will constitute the duly elected and qualified board of education for such district, and that the old board should retire and turn over the books and other properties belonging to the district to the newly elected board of education.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1771.

APPROVAL, BONDS OF HARRISON TOWNSHIP RURAL SCHOOL DISTRICT, PREBLE COUNTY—$51,500.00.

COLUMBUS, OHIO, February 27, 1928.

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

1772.

APPROVAL, BONDS OF LEWISBURG VILLAGE SCHOOL DISTRICT, PREBLE COUNTY, OHIO—$38,600.00.

COLUMBUS, OHIO, February 27, 1928.

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

1773.

COUNTY COMMISSIONERS—WHEN THEY MAY EMPLOY ATTORNEY TO FILE SUIT ON BOND OF DEFAULTING TREASURER—SECTION 2695, GENERAL CODE, AS TO PENALTY DISCUSSED—DUTY OF STATE AUDITOR.

SYLLABUS:

1. *The board of county commissioners of the county is not authorized to employ attorneys other than the prosecuting attorney of the county for the purpose of filing suit on the bond of the defaulting county treasurer, unless the employment of such attorneys is authorized by the common pleas court upon application for such authority made by the board of county commissioners and the prosecuting attorney in the manner provided by Section* 2412, *General Code.*

2. In an action properly brought under the provisions of Section 2695, General Code, a recovery may be had on the official bond of a defaulting county treasurer for the amount due and the penalty provided for by said section.

3. The penalty provided for by Section 2695, General Code, can not be recovered in an action on the official bond of a defaulting county treasurer instituted by the county commissioners under the provisions of said section, unless said action is so instituted on instructions for the purpose given by the auditor of state.

COLUMBUS, OHIO, February 27, 1928.

HON. JAMES COLLIER, *Prosecuting Attorney, Ironton, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your recent communication which reads as follows:

> "On November 16, 1927, the State Examiner, W. F. Bowen, discovered a shortage in the sum of approximately $47,000.00 in the office of Frank E. Melvin, County Treasurer. The American Surety Company of New York, and the American Guaranty Company of Ohio, Mr. Melvin's sureties, were immediately given proper notice of the defalcation, and by their representative agreed to reimburse the county for any shortage shown by the State Examiner's audit. The Examiner's audit was not completed until December 21, 1927, and showed a shortage of $54,838.06. The result of the final audit was immediately made known to the Surety Companies in verified form, and again they expressed their willingness to reimburse the county for the full amount, and also agreed to hold themselves liable for any shortage coming up in the future for which Mr. Melvin himself would be liable.
>
> On January 4, 1928, the county commissioners, without the knowledge or consent of the prosecuting attorney, employed A. R. Johnson and E. L. Riley, local attorneys, to collect from Mr. Melvin's sureties all monies misappropriated by him. On January 7, 1928, these attorneys, without instructions from the Auditor of State, and without the Prosecuting Attorney's knowledge or consent, filed suit against the Surety Companies for the amount as shown by the State Examiner's audit plus a 10% penalty, and claim Section 2695, G. C., as authority for the procedure of the county commissioners and the 10% penalty.
>
> Will you please advise me whether or not Section 2695, G. C., or any other section of the General Code, authorizes the county commissioners to employ counsel without the co-operation of the Prosecuting Attorney? Also will you please advise me whether or not under the circumstances as outlined above, Section 2695, G. C., provides a penalty of 10% against the treasurer and his sureties?"

It may be assumed that the first bond of the county treasurer involved in the litigation referred to in your communication was executed under the provisions of Section 2633, General Code, as it read before its amendment by the last General Assembly, 112 O. L. 111. This section then provided as follows:

> "Before entering upon the duties of his office, the county treasurer shall give bond to the state in such sum as the commissioners direct with two or more bonding or surety companies as surety, or at his option, with four or more free-hold sureties approved by the commissioners and conditioned for the payment, according to law, of all monies which come into

his hands, for state, county, township or other purposes. If bond with bonding or surety companies as surety be given, the expense or premium for such bond shall be paid by the commissioners and charged to the general fund of the county. Such bond, with the oath of office and the approval of the commissioners endorsed thereon, shall be deposited with the auditor of the county and by him carefully preserved in his office. Such bond shall be entered in full on the record of the proceedings of the commissioners, on the day when accepted and approved by them."

