1025.

BANKS AND BANKING—COURT APPOINTING DOMESTIC TRUST COMPANY TO FIDUCIARY POSITION—NOT REQUIRED TO GIVE BOND IN FIRST INSTANCE—UPON APPLICATION, ADDITIONAL SECURITY MAY BE REQUIRED—SECTION 710-161 G. C. CONSTRUED.

A court or other authority appointing a domestic trust company to any of the fiduciary positions mentioned in section 710-161 G. C. may not, in the first instance, require the giving of a specific bond or other security for the performance of the duties of the position; but after appointment, upon application in writing made by any person interested in the trust estate at any time, such additional security may be required by the court or officer.

COLUMBUS, OHIO, February 26, 1920.

HON. LOUIS H. CAPELLE, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—I acknowledge the receipt of your letter of recent date requesting, on behalf of yourself and Hon. Wm. H. Lueders, probate judge of Hamilton county, the opinion of this department on the following question:

> What is meant by the phrase "upon proper application" occurring in section 161 of the Banking Act of 1919 (108 O. L., Part I, p. 80-121)? May a probate court appointing a trust company as guardian on its own motion require a bond of the trust company?

The section in question, designated section 710-161 G. C., provides as follows:

> "The capital stock of such trust company, with the liabilities of the stockholders existing thereunder, and the fund deposited with the treasurer of state as provided by law shall be held as security for the faithful discharge of the duties undertaken by such trust company in respect to any trust, and no bond or other security, except as hereinafter provided, shall be required from any such trust company for or in respect to any trust, nor when appointed executor, administrator, guardian, trustee, receiver, assignee, or depositary; except that the court or officer making such appointment may, upon proper application, require any trust company which shall have been so appointed to give such security for the faithful performance of its duties as to the court or officer shall seem proper, and upon failure of such trust company to give security as required may remove such trust company and revoke such appointment."

In the opinion of this department, the first part of this section, which states the general rule to be applied, is not ambiguous. That rule is that the capital stock of the trust company, the so-called "double" liability of its stockholders and the securities required by law to be deposited with the treasurer of state shall stand in lieu of any special bond to be exacted as a condition of qualification under an appointment in any of the capacities named in the section. So far as it goes, this provision is mandatory and, though it may have a modifying effect upon numerous other statutes, still it must prevail so far as prior statutes are concerned as being the last expression of the legislative will.

The rule as stated, however, admits of the exception also stated in the section. That exception is that the appointing authority may "upon proper application" require additional security of a trust company that has been appointed. I call attention in considering the meaning of this part of the section, first, to the fact that it is presupposed by the form of words therein used that an appointment has already been made

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" withi nthe 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*