting as notary public in any matter in which the bank, banker or broker is interested, regardless of the nature or extent of such interest, or whether such interest be a direct one, it departs from the common law rule. While such a statute should not be construed so as to defeat the purpose of the Legislature, it nevertheless should be strictly construed and should only be applied to those coming clearly within its terms.

The third definition of the word "broker" given in Webster's New International Dictionary is as follows:

> "A dealer in moneys, notes, bills of exchange, etc.; often with a qualifier, as, *bill broker, exchange broker.* * * *"

One of the well settled rules of statutory construction is that associated words explain and limit each other. This rule is expressed in the maxim *"noscitur a sociis."* With reference to this rule, in 36 Cyc. 1118, it is said as follows:

> "In accordance with the maxim, *noscitur a sociis*, the meaning of a word used in a statute must be construed in connection with the words with which it is associated. Where several words are connected by a copulative conjunction, they are presumed to be of the same class, unless a contrary intention appears."

In Lewis' Sutherland Statutory Construction, Second Edition, at page 803, the author says:

> "Not only are words and provisions modified to harmonize with the leading and controlling purpose or intention of an act, but also by comparison of one subordinate part with another; that is to say, the sense of particular words or phrases may be greatly influenced by the context, or their association with other words and clauses. The principle is embodied in the maxim, *noscitur a sociis*, and is applicable to the construction of all written instruments. When two or more words are grouped together, and have ordinarily a similar meaning, but are not equally comprehensive, they will quality each other when associated; they may import a conventional sense and have great scope when so used without restriction in the context, and they may be capable of widely different applications when specialized by accompanying provisions expressive of a particular intention or limited application. The expression, for instance, of 'places of public resort' assumes a very different meaning when coupled with 'roads and streets' from that which it would have if the accompanying expression was 'houses.' In an enactment respecting houses 'for public refreshment, resort and entertainment,' the last word was understood to refer to, not a theatrical or musical or other similar performance, but something contributing to enjoyment of the 'refreshment.' * * *"

Applying this rule of construction to the statute under consideration, I am of the opinion that the word "broker," as used in Section 121, General Code, should be construed in the light of the words "banker * * *, cashier, director, teller or clerk of a bank, * * *" and held to mean only such brokers as are dealers in money, notes, bills of exchange, etc., that is, brokers doing a banking business or business of like nature as distinguished from real estate brokers, bond brokers, commission merchants, pawnbrokers and the like. Not only does the association of the word "broker" with the words bank and banker sustain this view but the context of the statute as it now reads and as it previously read supports these conclusions as well.

Your question is no doubt prompted by the fact that the Legislature, in the enactment of the act providing "for the regulation by license, of real estate brokers and real estate salesmen," enacted Section 6373-25, General Code, which among other things defines "a real estate broker" as the term is used in such act. This section, as amended by the 87th General Assembly on April 21, 1927 (112 vs. 262), reads in part as follows:

> "As used in this act:
>
> 'Real estate broker' means a person, firm or corporation who, for a commission, compensation or valuable consideration, sells, or offers for sale, buys, or offers to buy, negotiates the purchase or sale or exchange of real estate, or leases, or offers to lease, rents, or offers for rent, any real estate, interest therein or improvement thereon, for others. * * *"

It will be observed that this section simply defines the term real estate broker as used in the act of which such section is a part. It does not create a new kind of broker but on the other hand provides that a person, firm or corporation, who does any of the things specified in the section shall be comprehended within the term of real estate broker as that term is used in the law requiring brokers and salesmen of real estate to be licensed. The business or acts described in Section 6373-25, General Code, have been carried on for many years, both prior and subsequent to the enact-

ment of Section 121, General Code; and it is manifest that if the persons now defined by statute as real estate brokers for the purpose of the real estate license law are now within the inhibition contained in Section 121, General Code, they were just as clearly within that inhibition before the Legislature saw fit to license real estate brokers and salesmen, thus making it necessary or desirable to define a real estate broker by statute. As a matter of fact, persons engaged in the kinds of business specified in Section 6373-25, General Code, prior to the enactment thereof, were not generally called brokers, such persons generally being designated as real estate agents, estate men, dealers in real estate, realtors, etc.

For the reasons above set forth, therefore, 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., and does not include a real estate broker as that term is defined by Section 6373-25, General Code.

Your second question is:

> "Also does this same section (Section 121, G. C.) disqualify a director or other officer from acting as notary public when his company is one of the parties to the instrument."

