Later, in 1925, Section 7689 was amended so as to provide that beginning on July 1, 1925, the school year should begin on the first day of July of each calendar year and close on the 30th day of June of the succeeding calendar year.

No change was made in the provisions of Section 4744-2 at the time of the amendment in 1925 of Section 7689 and while the word "ensuing" as used in Section 4744-2 means "following", it is apparent that the meaning of the law is, that the certification to be made by the county board of education as provided by Section 4744-2 shall be as and for the year which began on the first day of the previous July.

Inasmuch as the McConnelsville-Malta School District will not become an exempted village school district until September first, that is, after one-sixth of the school year shall have passed and obligations for the payment of superintendents and assistant superintendent's salaries and contingent expenses of the county board of education shall have been incurred for these two months, it is my opinion that the McConnelsville and Malta District would be chargeable with their proportionate share of such expenses incurred prior to their becoming an exempted village school district. No expenses, however, will likely be incurred prior to September first for teachers and any expenses incurred after September first for teachers in the McConnelsville-Malta District and contingent expenses of the county board of education and the proportion of superintendent's and assistant superintendent's salaries for the remaining portion of the school year after September first, that would have been chargeable to the McConnelsville-Malta District had it not become an exempted village school district, would of course not be chargeable to it after it becomes an exempted village school district and should not therefore be included in the certification which the county board of education will make on August first.

Answering your questions specifically, I am of the opinion:

1. That the president of the Morgan County Board of Education now residing in the McConnelsville-Malta Village School District will become a non-resident of the Morgan County School District, when the McConnelsville-Malta District becomes an exempted village school district on September first, and that, therefore, at that time he automatically ceases to be a member of the Morgan County Board of Education and a vacancy is created on the said board.

2. When the Morgan County Board of Education makes its certification on August first in accordance with the provisions of Section 4744-2, General Code, the McConnelsville-Malta School District should be considered as a part of the Morgan County School District for one-sixth of the school year beginning July 1, 1927, and there should not be included in such certification the number of teachers to be employed nor any portion of the superintendent's and assistant superintendent's salaries or contingent expenses of the county board of education for that part of the school year following September 1, 1927.

Respectfully,
EDWARD C. TURNER,
Attorney General.

776.

PROCEEDING—WHEN PROCEEDING IS PENDING WITHIN MEANING OF SECTION 26, GENERAL CODE—EXISTING HIGHWAY LAWS AND EDWARDS-NORTON ACT, DISCUSSED.

SYLLABUS:

1. *A proceeding is "pending" within the meaning of Section 26 of the General Code when a board of county commissioners makes application for state aid under the provisions*

of Section 1191 *of the General Code, and such a proceeding may be completed under the present law after the effective date of House Bill No.* 67, *passed by the Eighty-seventh General Assembly (Edwards-Norton Act.)*

2. *A board of county commissioners or a board of township trustees contracts an obligation within the meaning of Section* 91 *of House Bill No.* 67 *at such time as it files an application under Section* 1191 *of the General Code for state aid, in that by filing such application a board of county commissioners or a board of township trustees agrees to pay one-half of the cost of surveys and other preliminary expenses incident to the construction, improvement, maintenance or repair of an inter-county highway or main market road.*

COLUMBUS, OHIO, July 25, 1927.

HON. GEORGE F. SCHLESINGER. *Director of Highways and Public Works, Columbus, Ohio.*

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

> "The Edwards-Norton Highway Bill, House Bill No. 67, enacted by the last General Assembly, does not, according to its terms, go into effect until the first Monday in January, 1928. This law, in a large measure, changes the basis of financing state highway improvement projects and substantially reduces the basis of county cooperation in a large majority of the counties.
>
> There are a number of steps in the procedure incident to the execution of a contract under existing state highway laws the most important of which are as follows. Application for state aid by the county commissioners; approval of such application by the Director of Highways; preparation of plans; resolution of county commissioners approving plans and determining to proceed; providing of funds by county commissioners; adoption of final resolution by county commissioners, constituting a written agreement in behalf of the county to assume a certain part of the cost; approval of such agreement by the Attorney General, advertisement and opening of bids award and execution of contract.
>
> Since the Edwards-Norton Bill does not become effective until the first Monday in January, 1928, we are proceeding on projects that are proposed to be placed under contract before that time under the present law. However, in case it develops that a project on which proceedings have been started before the Edwards-Norton Bill goes into effect cannot be placed under contract this year, at what stage of the procedure would it be my duty to continue and complete the proceedings already begun? In other words, I am requesting your opinion as to just how far a proceeding for the improvement of a state road project in cooperation with a county must be carried prior to the first Monday in January, 1928, in order to warrant the completion of the same under the statutes in existence immediately prior to that date.
>
> It is important that I be advised in this connection at your early convenience so that I may furnish accurate information to the county authorities many of whom have requested advice on this matter. As you can see this question also affects the program for the entire appropriation period."

