and that no bond or other security has been exacted as a condition of original qualification. The language is that such additional security may be required of a company "which shall have been so appointed," and the provision goes on to say that "upon failure * * * to give security as required" the appointing authority "may remove such trust company and revoke such appointment."

So that it is clear that the section does not contemplate that even the exception shall apply in the case of original appointment.

Coming now to the specific question submitted, it seems to me that the natural import of the phrase "upon proper application" is such as to exclude action by the court *sua sponte*. The court is not to move of its own accord, but only to act when moved by an "application." Who, then, may apply, and how should an application be made in order to be "proper?" The section itself does not furnish very satisfactory answers to those questions, although it suggests as a natural meaning that the application shall be made as other applications in like cases would be made by any party in interest.

However, it is believed that the next succeeding section, 710-162, contains explicit provision which suggests the thought that was in the legislative mind. The pertinent language is as follows:

> "Any judge of a court in which such trust company is acting in such trust capacity, if he deems it necessary, or upon the written application of any party interested in the estate which it holds in a trust capacity, at any time, may appoint a suitable person or persons, who shall investigate the affairs and management of such trust company concerning such trust and make sworn report to the court of such investigation."

Here the legislature was dealing with action that might be taken either on the court's own motion or on application; but in dealing with the latter method of initiating the proceeding it is stipulated that the application shall be written and that it shall be made by "any party interested in the estate" held in a trust capacity "at any time."

It is believed that these qualifying words may be understood in connection with the phrase "upon proper application" as used in the preceding section, and that an application is proper if it is made by any person interested in the trust estate in writing and at any time.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1026.

DITCHES—"PENDING PROCEEDING"—IMPROVEMENT IN MORE THAN ONE COUNTY—MORE THAN TWO HUNDRED FREEHOLDERS AFFECTED—SERVICE OF NOTICE—HOW MADE—SECTION 6449 G. C. APPLICABLE.

1. *A ditch improvement project undertaken in accordance with sections* 6563-1 *et seq., repealed as of October* 11, 1919, (108*O. L.* 926), *was a "pending proceeding" within the meaning of section* 26 *G. C. when the steps taken in such project prior to the date of such repeal had included the various proceedings described by sections* 6563-1 *up to and including* 6563-14.

2. *Where the project in question concerns an improvement in more than one county, of the channel of a river, creek or run, and more than two hundred freeholders will be affected, service of notice of the hearing mentioned in sections* 6563-18 *G. C. is to be made in*

accordance with section 6449 *G. C. as amended* 106 *O. L.* 135, *and not in accordance with sections* 6563-15 *G. C. or* 6496 *G. C.; and the rule just stated is applicable as to notice to municipal corporations through which the improvement does not pass and as to notice to owners of affected lands in municipalities through which the improvement passes.*

COLUMBUS, OHIO, February 26, 1920.

HON. JONATHAN E. LADD, *Prosecuting Attorney, Bowling Green, Ohio.*

DEAR SIR:—This department received in due course your letter reading as follows:

"Some time ago a petition was filed with the auditor of Wood County, signed by fifty or more persons, praying for the improvement of a ditch or watercourse located in the counties of Hancock and Wood. This petition was filed under section 6563-1 of the General Code. Proceedings were delayed by reason of war conditions but are now taken up by the joint board of said counties.

Section 6563-15 of the General Code provides that the auditors of the respective counties shall give notice of the filing of said petition and that the question of the allowance of the prayer thereof will be heard before said joint board at the time and place, etc. Said notice to be served either personally or by copy left at usual place of residence of the persons named in the report of the Surveyors in the respective counties at least thirty days before the time of hearing.

Edward C. Turner, attorney-general, rendered an opinion to the prosecuting attorney of this county on June 1, 1916, as shown on page 958, 1916 Attorney-General's Opinions, affecting the construction of joint ditch improvement in Lucas, Ottawa and Wood counties, in which he held that costs for making and serving notices in joint county ditch improvements were regulated by section 6449 G. C., 106 O. L. 135. This section provides for personal service of notice upon each lot or land owner but further provides that if the petition prays for the improvement of the channel of a river, creek or run or part thereof in more than one county and more than two hundred freeholders will be affected if said improvement is granted as prayed for, all persons, firms, and corporations, excepting steam railways, etc., may be given notice by publication whether they are residents or non-residents of any or all of the counties through which the improvement shall pass and no other notice shall be required.

