commission of a county has no authority to modify a properly authorized levy outside of the fifteen mill limitation to meet the interest and principal requirements of bonds payable by levies outside the fifteen mill limitation, when the amount of such levy is augmented on account of previous tax delinquencies.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4780.

APPROVAL, BONDS OF NORTON TOWNSHIP RURAL SCHOOL DISTRICT, SUMMIT COUNTY, OHIO— $1,800.00.

COLUMBUS, OHIO, December 3, 1932.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

4781.

COUNTY TREASURER—LIABLE WITH HIS SURETIES FOR FUNDS RECEIVED IN HIS OFFICIAL CAPACITY AND FOR DIVERSION OF TAX FUNDS TO COVER SHORTAGE OF PREVIOUS TREASURER—JUDGMENT MAY BE SECURED AGAINST EACH TREASURER BUT RECOVERY LIMITED TO ACTUAL LOSS.

SYLLABUS:

1. *A county treasurer and his sureties are liable for the payment according to law of all funds received by him, in his official capacity, as evidenced by his "cash stubs" other than those representing the payment of taxes by checks which have been dishonored upon presentment unless it is clearly shown that the amount of money stated in such receipt to have been received by him is erroneous.*

2. *When a shortage of funds occurs during the term of a county treasurer whether by reason of defalcation or otherwise and a subsequent county treasurer applies funds coming into his possession in payment of other tax items for the purpose of expunging such shortage such misapplication of the tax funds by the subsequent treasurer is tantamount to a payment of funds coming into his possession otherwise than in the amount required by law, and renders such treasurer and his sureties liable for the entire amount of the shortage in his accounts caused by such diversion of funds.*

3. *When a county treasurer has diverted funds coming into his possession as treasurer and such diversion is paid by a subsequent county treasurer by the application of tax funds received during a subsequent term and a third county treasurer similarly expunges the shortage in the accounts of the second county treasurer each of such county treasurers has failed to pay out the moneys coming into his possession in the manner provided by law. Since the liability of each of such*

treasurers is several, a separate judgment may be obtained against each treasurer even though the county has no right to receive on such judgments a greater amount than will replace its loss created by the several acts of such county treasurers.

COLUMBUS, OHIO, December 3, 1932.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Your recent request for opinion reads:

"Our examiners, in their examination of the Treasury of Cuyahoga County as of December 17, 1931 (report released and filed April 11, 1932) charged that there was a cash deficit of $475,000.00. This amount consisted of 2416 items of tax paid to the treasurer, as evidenced by his records, prior to the date of the examination, which were not reported to the county auditor as taxes collected, and therefore, not included in the auditor's balance sheet charge to the treasurer, but which money was used by the treasurer to balance the amount charged to him upon the auditor's accounts.

On April 13, 1932, the treasury was closed, and an examination made as of April 23, 1932 disclosed a cash shortage of tax money amounting to $477,000.00. The auditor's February, 1932, settlement with the treasurer shows a charge in excess of collections reported amounting to $477,000.00.

A further examination of tax collections discloses that conditions similar to the above stated existed in former years. It is found that taxes collected during the closing weeks of a collection have not been reported to the auditor, nor included in the settlement, but that the money for the same has been used to balance the treasury against the auditor's charge.

These manipulations took place over a period from August, 1926, to December, 1931, and cover the administrations of three treasurers, as follows:

Treasurer No. 1—1926 to January 1, 1929.

Treasurer No. 2—January 1, 1929, to September 2, 1929.

Treasurer No. 3—September 2, 1929, to date.

Treasurer No. 2 also served as chief deputy under both Treasurers Nos. 1 and 3, and during the entire period, all assets of the treasury were under his direct charge and control.

The examination so far has disclosed that a diversion of tax moneys occurred during August, 1926, and that during November and December, 1928, a partial restoration was made. The remainder was kept under cover by delayed accounting for taxes received.

Analysis of the treasurer's records of taxes collected shows that various items received during the administration of Treasurer No. 1 were accounted for during the administration of Treasurer No. 2; and that various items collected during the administration of Treasurer No. 2 were accounted for during the administration of Treasurer No. 3. At this time it appears that the shortage was ever increasing, and was covered in the delayed accounting for taxes collected.

QUESTION: Under the conditions as above stated, as a matter of law and accounting, are we right in assuming that each treasurer and

his bond is liable for the entire amount of taxes received during his administration as evidenced by his cash stubs?