By the enactment of House Bill No. 67 (Edwards-Norton Act) the Eighty-seventh General Assembly completely revised and codified the existing highway laws. When such act becomes effective, viz., on the first Monday in January, 1928, it will result in the placing of the responsibility of a state highway system in the state of Ohio, acting

by and through its Department of Highways, and will relieve the smaller counties from the burden of taxation, resulting from their cooperating with the State Highway Department in the construction of intercounty highways and main market roads under the present law (Sections 1191, et seq., General Code.)

Since this act by its terms is not to become effective until the first Monday in January, 1928, the question naturally arises as to just what steps must be taken under the existing law in order to constitute a "proceeding" as will permit the construction, improvement, maintenance and repair of inter-county highways and main market roads upon the present cooperative basis (Sections 1191, et seq., General Code,) after the date that such act becomes effective. In other words, just how far must a proceeding for the improvement of a state road project in cooperation with a county or a township be carried prior to the first Monday in January, 1928, in order to warrant the completion of the same under the statutes in existence immediately prior to that date?

While it is true that the new act will not have the effect of entirely doing away with the construction, improvement, maintenance and repair of inter-county highways and main market roads upon a cooperative basis, yet in the great majority of counties the construction, improvement, maintenance and repair of inter-county highways and main market roads by the Department of Highways and Public Works, acting in conjunction and cooperation with counties and townships will be greatly reduced, if not entirely done away with.

A situation will undoubtedly arise wherein several counties will desire to continue to cooperate with the State Highway Department in the construction, improvement, maintenance and repair of inter-county highways and main market roads upon the present basis under existing laws after House Bill No. 67 becomes effective.

In order to accomplish the same cooperation in 1928 as is now provided in Sections 1191, et seq. of the General Code, it will be necessary to start the proceedings under said sections of the Code some time previous to the effective date of House Bill No. 67.

The question then confronting us involves a consideration of the steps necessary to be taken under the present law, and further, just how far must any one or more of these steps have progressed in order to constitute a "proceeding" such as will be "pending" within the meaning of Section 26 of the General Code and the saving clause of House Bill No. 67 (Section 91). These two sections provide respectively as follows:

Section 26, General Code:

> "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."

Section 91, House Bill No. 67:

> "Nothing in this act shall in any way nullify or affect the obligations or rights of any county, township or other subdivision of the state contracted on or before and in effect at the time this act becomes effective, nor shall the existing rights and obligations of any person contracting with the state or any political subdivision thereof be affected. All bonds or notes issued by counties or townships under authority of any sections of the General Code of Ohio which have been amended or repealed by this act shall remain in full force and effect and the provisions or authority providing for the retirement of

said bonds and notes with interest therefor shall remain in force and effect until all have been paid.

All levies or bonds voted by any county, township or other subdivision of the state prior to the time of the taking effect of this act shall be in full force and effect and shall remain in force and effect as provided by law at the time voted and approved by the electors. This act shall be effective the first Monday of January, 1928."

We must consider, for the purpose of answering your question, the sections above quoted, not only in relation to each other but also in the light of the various sections of the statutes constituting the procedure that now prevails for the construction, improvement, maintenance and repair of intercounty highways and main market roads upon a cooperative basis between the state and the county or township.

It is only necessary for present purposes to outline briefly the various steps now necessary to be taken under Sections 1191, et seq. of the General Code.

Under Section 1191 the county commissioners may make application for state aid to the State Highway Commissioner on or before the first day of March of each calendar year.

Section 1192 provides in substance that in case the county commissioners do not make application for state aid on or before the first day of March in any calendar year, the board of township trustees of any township, within the county, may file such application and the state highway commissioner may cooperate with such trustees in like manner as with county commissioners.