Now, the question on which I desire your opinion is as to how notices are to be made for this ditch improvement. Must personal service be made as set forth in section 6563-15 of the General Code or must they be made in accordance with the latter part of said section 6449, as this ditch improvement is a branch of the Portage River extending through more than one county, to-wit, Hancock and Wood counties, and more than two hundred freeholders are affected by reason of said improvement? If notice can legally be made under the latter section, much time and expense will be saved thereby.

Another question on which I desire your opinion is that if service is made under section 6449 of the General Code, will that answer for owners of lots and lands in municipalities through which said improvement passes or municipalities benefited by reason of said improvement but through which the improvement does not pass, or will it be necessary to serve notice on the mayor of such municipality as provided in section 6496 of the General Code.

I have requested the auditor to withhold serving notices on this ditch improvement until your opinion is received."

In response to the above, the suggestion was made by this department that consideration be given the question whether the enactment into law of amended senate bill No. 100, effective October 11, 1919 (108 O. L. 926), has operated to work a discontinuance of the improvement enterprise mentioned in your above quoted letter, in view of the fact that all the sections under which the project was undertaken were repealed as of October 11, 1919. Correspondence in that connection has elicited the information that:

> "The original petition was filed January 9, 1917, and all the proceedings of the joint board were strictly in accordance with said sections 6563-1 et seq. *up to section* 6563-14. On February 19, 1917, the joint board *passed a resolution to proceed with the improvement* and ordered the county surveyors to meet and go over the line of the proposed improvement, make plans, specifications, profiles, etc., as provided in section 6563-1. There were no further meetings of the joint board by reason of war conditions, although the surveyors arranged plans, specifications, etc., in accordance with instructions of the joint board. The improvement was again taken up in November, 1919, and proceedings were had as above stated up to the time I wrote you as to serving notices."

Of course, if the proceedings have been discontinued because of the repeal noted it becomes unnecessary to answer your inquiries, so that it is proper first to consider the effect of such repeal.

The improvement in question was undertaken in conformity with an act passed May 31, 1911 (102 O. L. 575), entitled "An Act to provide for the construction of joint county ditches." The act consists of forty-eight sections, since known as sections 6563-1 to 6563-48, inclusive. Some minor amendments to sections 8 and 18 of the original act were made; but these amendments are immaterial to a discussion of your inquiries. As has been noted, all of said sections were repealed as of October 11, 1919.

The earlier sections of the series provide for a petition, cost bond, etc. Section 6563-5 provides for the giving by the auditor of the county in which the petition is filed, of notice to the auditors of the other counties affected, as well as for a meeting of the commissioners of the affected counties. Sections 6563-9 and 6563-10 read respectively:

> "Section 6563-9. At said first meeting provided for in section 5, or at any adjournment thereof as said joint board shall determine, said joint board shall hear evidence and arguments for and against the establishment of said ditch and improvement, and if said joint board determines to proceed with said improvement, it shall then at once order the county surveyor of each of said counties named in said petition to meet and go over the line of said proposed improvement and make plans, specifications and profiles thereof and an estimate of the cost of the same, including the cost of protecting the mouth of said ditch with piers or abutments according to the plans made by said surveyors, if it is determined to be necessary so to protect said mouth, together with a map showing all of the lands in each of said counties which will be benefited or affected thereby, and said surveyors shall make a map for each county separately showing the lands which will be benefited in said county, together with a description of said lands, including the acreage thereof, and the names of the owners of the same.
>
> Section 6563-10. If the joint board shall determine that said surveyors shall be so appointed, then the bond given by said petitioners shall be released from liability. But if said joint board determines not to proceed with said petition, then said petitioners shall pay the expenses of said proceedings."