Or, to state it in another way:

If the total tax stubs stamped paid by Treasurer No. 1 during his term of office exceed the amount of taxes reported to the county auditor during such term, are he and his bond liable for such difference, although such difference is accounted for by Treasurer No. 2 during his term? (The same to apply to the change from Treasurer No. 2 to Treasurer No. 3).

For example: An item of tax amounting to $150,000.00 is paid to Treasurer No. 1 on date of December 28, 1928, as evidenced by the cash stub. The check for this amount was deposited in the county depository to his credit on December 29, 1928, and the same included in the treasury assets on December 31, 1928, at the expiration of his term of office. This tax, according to the records of Treasurer No. 1, was not accounted for to the county auditor on date of December 31, 1928, or prior thereto. But, during January, 1929, Treasurer No. 2 did enter such item in his cash book of tax collected and did report the same to the county auditor as taxes collected during his term of office."

To arrive at an intelligent understanding of your inquiry, as to whether any or all of the county treasurers mentioned in your request are liable in damages by reason of the conduct therein described it might prove profitable to review briefly the duties, rights and liabilities of a county treasurer as well as the nature of his office.

Since the office of the county treasurer is established by statute, the county treasurer can have neither duties nor rights except as given by the statutes creating and defining such office. It is evident that any liability that attaches to such office must be either specifically imposed by such statutes or must arise by reason of misfeasance, malfeasance or nonfeasance in the performance of such duties so imposed.

The statutes concerning the collection of taxes places a duty on the county treasurer to collect the taxes after they are assessed, but with such duty this opinion has no concern. Your inquiry does not raise a question as to any violation of the treasurer's obligations in this regard; it rather presupposes a violation of duty after the taxes have been collected.

What duty is imposed by statute on the county treasurer concerning the custody of tax moneys? Section 2638, General Code, in setting forth the method of custody of public funds, contains the following language:

"Except as otherwise specifically provided by law, *all public moneys * * shall be at all times kept in the county treasury.*"

This same section defines what is meant by the "county treasury":

"The county treasurer shall keep *his office* at the seat of justice of the county *in a room or rooms provided* for that purpose *by the county commissioners,* which *shall constitute the county treasury.*"

What is meant by "except as otherwise specifically provided by law?" In Sections 2715 et seq. General Code, the legislature has provided for the establish-

ment of county depositories by the county commissioners and has in Section 2736, General Code, required the county treasurer to:

> " * * before noon of each business day * * deposit therein the balance, if any, remaining in his hands after having paid out of the receipts of the preceding business day, in cash, warrants presented to him for payment during such day, except as herein before provided. Such money shall be payable only on the check of the treasurer."

"Except as herein before provided" as used in such section, refers to section 2733, General Code, which limits the deposits in a depositary to ninety percent of the penal sum of the bond furnished by the depositary or of the face value of the securities deposited by the depositary as security for the deposits. These sections, when read together, provide that all public funds coming into the hands of a county treasurer shall be kept *only* in the county treasury unless a county depositary has been established in the manner provided by law, in which case the county treasurer must deposit in such depositary daily before noon, the public funds in his hands until the sum on deposit is equal to ninety percent of the penal sum of the bond, or ninety percent of the face value of the securities deposited as security for such deposits.

What is the duty of the county treasurer in the disbursement of such public funds? The legislature has laid down certain specific rules or requirements relative to the payment of such funds. In section 2674, General Code, it has provided:

> *"No money shall be paid from the county treasury,* or transferred to any person for disbursement *except on warrant of the county auditor,* but money paid over by the county treasurer to the treasurer of state shall be *on the warrant of the auditor of state."* (Italics the writer's.)

and in section 2639, General Code, it has further provided:

> *"At the expiration of his term of office* or on his resignation or removal from office, *the county treasurer shall deliver to his successor, all moneys,* books, papers and other property in his possession as treasurer, and in case of death or incapacity of the treasurer, they shall in like manner be delivered over by his legal representative." (Italics the writer's.)

From the language of the foregoing statutes, it is evident that the legislature has not authorized the county treasurer to make use of any funds that come into his hands in his official capacity but that at all times, such treasurer is required to have either in the county treasury or in the depositaries established by the county commissioners the total amount of public moneys which have come into his possession as such officer, less such sums as have been previously disbursed upon the authority of warrants drawn by the auditor of state or the county auditor. (See *State* vs. *Meyers,* 56 O. S. 340; *In re. Osborn Bank,* I O. App. 140.)