Section 1193, General Code, provides that the application filed by the county commissioners must contain an *agreement* on the part of the county commissioners or township trustees to pay *one-half of the cost and expense of surveys and other preliminary expenses.*

By the provisions of Section 1195, General Code, the next step of the proceeding under the present law is the approval of such application by the Director of Highways and Public Works, and this section also provides that any application not approved shall remain on file *and be available* for future approval until withdrawn with the consent of the Director or disapproved by him. It is further provided in said section that if any application is not approved or withdrawn, it may be considered in the apportionment of state aid money to any county *for any succeeding year.*

Further steps in the proceeding are the making of plans by the Director under authority of Section 1196, General Code; the transmittal of such plans to the county commissioners under authority of Section 1199, General Code, and the passage by the county commissioners of a resolution approving such plans and determining to construct the highway, as provided in Section 1200, General Code.

After the passage of the resolution by the board of county commissioners, the board must provide the necessary funds to meet the county's share of the cost, either from appropriate tax funds or from the proceeds of notes or bonds, and thereupon the county enters into an agreement with the state to assume, in the first instance, that part of the cost and expense of the improvement over and above the amount to be paid by the state. The several formalities incident to the execution of this agreement are to be found in Section 1218, General Code.

The Director of Highways and Public Works then advertises for bids under the provisions of Section 1206, General Code; opens said bids under authority of Section 1207, General Code, and enters into a contract with the successful bidder and receives a bond as provided in Section 1208, General Code.

It is well settled that the several statutory steps required for the improvement of a street or highway are a "proceeding" within the meaning of Section 26 of the General Code.

In the case of *Toledo* vs. *Marlowe*. 18 O. D. C. 298 (8 O. C. C., N. S. p. 121, affirmed without report, 75 O. S. 574), it was expressly held that the various statutory steps required for the improvement of a street constitute a "proceeding" within the meaning of Section 79, Revised Statutes, (now Section 26, General Code), and that the adoption of the preliminary resolution of necessity is, in the absence of petition by property owners, the beginning of a "proceeding" which is thereafter "pending" within the meaning of the statute and unaffected by an act not expressly retroactive.

In a comparatively recent case *State ex rel.* vs. *Zangerle*, reported in 101 O. S. 235, the court held that an order or resolution declaring for or in favor of a county road improvement, or fixing the assessment therefor, is a "proceeding" within the contemplation of Section 26, General Code, which section is a rule of legislative interpretation and is to be construed as a part of any amended act unless such amendment otherwise expressly provides.

It has been held that Section 26, supra, is to be read as a saving clause in all statutes which amend prior legislation. See *Bode* vs. *Welch*, 29 O. S. 19.

It will be observed from the language used in Section 26, supra, that the legislature expressly provided for the protection of those "proceedings" which were "pending" such as a road proceeding, from subsequent amendment or repeal which might provide changes in the procedure in those matters which were started previous to the amendment or repeal of the act under which they were instituted. However, the provisions of Section 26 as they apply to the question here are made dependent upon the language used in Section 91 of House Bill No. 67. These two sections must be read together. It is noted that by the language of Section 26, General Code:

> "Whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending * * * proceedings * * *, and when the repeal or amendment relates to the remedy, it shall not affect pending * * * proceeding * * * *unless so expressed*, nor shall any repeal or amendment affect * * * proceeding, * * * *unless otherwise expressly provided* in the amending or repealing act."

We must now look to Section 91 of House Bill No. 67 to determine what effect, if any, such section has upon proceedings for road improvements that have been instituted prior to its effective date by a county in applying for state aid under section 1191 of the General Code. In other words, just what step is to be taken before the effective date of said act in order to constitute a "proceeding" that will be "pending" in contemplation of Section 91 of House Bill No. 67 in the light of Section 26 of the General Code?

It is well to emphasize the pertinent part of House Bill No. 67 as it has application to the question here. By the provisions of Section 91:

> "Nothing in this act shall in any way nullify or affect the *obligations* or rights of any county, township * * * of the state *contracted* on or before and in effect at the time this act becomes effective, * * *."