Section 6563-11 provides for the organization of the board of surveyors, perparation of plans, etc.
Further sections read:

"Section 6563-13. If said surveyors fail to agree as to the land which will be benefited by said improvement, a majority of said surveyors shall join in a report which shall be deemed the report of said surveyors with reference to the land which will be benefited, and if there are an equal number of surveyors and said surveyors are divided equally upon their report of the benefited property, then they shall have the power to call in another surveyor who shall not be a resident or taxpayer in any county affected by said improvement, and a majority of said board so constituted shall then decide said question. Said board of surveyors may prepare a joint report, or may, as to plans, specifications, profiles and estimates, prepare a majority and minority report, or prepare several reports, and when said surveyors have prepared their report, or reports, they shall file the same with the secretary of the said joint board, and said secretary shall notify the members of said joint board of the filing of said report, fixing a time not later than fifteen days thereafter when said joint board shall meet and examine the report or reports of said surveyors and shall approve the same or any one thereof, or reject them, and said joint board shall have power to cause any report to be altered or amended, and if said board approves said report or any one of them as originally filed or as amended they shall adjourn to some day to be fixed by said board, and said joint board shall fix a time at which it will finally determine the question of the allowance of said petition and the auditors of the several counties shall be notified of said fact, and shall furnish to the auditor of each county the map and description and names of owners of benefited lands in his county as reported by said surveys, as provided in section 8 (G. C. 6563-8), as amended by said joint board."

"Section 6563-14. If upon consideration of the reports of said surveyors said joint board shall determine to abandon said proceedings, it may dismiss the same, and the costs of said proceedings shall be paid by each county equally upon the order of the joint board, and the secretary thereof shall certify the amount to be paid by each county to the auditor thereof, and the auditor shall draw his warrant for the amount, and it shall be paid by the treasurer of the county."

"Section 6563-15. Upon the receipt of the notice provided for in section 12 (G. C. 6563-12), the auditors of the respective counties shall cause notice of the filing of said petition, and that the question of the allowance of the prayer of said petition will be heard before said joint board at the time and place so fixed and determined to be served either personally or by copy left at the usual place of residence of the persons named in said report of the surveyors in their respective counties at least thirty days before the date of said hearing."

"Section 6563-18. When all persons have been served with notice as herein provided the commissioners shall hear evidence and arguments in favor or against said petition, and shall grant or reject the prayer of said petition; provided that the prayer of such petition shall not be granted unless a majority of the members of the board of commissioners of each county vote therefor.

Nothing herein contained shall be construed as in anywise affecting sections 6536, 6537, 6539, 6540, 6541, 6543, 6545, 6546, 6550, 6553, 6556, 6557 and 6558 of the General Code, or any amendment or supplemental provision thereto."

"Sec. 6563-19. If the prayer of said petition is granted, said joint

board shall establish said ditch and cause said improvement to be made in accordance with the plans, specifications and profiles heretofore adopted by said joint board or as modified by said joint board as above provided."

"Sec. 6563-20. If at said hearing the prayer of said petition is rejected and said improvement is not ordered, the costs of said improvement shall be paid by said several counties equally, and the same shall be paid as provided in section 13 (G. C. 6563-13)."

It should be said that the reference in section 6563-15 to "section 12" should be to section 13 (6563-13); while the reference in section 6563-20 to "section 13" is evidently intended as a reference to section 14 (section 6563-14).

There is no longer any question in Ohio that a ditch improvement project is of such a character as to be a "proceeding" within the meaning of section 26 G. C. See authorities as summarized in Toledo vs. Marlow, 8 O. C. C. (N. S.) 121; 18 O. C. D. 298; affirmed without report 75 O. S. 574. This leaves us with the question whether the project which you describe had on October 11, 1919, reached such a stage as to be "pending," within the meaning of that word as used in Section 26 G. C. That section reads as follows:

"Whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions, or proceedings, civil or criminal, and when the repeal or amendment relates to the remedy, it shall not affect pending actions, prosecutions, or proceedings, unless so expressed, nor shall any repeal or amendment affect causes of such action, prosecution, or proceeding, existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act."

The precise question, so far as has been found, has not been passed upon by the courts. However, a careful examination of Toledo vs. Marlow, supra—a well considered and instructive case,—is convincing that the principle upon which that case was decided is equally applicable to the situation stated by you and by analogy furnishes answer to our question.

The case referred to arose in connection with certain sewer and street paving projects in the city of Toledo. The projects had their inception in the passage of what is called "preliminary resolutions." The law applicable at the time of the passage of such preliminary resolutions was as found in the then New Municipal Code, appearing 96 Ohio Laws, page 20. Section 51 of that code provided as to a municipal improvement on the assessment plan, that the first step should be the passage by council of a resolution of necessity of such improvement. The same section further provided that not earlier than two weeks after the passage of the resolution, an ordinance should be passed determining the general nature of the improvement, grade thereof, approving plans, and determining method of assessment. Section 52 provided for serving of notice of passage of the ordinance last mentioned; Section 53 provided, among other things, for a limitation of the assessment to thirty-three per cent. of tax value; and section 54 provided for the filing of claims for damage. Section 55 was to the effect that at the expiration of the time limited for filing claims for damages

"the council shall determine whether it will *proceed with the proposed improvement or not;* * * * and if it decides to proceed therewith, an ordinance for the purpose shall be passed."