It is true that certain provisions contained in statutes are construed by the courts as directory or permissive, while certain other provisions in statutes are

construed as mandatory. It should, however, be borne in mind that the language of the statutes concerning the custody of public money by the county treasurer purports to be mandatory rather than permissive. I am not unmindful of the rule of construction of statutes sometimes used by courts, that words importing a command may be read to be permissive or enabling only. An examination of textbooks and authorities discloses that such conduct is only allowable "when such a construction is rendered necessary by the evident intention of the legislature or the rights of the public or of private persons under the statute." (Black on Interpretation of Laws, Section 69; *Stanton* vs. *Realty Company,* 117 O. S. 345; *State ex rel* vs. *Board of Education,* 95 O. S. 367; *C. S. & C. R. Co.* vs *Mowatt,* 35 O. S. 294; *Lessee of Swazey's Heirs* vs. *Blackman,* 8 Oh. 5, 18.) The converse of such rule is likewise definitely established. Thus: "Where a statute confers authority to perform an act which public interest demands, the word 'may' will be regarded as imperative." *(Stanton* vs. *Realty Company, supra; C. S. & C. R. Co.* vs. *Mowatt, supra.)*

It is not unreasonable to conclude that the public has, or should have, an interest in the safe custody of the public funds which they have paid into the treasury for public or governmental purposes. If this be a valid deduction, it appears to be immaterial whether the language contained in the sections of the statutes above referred to, is permissive or mandatory, for it would be the duty of the court to construe it as mandatory. To again use language contained in Black on Interpretation of Laws, Section 125:

> "Where a statute provides for the doing of some act which is required by justice or public duty, or *where it invests a public* body, municipality, or *officer with power to take some action which concerns the public interests or the rights of individuals,* though the language be merely permissive in form, yet *it will be construed as mandatory,* and the execution of the power may be insisted upon as a duty." (Italics the writer's.)

The legislature has taken further precautions in making such duty mandatory. In section 2633, General Code, which sets forth the requirements of the bond of the county treasurer, it has specified that such bond shall "be conditioned for the payment, according to law, of all moneys which come into his hands, for state, county, township or other purposes." It further has provided that the county treasurer shall take an oath, among other requirements, "faithfully to discharge the duties of his office." (See sections 2633, General Code.)

The county treasurer is the principal on such bond. The terms of such bond, together with the obligation or oath of office, form a contract between the county treasurer on the one hand, and the citizens of the state on the other. The treasurer becoming obligated to receive the public moneys and to retain them either in the county treasury or in a legally created depository until a draft for their legal payment, executed by either the county auditor or the auditor of state, authorizes and directs their payment. To use the language of Bowen, J. in *State ex rel.* vs. *Harper,* 6 O. S. 610:

> "By accepting the office, the treasurer assumes upon himself the duty of receiving and safely keeping the public money, and of paying it out according to law. His bond is a contract that he will not fail, upon any account, to do these acts. It is, in effect an insurance against

the delinquencies of himself, and against the faults and wrongs of others in regard to the trust placed in his hands. He voluntarily takes upon himself the risks incident to the office, and to the custody and disbursement of money. Hence it is not a sufficient answer when sued for a balance found to have passed into his hands, to say that it was stolen from him; for even if the larceny of the money be shown to be without his fault, still, by the terms of the law, and of his contract, he is bound to make good any deficiency which may occur in the funds which come under his charge."

A county treasurer is by statute made personally liable for all acts of his deputies. Section 2637, General Code, reads:

"Each county treasurer may appoint one or more deputies, and *he shall be liable and accountable for their proceedings* and misconduct in office." (Italics the writer's.)

The obligation of the sureties of a public official is not necessarily as great as the obligation of the public official. The liability of the sureties must be determined from the language contained in the bond. As stated by Davis, J. in *State* vs. *Griffith,* 74 O. S. 80, 92:

"There is no question of law more firmly settled in this state than that the sureties are not liable beyond the letter of their contract."

See also *State* vs. *Mediary,* 17 Oh. 554; *Birdsall* vs. *Heacock,* 32 O. S. 177; *Morgan* vs. *Boyer,* 39 O. S. 324; *Cleveland Metal Roofing Company* vs. *Gaspard,* 89 O. S. 185; *American Guaranty Company* vs. *The Cliffwood Coal & Supply Company,* 115 O. S. 524, 536; *City of Wilkes Barre* vs. *Rockfellow et al.,* 171 Pa. 177; *Malloy* vs. *County Commissioners,* 52 L. R. A. (N. M.) 126.