I am not clear from your question whether the company referred to by you is a real estate company, or whether your question is general. In view, however, of the answer to your first question, the rule would be the same in either case, except where the director or other officer is a director of, or an officer "holding an official relation to a bank, banker or broker." In any event, in view of the general nature of your question, it is impossible to give a categorical answer thereto.

As a general proposition an official is incapacitated to act in a matter in which he has self interest. In its application to notaries public, in Section 21 of John's American Notaries, the author states the law as follows:

> "It has been held that the probate of a deed of trust before a notary public who is a preferred creditor, is invalid, upon the principle of the common law that no one can sit in judgment upon his own cause, and as a general proposition an officer who is a party to an instrument, or interested therein, is disqualified from taking an acknowledgment. This is a rule of public policy arising because of the probative force attached to the notary's certificate. The question of what interest or relationship will disqualify a notary from acting in a transaction is, however, a rather difficult one, depending upon the facts of each case. Usually agents or attorneys are not disqualified unless financially interested in the transaction involved, although attorneys who are notaries are frequently disqualified from taking the oaths of their clients. Stockholders who are beneficially interested have been held disqualified from acting as notaries, although other decisions hold that they are qualified. Officers of a corporation who are beneficially interested, but who are not stockholders, are not disqualified. In some states, the statutes prohibit a stockholder, director, cashier or other officer of a bank from also exercising the office of notary, and in other states, such acknowledgments have been rendered valid by statute. Still other decisions hold the act of an interested official as notary voidable, and it will be set aside on proof of fraud, oppression or undue advantage."

A concise statement of the law in Ohio, citing Ohio cases, is contained in a note, at page 2, of Couse's New Ohio Form Book, which reads:

"Interest as a party to the transaction will, in general, prevent an officer from acting in his official character. The grantee in a deed or mortgage is disqualified on grounds of public policy from taking the acknowledgment of the grantor. But the interest must be a direct one. The taking of an acknowledgment is a ministerial and not a judicial act. Where the grantee is a corporation, the interest of a stockholder is not such as to disqualify him from acting in his official character in taking the acknowledgment of the grantor. And the secretary and treasurer of a corporation is not disqualified from taking the acknowledgment of a person executing a mortage to it. The fact that the notary public is a clerk in the office of the attorney for the grantee does not invalidate the acknowledgment. Bank officers and employes, however, are disqualified from acting in any matter in which the bank is interested.

The fact that the officer signs as an attesting witness does not prevent his taking the acknowledgment also."

In the case of *Amick* vs. *Woodworth et al.*, 58 O. S. 87, cited in a note to the above quotation from Couse, it was held:

"A grantee in an instrument for the conveyance or incumbrance of real property is disqualified, on grounds of public policy, to be an attesting witness to its execution, or to act in an official character in taking and certifying the acknowledgment of the grantor."

In the opinion Judge Williams said:

"The statute does not in express terms forbid a grantee in an instrument for the conveyance or incumbrance of real property to take and certify the grantor's acknowledgment, nor disqualify him as a witness to its execution, nor declare an instrument so attested and acknowledged to be void. Nor, does the effect of such attestation or acknowledgment on the validity of the instrument appear to have been considered in any reported decision of this court. It is generally held, however, in other states, under statutes similar to ours, that deeds and mortgages so attested and acknowledged are not entitled to record; and, if recorded, are inoperative as constructive notice to persons who subsequently acquire an interest in or lien on the property. The reason given in some of the cases is, that taking an acknowledgment of such an instrument is a judicial, or *quasi* judicial act, and comes within the rule that one cannot be a judge in his own case. This reason would not apply to the attestation by the grantee. The true reason of the disqualification we apprehend is, that to permit a grantee to attest as a witness the execution of an instrument made to himself, or take its acknowledgment as an officer, where its attestation and acknowledgment are necessary to give it validity, would be against public policy, and practically defeat the real purpose of the law, which is to prevent the perpetration of frauds on the grantors, and afford reasonable assurance to those who deal with or on the faith of such instruments that they are genuine and represent *bona fide* transactions."

This case was distinguished by the Supreme Court in the case of *Read* vs. *Toledo Loan Company*, 68 O. S. 280, in which it was held:

"1. A mortgage executed agreeably to the provisions of Section 4106, Revised Statutes of Ohio, and attested and acknowledged as therein provided, is not invalid and cannot be impeached, in the absence of fraud and

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.*

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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.*