On April 21, 1904 (97 O. L. 121, and 97 O. L. 125), changes were made in the above mentioned sections by amendment. Section 51 was amended so to do away with the necessity of passing the ordinance therein mentioned (said ordinance being referred to

in the court's decision as "intermediate ordinance"). Section 53 was amended so as to make actual value after improvement, instead of tax value, the basis of the limitation; and the percentage of limitation was changed from thirty-three per cent. to thirty three and one-third per cent. After making reference to these statutory changes the court says:

> "And in this case, as to the paving improvement, the *preliminary resolution only* had been passed prior to April 21st. On the 25th of April, the so-called intermediate ordinance was passed, although the law requiring it was repealed by the amendatory act."

The foregoing detailed statement serves to show that the mere passage of the "preliminary resolution," or "resolution of necessity" did not constitute final action on the part of the council. Notice to property owners of the passage of the resolution was not required. The notice served on property owners was as to the passage on the "intermediate ordinance." It was not until after such notice had been served and time given for filing of claims for damages that council finally determined whether it would proceed with the improvement (see quotation from section 55, *supra*). Thus the court, in determining which of the statutory limitations on assessment was applicable, had before it squarely the question whether the passage of the preliminary resolution alone gave the project the character of a "pending proceeding," within the meaning of section 26 G. C. (then section 79 R. S.); and the conclusions of the court are well summed up in the syllabus as follows:

> "1. The several statutory steps required for the improvement of a street by pavement or sewer, constitute a 'proceeding' within the meaning of section 79, Revised Statutes.
>
> 2. The rate or amount of lawful assessment by a municipality for a street improvement, such as a pavement or sewer, upon benefited or abutting property, is governed by the statute in force at the beginning of the proceeding.
>
> 3. The adoption of the preliminary resolution declaring the necessity of a street improvement, such as a pavement or sewer, is, in the absence of a petition by property owners for the improvement, the beginning of a proceeding, which is thereafter 'pending' within the meaning of section 79, Revised Statutes, and unaffected, in respect to limitation of rate of assessment, by an amendatory act not expressly retroactive."

In the situation stated by you, the joint board has taken a definite step in accordance with section 6563-9, in that it determined "to proceed with said improvement," and ordered the surveyors to proceed, etc. If we apply to this circumstance the conclusion reached in the above cited case, there can be no doubt that the ditch project took on the character of a "pending proceeding" at least not later than the making of such determination and order. This view is much strengthened by the fact that b the terms of section 6563-10, the making of such determination and order had the effect of releasing the petitioners from liability on their cost bond.

It is quite true that the Toledo case was one in injunction, involving the question of the proper amount of the assessment, rather than of the continuamce of the proceedings, and that the matter of vested property rights entered into the situation. However, it is difficult to perceive that considerations of this character furnish any distinction between the case in question and the situation described by you. Even if the matter be viewed from the procedural standpoint, there is authority that the word "pending" as used in saving clauses is to be given a broad construction.

"The word 'pending' as applied to proceedings in saving clauses, is used in the general sense of 'commenced and not terminated,' and, not in the technical sense in which the expression *'lis pendens'* is usually understood."

36 Cyc., 1232.

In connection with the text just quoted, there is cited the Delaware case of Rice vs. McCaulley, 7 Houst. 226; 31 Atl. 240—an authority which furnishes strong support to the text.

For the reasons given, it is concluded that the improvement project which you describe comes clearly within the saving provisions of section 26 G. C., and consequently was not affected by the repeal.