There is considerable dicta in some of the reported decisions in this and other states, tending to indicate that a greater liability is created against the sureties on bonds when they have received a remuneration for their risk. (See *Bryant* vs. *American Bonding Company,* 77 O. S. 90, 99; *Cleveland Metal Roofing Company* vs. *Gaspard, supra; Royal Indemnity Company* vs. *Northern Ohio Granite & Stone Company,* 100 O. S. 373). Such language of the court apparently refers to the construction of any ambiguities of language contained in the contracts of indemnity rather than to the obligation of the sureties, for, as stated by Allen, J. in the case of *American Guaranty Company* vs. *Cliffwood Coal & Supply Company, supra:*

"There is no real inconsistency in the rulings which make a distinction between private and compensated sureties. *The obligation of the surety must in each case be measured by its contract;* but in the case of the compensated surety, the construction of the contract is necessarily affected by the fact that the surety draws its own contract, often in terms technically complex. The familiar rule will therefore be exerted against a compensated surety that the contract will be applied most strongly against the party who draws it."

In the case at hand, however, such rule of construction of contracts has no application for the obligation of the surety is definitely described by the statute which is read into and made a part of the bond. The condition of the bond, as stated in Section 2633, General Code, is "for the payment, according to law, of all moneys which come into his (the county treasurer's) hands, for state, county, township or other purposes." The bond of the county treasurer is not conditioned for "the faithful discharge of his duties as county treasurer." Such bond is not security for any act of the county treasurer except for the payment of money according to law. Thus, it is evident that even though a county treasurer may falsify each, any and all of his records, reports and settlement sheets, if he pays out the public moneys received by him "according to law" such conduct would not create any liability against his sureties.

Your inquiry cannot be answered categorically either as to the respective treasurers or as to the respective sureties. By "cash stubs", I assume that you refer to the stub attached to the tax bill, which, when a tax bill is paid and receipted, is also receipted and retained by the county treasurer. It then becomes an evidentiary voucher "showing the amount, the time, from whom and from what source received", of money received by the county treasurer as required by section 2640, General Code. In the collection of taxes the county treasurer is authorized to receive checks tendered in payment of taxes. Section 2744, General Code, provides:

> "A county treasurer may receive checks but such receipt shall in no manner be regarded as payment. No sum shall be considered paid until the money therefor has been received by the treasurer or a depositary. No responsibility shall attach in any manner directly or indirectly to a treasurer, his sureties or the county by reason of the receipt of a check and collection of checks shall be entirely at the risk of the person turning them into the treasury."

One of my predecessors in office (Opinions of the Attorney General for 1917, Volume I, page 966) in construing the law concerning checks given in payment, held, as stated in the first paragraph of the syllabus:

> "Ordinarily, the receipt by a county treasurer of a check in payment of the liquor tax under section 6071, General Code, is not payment of such assessment, even if the officer, on receiving the check, marks the duplicate 'paid' and issues a receipt therefor, if the check is not honored by payment."

This ruling by a former Attorney General is amply supported by authorities other than Section 2640, General Code, that is, even in the absence of such section the rules of common law would cause the court to hold that when a check given in payment of taxes is dishonored upon presentment, the tax item for which the check was given is not paid.

In 3, Cooley on Taxation, Section 1252, such author states:

> "A bank cheque is conditional payment only, and the tax will remain in force if the cheque is dishonored."

See also, to the same effect, *Kahl* vs. *Love,* 37 N. J. L., 5; *Houghton* vs. *City of Boston,* 159 Mass. 138; *Moore* vs. *Auditor General,* 122 Mich. 599; *Koones* vs. *District of Columbia,* 4 Mackay (D. C.) 339; *Manck & Bauer* vs. *Fratz, County Treasurer,* 4 W. L. B., 1043.

From the language of the statute, as well as that of the opinions in the cases above cited, it is evident that the receipt of a check by the county treasurer is not a receipt of money for taxes, but rather is a conditional payment, becoming an absolute payment only when such check has been honored by the bank upon which it is drawn.