It will be observed that the legislature has enacted the above saving clause with the express intention of safeguarding those proceedings which have been instituted prior to its effective date under the present law. This saving clause was enacted in addition to the provisions contained in Section 26 of the General Code. Does the fact that a board of county commissioners or a board of township trustees passes a resolution applying for state aid for the purpose of constructing, improving, repairing, or maintaining an inter-county highway or main market road create such an obligation on the part of the county or the board of township trustees as will be "contracted"

so as to bring the matter within the contemplation of Section 91 of House Bill No. 67? I think this question must be answered in the affirmative.

It will be observed that under the provisions of Section 1195, General Code, the application made under Section 1191, General Code, must contain an agreement on the part of the commissioners or township trustees to pay one-half of the cost and expense of the surveys and other preliminary expenses. It will therefore be seen that in applying for state aid a county or a board of township trustees creates an obligation such as will bind such county or such township not only to pay one-half of the cost of the surveys and other preliminary expenses incident to a contemplated road improvement, but likewise one-half of the cost of such road improvement or more, as may be agreed upon. This obligation continues until such time as said application is withdrawn or t is definitely determined by the Director of Highways not to proceed with said improvement.

An argument might be advanced that a further step is necessary to be taken in addition to the filing of the application in order to constitute a "proceeding," inasmuch as the Director of Highways under Section 1195 of the General Code may in his discretion disapprove such application. The answer to such an argument, if advanced, may be found in that part of Section 1195 of the General Code which provides:

> "* * * Any application or part thereof not approved or withdrawn may be considered in the apportionment of state aid money to any county for any succeeding year, and any inter-county or main market highway or part thereof described therein may be constructed, improved or repaired at any future time under the provisions of this chapter."

It is therefore quite apparent that the mere lack of approval of an application for state aid by the Director of Highways does not of itself relieve a board of county commissioners or board of township trustees from their obligation contracted at the time of applying for state aid. Therefore, a county upon making application for state aid as provided in Section 1191, supra, has contracted an obligation within the meaning of Section 91 of House Bill No. 67.

The view asserted here is further strengthened by an opinion rendered by this department in 1924, where a simlar question arose as to at just what point in the proceedings followed in the construction, improvement, maintenance and repair of inter-county highways or main market roads constituted a "proceeding" as "pending" within the meaning of Section 26 of the General Code. I refer to Opinion No. 1602, found in Opinions of the Attorney General for 1924, volume I, page 378, the syllabus of which reads as follows:

> "1. The various steps before a board of county commissioners and the director of highways and public works, in connection with a state aid road improvement project under the provisions of Section 1191 of the General Code, and related sections, wherein it is sought to construct, improve, maintain or repair an inter-county highway, constitute a 'proceeding' within the contemplation of Section 26 of the General Code.
>
> 2. Such a proceeding is pending, within the contemplation of said Section 26 of the General Code (a) when the owners of twenty-five per cent of the lineal feet abutting on the inter-county highway petition the county commissioners for its construction, improvement, maintenance or repair, under the provisions of the state aid road law or (b) when the county commissioners, without the presentation of any petition, or the township trustees, under the conditions as set out in Section 1192 of the General Code,

make application to the director of highways and public works for aid in the construction, improvement, maintenance or repair of an inter-county highway, under the provisions of said law.

3. Section 1222 of the General Code, as amended by an act passed February 28, 1923, (110 Ohio Laws, p. 453) and which became effective June 17, 1923, should be read in connection with Section 26 of the General Code and has no application to an inter-county highway improvement project pending prior to June 17, 1923."

My predecessor at that time had under consideration and used as an authority in arriving at his opinion the case of *State ex rel.* vs. *Zangerle*, above cited.

I am not unmindful that this department in an opinion found in Opinions of the Attorney General for 1917, volume II, page 1231, made a holding that at first blush would seem contrary to the holding here. At that time a great many sections of the Cass Act (106 Ohio Laws, page 574) had been amended by the White-Mulcahy Act (107 Ohio Laws, page 69), and the question arose as to the procedure to be followed after the going into effect of the White-Mulcahy Act under certain amended sections thereof as to those proceedings which had been started but not completed under the Cass Act. The fourth branch of the syllabus of that opinion is as follows:

"The different steps connected with an improvement of a highway constitute a proceeding and under Section 26 G. C. the provisions of the law as it existed prior to June 28, 1917, must be followed when the first step in reference to a particular road improvement, was taken prior to said date. The first step in the matter of a road improvement is the approval by the state highway commissioner of the application of the county commissioners, or the approval of any part of the highways for which application is made, and his ordering the county surveyor to make plans, etc., of the part of the highway so approved."