The second bond given by the county treasurer was given pursuant to the authority and requirements of said Section 2633, General Code, as amended. Inasmuch, however, as the only amendment to this section was the provision with respect to the qualifications of free-holder sureties on the bond of a county treasurer, it will not be necessary to further note the provisions of this section as amended.

Section 2695, General Code, referred to in your communication, provides:

"If the county treasurer fails to make a settlement or to pay over money as prescribed by law, on receiving such instructions from the auditor of state, the county auditor or the county commissioners shall cause suit to be instituted against such treasurer and his sureties, for the amount due, with ten per cent penalty thereon, which suit shall have precedence of all other civil business."

Whether this section or the other sections of the General Code hereinafter referred to govern the action on the county treasurer's bond here in question, the action on this bond is required to be in the name of the State of Ohio, the obligee named in said bond. *Hunter* vs. *Commissioners,* 10 O. S. 515; *State* vs. *Kelley,* 32 O. S. 421; *Kelley* vs. *State,* 25 O. S. 567.

Aside from the fact that the State of Ohio is the obligee named in the bond, it may be assumed that the funds involved in the defalcation on the county treasurer's bond were monies that come into his hands as the proceeds of taxes levied by the state and its political subdivisions, in Lawrence County. In this view the state may be said to be the real party in interest in such action. Touching this point, the Supreme Court in the case of *Wasteney* vs. *Schott,* 58 O. S. 410, in its opinion says:

"Revenues are essential to the maintenance of the state and the execution of its governmental functions. Taxation is a recognized constitutional and lawful means of raising such revenues for most, if not all public needs; and the courts will take notice that general taxes levied by the state directly, or through local agencies to which it has delegated that power, constitute a source of revenue for use in the due performance of the functions of the state government. Whether voluntarily paid, or collected by suit, they go partly to the general funds of the state for its disbursement in the administration of public affairs, and are in part disbursed in the due course of local administration by officers exercising the delegated powers of the state, deemed necessary and proper for that purpose. In the latter case, as well as the former, the fund belongs to the state's revenues, and the disbursement is for the public benefit, although local advantages may also result. Through county, township, municipal, and other organizations, they are paid out in the administration of public justice, the maintenance of the public order and security, the support of the public schools, and other purposes of a public nature pertaining to the state government."

With respect to your first question, Sections 2916 and 2917 of the General Code, so far as pertinent, provide as follows:

> Section 2916. "The prosecuting attorney shall have power to inquire into the commission of crimes within the county and except when otherwise provided by law shall prosecute on behalf of the state all complaints, suits, and controversies in which the state is a party, and such other suits, matters and controversies as he is directed by law to prosecute within or without the county, in the Probate Court, Common Pleas Court and Court of Appeals. In conjunction with the Attorney General, he shall also prosecute cases in the Supreme Court arising in his county. * * * "
>
> Section 2917. "The prosecuting attorney shall be the legal advisor of the county commissioners and all other county officers and county boards and any of them may require of him written opinions or instructions in matters connected with their official duties. He shall prosecute and defend all suits and actions which any such officer or board may direct or to which it is a party, and no county officer may employ other counsel or attorney at the expense of the county except as provided in Section twenty-four hundred and twelve. * * * "

Section 2412, General Code, referred to in Section 2917, General Code, above quoted, provides as follows:

> "If it deems it for the best interests of the county, the Common Pleas Court, upon the application of the prosecuting attorney and the board of county commissioners, may authorize the board of county commissioners to employ legal counsel temporarily to assist the prosecuting attorney, the board of county commissioners or any other county board or officer, in any matter of public business coming before such board or officer, and in the prosecution or defense of any action or proceeding in which such county board or officer is a party or has an interest in its official capacity."