Under date of March 2, 1928 (Opinions of the Attorney General for 1928, Volume I, page 566) my predecessor in office held, as stated in the syllabus:

> "Under the provisions of Section 2744, General Code, a county treasurer may receive checks from taxpayers, but such receipt shall in no manner be regarded as payment until the money is received on said checks. If payment on said checks is refused by the bank on which it is drawn, the tax will remain in force even though the tax has been marked paid and a receipt is given, in reliance upon which a person has bought the land."

No liability is created against the county treasurer by reason of his having received a check in payment of an item of tax and having issued a receipt therefor, which check is dishonored upon presentment to the bank upon which it is drawn, since the tax is not paid and is not expunged from the tax list and duplicate. Therefore, if by "cash stubs" you refer to the stub of a tax bill which, along with the tax bill, has been receipted and retained by the county treasurer as evidence of the receipt of payment, it would appear that the county treasurer and his sureties are not liable for any such "cash stubs" which are evidentiary of receipt of a check where the check has been dishonored upon due presentment.

As I have above pointed out, it is the duty of the county treasurer to deposit before noon of each day, all cash, checks, etc., coming into his possession as county treasurer. (See Section 2715 et seq. General Code.) Any check that has been dishonored and returned by the bank upon which it is drawn, would be conclusive evidence that the "cash stub", evidencing the receipt, should be voided or canceled and not charged against the county treasurer.

I assume that the "cash stub" is receipted to show the facts required by Section 2640, General Code, and when receipted, is used for the purposes of such section. Such section provides:

> "The county treasurer shall keep an accurate account of all moneys by him received, showing the amount, the time from whom and from what source received."

It is, I am informed, an established practice in many counties that the cashier for the county treasurer makes no record at the time of the actual receipt of payment of tax items, other than that made on the "cash stubs." Thus, such stubs are the original entry of the cash receipt and the best evidence of the receipt of such payment and of the time of such receipt. A receipt may always be rebutted by evidence; it is not conclusive. *Stone* vs. *Vance,* 6 Oh. 246; *Babcock* vs. *May,* 4 Oh. 334, 346; *Emrie* vs. *Gilbert, Wright.* A typographical error on the face of a receipt may always be corrected by parol evidence.

However, in the case of *New Amsterdam Casualty Company* vs. *City of Norwalk,* 19 O. App. 476, the Court of Appeals of Huron County laid down the rule that where the treasurer uttered his receipt for funds which were received by another officer the treasurer and his sureties were liable for the sum evidenced by the receipt even though the treasurer never actually received the money. This case is decided upon the theory that it was the duty of the treasurer to require the funds to be delivered to him rather than to someone else before issuing the receipt.

It is my opinion that the county treasurer and his sureties are liable for all funds received by him, as evidenced by his "cash stubs" other than those evidencing receipt of payment of taxes by checks unless he can clearly show that the amount of money evidenced by such receipt is erroneous.

The problem presented by your inquiry is, which of the county treasurers are chargeable with the shortage. The tenor of your inquiry indicates that whatever funds were received and not accounted for by treasurer No. 1, were accounted for by treasurer No. 2, and, likewise, whatever funds were received and not accounted for by treasurer No. 2, were accounted for by treasurer No. 3, so that at the present time all items of taxes paid have been accounted for except those received by treasurer No. 3.

Sections 2596 and 2683, General Code, provide the manner of settlement between the county treasurer and the county auditor. The county auditor is required at such time to determine "the amount of taxes with which such treasurer is to stand charged." The language of such sections, and those following describing the method of making settlement, clearly indicate that the treasurer shall account to the auditor for all items of taxes collected, and that he shall be charged with having received the moneys credited as paid on the tax duplicate returned by the county treasurer to the county auditor, and as paid on warrants for collection, theretofore delivered by the auditor to the treasurer. The county auditor after examination is required to make a finding from information gained from an examination of the duplicate and other sources, as to what items of tax have been paid. (Sections 2598 and 2599, General Code). The county treasurer is no longer charged with items of tax which are unpaid until they are again certified to him for collection as delinquent items of tax but is charged with the amount thus shown to have been paid. The county treasurer is held to have the amount of money which he accounts for as being received, for the proper distribution to those taxing districts and to those governmental agencies for which the items of tax reported as collected were assessed.

In Throop on Public Officers, Section 219, the following rule is laid down:

> "Where a tax collector has held office for two successive years, and has made up his arrears for the first year, with money collected during the second year, the sureties for the second year cannot deduct that money from his defalcation. *(Colerain* vs. *Bell,* 9 Metc. (Mass.) 499.) The general rule is, that where a deficiency for one term has been covered up by money received during a second term the sureties in the bond for the second term are liable for that money."