It might be well to point out at the time of the rendering of the aforesaid opinion the provisions of Sections 1191, 1192 and 1193, respectively, were the same as they are today. Also that a saving clause similar to the one found in Section 91 of House Bill No. 67 was contained in the White-Mulcahy Act. However, in the opinion rendered by the then Attorney General, as last above referred to, to the State Highway Commissioner, he was not called upon to make and did not undertake to make the distinction required in order to answer the question now submitted. He was asked whether Section 1213-1 of the General Code, being then a new and recently enacted section of the Code, applied to road proceedings in which the final resolution had not been adopted prior to the enactment of such section. He properly answered this question in the negative, and his statement on the question now submitted was made largely as a matter of argument in support of his conclusion and answer given to another and different question.

In view of all the foregoing, it is quite clear to me that after the new law takes effect the parties concerned, that is to say, the state and the county, have full and complete authority by virtue of Section 26, General Code, to continue their proceedings under the old law, provided the county commissioners have filed an application for state aid in proper form prior to the effective date of House Bill No. 67. If the proceedings have progressed no further than the application, or the approval of plans, the only right which the state may thereafter assert against an unwilling county is to require it to pay one-half the cost of the preliminary expenses. If the proceeding has progressed to the point where the county has executed the agreement provided for by Section 1218, General Code, then, of course, the state may proceed to complete the

construction of the work and require the county to pay the agreed share of the cost. Unless the proceeding has progressed to the point where the agreement provided for by Section 1218, General Code, has been executed by the county, the Director of Highways and the county commissioners may abandon the proceeding and initiate a new proceeding under the new law after the same takes effect. In other words, where an application for state aid has been filed by a county prior to the first Monday of January, 1928, the question of whether the state and county will thereafter proceed under such application and under the provisions of the old law, or whether the old proceeding shall be abandoned and a new proceeding initiated under the new law, is to be determined by the Director of Highways and the county commissioners, subject to certain qualifications. One qualification is that unless the old proceeding has progressed to the point where the agreement provided for by Section 1218, General Code, has been actually executed by the county, then the county can not compel the Director to proceed under the old law or complete the old proceeding, and the Director can not compel the county to proceed under the old law or complete the old proceeding, except to the extent of completing its agreement made under Section 1193, General Code, to pay one-half of the cost of the plans, etc. Where the proceeding has proceeded prior to the effective date of the new law to the point where the agreement provided for by Section 1218, General Code, has been actually executed by the county, then the county can not withdraw and the Director has a right to proceed under the old law and complete the proceeding and make the improvement without regard to the wishes or subsequent actions of the county.

Specifically answering your question, it is my opinion:

1. That a proceeding is "pending" within the meaning of Section 26 of the General Code when a board of county commissioners makes application for state aid under the provisions of Section 1191, General Code, and that such a proceeding may be completed under the present law after the effective date of House Bill No. 67 (Edwards-Norton Bill).

2. That a board of county commissioners or a board of township trustees contracts an obligation within the meaning of Section 91 of House Bill No. 67 at such time as it files an application under Section 1191 of the General Code for state aid, in that by filing such application a board of county commissioners or a board of township trustees agrees to pay one-half of the cost of surveys and other preliminary expenses incident to the construction, improvement, maintenance or repair of an inter-county highway or main market road.

Respectfully,
EDWARD C. TURNER,
Attorney General.

777.

APPROVAL, CONTRACT BETWEEN THE STATE OF OHIO AND McAULIFFE BROTHERS, MARYSVILLE, OHIO, FOR CONSTRUCTION OF PLUMBING, HEATING AND VENTILATING FOR COTTAGE "H", INSTITUTION FOR FEEBLE MINDED, ORIENT, OHIO, AT AN EXPENDITURE OF $28,511.00—SURETY BOND EXECUTED BY THE GLOBE INDEMNITY COMPANY.

COLUMBUS, OHIO, July 25, 1927.

HON. GEORGE F. SCHLESINGER, *Director, Department of Highways and Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval a contract between the State of Ohio, acting by the Department of Highways and Public Works, for the Department