Coming to your questions as to manner of service of notice:

Above quoted section 6563-15 prescribes personal or residence service on property owners residing within the affected counties; while section 6563-16 prescribes service by publication as to property owners not residing within the affected counties. Section 6449, which in its present form was not enacted until 1915 (106 O. L. 135), several years after the enactment of section 6563-1 et seq., reads:

"The county auditor shall also prepare copies of the notice, for which he shall receive six cents per one hundred words, but not more than twenty-five cents for any one notice. At least fifteen days before the day set for hearing one copy of the notice shall be served upon each lot or land owner, or left at his usual place of residence and upon an officer or agent of each public or private corporation operating or having a place of business in the county. The person who serves such copies shall make return on the notice, under oath, of time and manner of service, and file it with the auditor on or before such day, and shall receive two dollars for each day actually employed in such service. If, however, the petition prays for the improvement of the channel of a river, creek or run, or part thereof, in more than one county and more than two hundred freeholders will be affected, if said improvement is granted as prayed for, all persons, firms and corporations, except steam railway companies having an agent located in the county, which shall be notified as hereinbefore provided, may be given notice by publication, whether they are resident or non-resident of any or all of the counties through which the improvement will pass, and no other notice shall be required.

Such notice shall be given by publication for four consecutive weeks in papers published but once a week but when publication is made in a daily newspaper one insertion a week shall be sufficient. Such publication shall be made in a newspaper printed and of general circulation in each county through which the proposed improvement will be located if granted as prayed for, the last publication to be made at least two weeks before the day set for hearing. Such notice shall be verified by affidavit of the printer or other persons knowing the facts of each of said newspapers, and filed with the auditor of the county where the newspaper is printed containing the notice, on or before the day of hearing, and within ten days after the first publication, five copies of such notice shall be posted by a petitioner in five of the most public places in each township affected by the proposed improvement. And the posting of such copies shall be proven by affidavit of the petitioner posting same, filed with the auditor of the county in which such notices were posted, on or before the day of hearing."

Very clearly, under your statement of facts, said section 6449 is applicable in the matter of service of notice. It is general in character; it was passed subsequently to the enactment of the sections under which your are proceeding; and it contains the

statement "and no other notice shall be required." Furthermore, while section 6449 is found in the chapter entitled "Single County Ditches," yet the opening section of the chapter entitled "Joint County Ditches," namely, section 6536 provides in substance that ditches, drains and water courses, providing drainage for lands in more than one county, may be located, enlarged, repaired, etc., "as provided in this chapter and the laws prescribed for constructing, enlarging, cleaning or repairing single county ditches, drains or water courses;" and at the time of the final amendment of section 6536 (103 O. L. 836), said series of sections 6535-1 et seq. had become part of the chapter designated "Joint County Ditches." Besides, section 6449 in its form as above quoted and as in effect at the inception of the improvement proceeding you describe, makes specific reference to joint county improvements.

The views just expressed are consistent with those set out in the previous opinion of this department to which you refer (Op. 1916, p. 958). The latter opinion dealt only with the matter of costs.

You further inquire as to whether the manner of service prescribed by section 6449, if applicable at all, will suffice in the matter of serving owners of lots and lands in municipalities through which the improvement passes. In view of the broad character, already noted, of section 6449, and the fact that it makes no exceptions, you are advised that in the opinion of this department, its provisions are applicable to service of notice on owners of lands within municipalities.

Your last inquiry is as to service upon municipalities benefited by the improvement, but through which it does not pass; and in that connection, you call attention to section 6496. The latter section reads:

> "If the proposed improvement passes through or into a municipal corporation, the mayor of which has not signed the petition therefor, as provided in the next preceding section, he shall be notified of the pendency of the petition by being served with a copy thereof by the county auditor at the same time that the county commissioners are required by law to be notified. The mayor shall notify the council of the pendency of the petition, at its next regular meeting, or, if necessary, call a special meeting of the council therefor; and thereupon the council shall appoint a committee of its members, or the engineer of the corporation, or both, to meet the commissioners, at the time and place of their meeting and view, and confer with them in regard to such improvement."

This section by its terms has no reference to municipalities into or through which the improvement does not pass. As to those municipalities through which the improvement does pass, the notice contemplated by said section seems to have reference to notice of the filing mentioned in section 6448 as to single county ditches and section 6563-5 as to joint county ditches, rather than to the notice to land owners as mentioned in such sections as 6449 and 6563-15. Hence, in the opinion of this department, any question as to the notice which you now contemplate serving does not involve a selection as between section 6496 and some other statute or statutes, but does call for a choosing as between sections 6449 and 6563-15. As between these two sections, it is the opinion of this department, for reasons already given, that section 6449 is applicable in the matter of notice to municipalities through which the improvement does not pass.

Respectfully,
JOHN G. PRICE,
Attorney-General.