This statement of law is well fortified by judicial decisions. See *U. S.* vs. *Boyd,* 15 *Peters* (U. S.) 187; *Cook* vs. *State,* 13 Ind. 154; *Rogus* vs. *State,* 99 Ind. 218; *Board of Supervisors of Lauderdale* vs. *Alford,* 65 Miss. 63; *Pine County* vs.

Willard, 39 Minn. 125; *State of New Jersey* vs. *Sooy,* 39 N. J. L. 539; *Lydon* vs. *Miller,* 36 Vt. 329.

In the case of *Cook et al.* vs. *State ex rel, Patterson, supra,* the court held as stated in the third paragraph of the headnotes:

> "Suit upon the official bond of the county treasurer. The condition of the bond was, that the county treasurer should pay over, according to law, all money that should come into his hands. The court instructed the jury as follows: 'If Cook, at the expiration of his first term, was a defaulter, and, being his own successor, used funds that came to his hands during his second term, to pay the balance against him at the end of the first term, the sureties in the first bond are discharged, and the sureties in the second bond are liable for the money thus appropriated.' HELD, that the instruction was correct."

In the case of *State of New Jersey* vs. *Sooy, supra,* the court held as stated in the syllabus:

> "1. Sureties on the bond of a state treasurer are liable for moneys received by him during the continuance of their suretyship, and used by him in payment of arrears due from him to the state at the time the bond was given.
>
> 2. S. was treasurer of state from January, 1873 to September, 1875. In April, 1875, he gave a new bond, with new sureties. He was then a defaulter to the state. After April, 1875, he received a large sum of public moneys, part of which he used to pay his prior defalcation, and part he failed to account for. HELD, in an action on the new bond, that his new sureties were liable for both amounts."

The law is definitely settled that sureties are only answerable for moneys received by their principal of his predecessor, or previously collected by him, if such moneys are actually in hand at the time of the giving of the bond; but they are not liable for past derelictions, unless the bond is retrospective. *Farrar* vs. *Brown.* 5 Pet. 373; *Broome* vs. *U. S.* 15 How. 143; *Hassel* vs. *Long,* 2 M. & S. 363; *Freeholders of Warren* vs. *Wilson,* 1 Harr. 110; *Patterson* vs. *Inhabitants of Freehold,* 9 Vroom. 256.

As hereinbefore pointed out, the obligation of the county treasurer, as created by the terms of his bond and oath of office, is to disburse the public moneys according to law. The crediting of moneys received on one tax item to the payment of another, or accounting which would cause moneys to be disbursed to those taxing entities which are entitled to share in the proceeds of a tax item other than those taxing subdivisions entitled to share in the proceeds of the item of tax for which the taxpayer paid the moneys to the county treasurer is not a payment according to law. The effect is that the present county treasurer has a shortage concerning tax items for which he has actually received payment, by reason of his diversion of funds to the payment of items for which he should not have been charged.

It does not appear to me to be material whether the diversion was in payment of obligations or shortages incurred during his prior term of office or whether during the term of a predecessor in office. The law set forth in Throop on Public Offices, supra, and cases above cited and quoted from, would, in my

opinion, apply in either case. I therefore am of the opinion that the present county treasurer referred to in your inquiry as "treasurer No. 3" and his sureties are liable for the entire amount of the shortage for the reason that such treasurer has not paid out the moneys coming into his possession according to law, but rather has caused them to be disbursed in payment of shortage of former county treasurers, in violation of law.

In arriving at this conclusion I have considered the case of *Walker* vs. *State,* 176 Ind. 40, and the case of *Royal Indemnity Company* vs. *American Vitrified Products Co.,* 117 O. S., 278.

In the Walker case, the condition of the treasurer's bond was "for the faithful performance of his duties as treasurer." The court, in rendering its decision, cited the case of *Cook* vs. *State, supra,* and *Goodwine* vs. *State,* 81 Ind. 109, and distinguished them on the ground that the conditions of the bonds were different. The court points out that where the condition of the bond is for the faithful performance of the duties of the office the breach occurs at the time of the extraction of the funds, while, when the express condition is for the payment of funds according to law, there is a breach of the bond every time such failure to so pay occurs.

In the case of *Royal Indemnity Company* vs. *American Vitrified Products Co., supra,* the conditions of the bond were for protection against "such pecuniary loss of money, funds or other personal property * * as the insured shall sustain by any act or acts of fraud or dishonesty (including forgery, theft, embezzlement, wrongful abstraction or misapplication)." The bond was upon the cashier of a private corporation. Such employe embezzled certain funds prior to March, 1924. On March 1, 1924, a new bond was written on such employe. It appears that such employe was in the habit of shifting the incoming moneys and checks in making the deposits in his employer's accounts in such manner as to conceal the embezzlement. The court held that the default occurred at the time of the extraction of the funds and not at the time of the credit of incoming funds to an improper fund. In this case it must be borne in mind that all the misapplications were funds of the same owner; the only diversion of money from one owner to another was by such extraction, while in the case of a county treasurer the funds diverted are funds of different owners, that is, the items of tax misappropriated by treasurer No. 1, were probably the funds of the county, the school district of B. and the municipality of B. The tax items misapplied by treasurer No. 2, to cover up the prior shortage probably were the funds of the county, the school board of X. and the municipality of X., and similarly, in the case of treasurer No. 3. I am inclined to the opinion that the case of the *Royal Indemnity Company* vs. *American Vitrified Products Company, supra,* is not applicable to your inquiry for the reason that not only are the conditions of the bond different from those contained in your inquiry but also that in that case the only diversion of any funds was during the existence of the first bond.

From the facts stated in your inquiry, there appears a definite failure by treasurer No. 1 to pay according to law the funds coming into the treasurers possession, which is a direct breach of the terms of his bond for which misappropriation the county treasurer and his bondsmen would be liable. Similarly, to such extent as treasurer No. 2 failed to pay the funds coming into his possession in the manner provided by law, whether by reason of his application thereof to prior shortages, or by reason of new shortages occurring during his administration there would be a breach of the terms of his bond and such treasurer and his sureties would be liable therefor.

It is my opinion that your finding should be for the sums found to represent the conclusions set forth in the next three preceding paragraphs. It is evident that the aggregate amount of your findings will be in excess of the amount of the county's loss, yet the liability of each of the treasurers with their sureties is several. As held in the case of *Clinton Bank* vs. *Hart,* 5 O. S. 36, until a judgment has been rendered against all of the parties severally liable a separate action may be maintained against each upon his several liability, and no merger of their liability occurs until a judgment has been obtained against all of the parties. It naturally follows that executions against such judgment creditors cannot be sued further than sufficient to make the county whole. Therefore, when the county has recovered a judgment and has realized on such several judgments an amount equal to its loss, all of the judgment liens are released and the county would have no right, by reason of its several judgments, to recover more than its actual loss, but could subject the property of any or all of the judgment debtors not in excess of the specific judgment rendered against him to the payment of the county's loss as evidenced by such judgments. In other words, there would be several judgments in favor of the county, for the loss, but there could be only a single realization on the judgments.

You do not inquire concerning the right of contribution between the respective sureties, if any; that matter is not of interest to the county or the municipalities and I therefore express no opinion concerning the existence or non-existence of such right.

Specifically answering your inquiries it is my opinion that:

1. A county treasurer and his sureties are liable for the payment according to law of all funds received by him, in his official capacity, as evidenced by his "cash stubs" other than those representing the payment of taxes by checks which have been dishonored upon presentment unless it is clearly shown that the amount of money stated in such receipt to have been received by him is erroneous.

2. When a shortage of funds occurs during the term of a county treasurer whether by reason of defalcation or otherwise and a subsequent county treasurer applies funds coming into his possession in payment of other tax items for the purpose of expunging such shortage such misapplication of the tax funds by the subsequent treasurer is tantamount to a payment of funds coming into his posession otherwise than in the manner required by law, and renders such treasurer and his sureties liable for the entire amount of the shortage in his accounts caused by such diversion of funds.

3. When a county treasurer has diverted funds coming into his possession as treasurer and such diversion is paid by a subsequent county treasurer by the application of tax funds received during a subsequent term and a third county treasurer similarly expunges the shortage in the accounts of the second county treasurer each of such county treasurers has failed to pay out the moneys coming into his possession in the manner provided by law. Since the liability of each of such treasurers is several, a separate judgment may be obtained against each treasurer even though the county has no right to receive on such judgments a greater amount than will replace its loss created by the several acts of such county treasurers.

Respectfully,
GILBERT BETTMAN,
Attorney General.