Assuming that the action on the county treasurer's bond referred to in your communication was instituted on the direction of the board of county commissioners, as is contemplated by Section 2695, General Code, it will be observed that Section 2917, General Code, relating to the duties of prosecuting attorneys, provides that "he shall prosecute and defend all suits and actions which any such officer or board may direct or to which it is a party", and that "no county officer may employ other counsel or attorney at the expense of the county except as provided in Section twenty-four hundred and twelve."

Under Section 2412, General Code, the board of county commissioners may employ legal counsel, but only temporarily, for the purpose of providing assistance to the prosecuting attorney and then only after such board of county commissioners has been authorized to do so by the Common Pleas Court upon application for such authority made to the court by such board of county commissioners and the prosecuting attorney.

By way of specific answer to your first question, I am clearly of the opinion, under the facts stated in your communication, that the board of county commissioners of Lawrence County had no authority whatever to employ the attorneys named therein to institute and prosecute said action to recover on said defaulting county treasurer's bonds. *State of Ohio ex rel. Hunt* vs. *Board of County Commissioners*, 8 O. N. P. (N. S.) 281; *Ireton et al.*, vs. *State of Ohio ex rel. Hunt*, 12 C. C. (N. S.) 202, 81 O. S. 562.

Your second question is whether on the facts stated in your communication, the defaulting county treasurer and his sureties are liable for the penalty provided for by Section 2695, General Code. This suggests the further question as to whether the provisions of said Section 2695, General Code, have been superseded by those of Sections 284, et seq., General Code. Section 284, General Code, provides for the examination of public offices by the Bureau of Inspection and Supervision of Public Offices. With respect to the question at hand, Section 286, General Code, provides in substance, that if the report of said bureau on examination of a county office shows that any public money collected has not been accounted for, a certified copy of such report shall be forwarded to the prosecuting attorney of such county, who within ninety days after the receipt of such certified copy of such report, may institute a civil action in the proper court of such county for the recovery of such public monies, and that he shall prosecute the same to final determination. In this connection, said Section 286, General Code, further provides that the Attorney General or his assistant may appear in any such action on behalf of the county in such case, and that he may either in conjunction with, or independent of such prosecuting attorney, prosecute the same to final determination, and further, that the Attorney General may, when in his judgment, it is proper, or there is good reason for so doing, and he is requested so to do by the Auditor of State, bring the action in such case if the prosecuting attorney neglects to do so within ninety days after the report of the examination of such office has been so filed. Section 286-4, General Code, provides as follows:

> "In addition to any and all liability of any officer or employe for which he may be sued under the provisions of Section 286 and the succeeding sections of the General Code, the sureties on any official bond given by any such officer or employe shall be liable to the same extent as the principal and such actions may be brought upon such official bonds."

Aside from the penalty provided for by Section 2695, General Code, I do not suppose that it can be said that either said Section or Sections 286 and 286-4, General Code, created a right of action on the bond of a defaulting county treasurer. Independent of either or all of the sections of the General Code just mentioned, a right of action would exist against the principal and sureties on such bond to the extent of the defalcation, within the penal sum provided for in such bond. In this connection I am inclined to the view that Sections 286 and 286-4, General Code, are to be considered merely as furnishing an additional remedy for the right of action, when the county treasurer thus bonded fails to account for the public monies collected by him.

In the case of the *City of Zanesville* vs. *Fannan,* 53 O. S. 605, it was held:

> "Where a statute which creates a new right, prescribes the remedy for its violation, the remedy is exclusive; but when a new remedy is given by statute for a right of action existing independent of it, without excluding other remedies already known to the law, the statutory remedy is cumulative merely, and the party may pursue either at his option."

See also *Feuchter* vs. *Keyl,* 48 O. S. 357; *State ex rel.* vs. *Court of Appeals,* 104 O. S. 96, 103.

It is quite apparent that the provisions of Sections 286-4, General Code, above noted are not at all incompatible with those of Section 2695, General Code, and that the provisions of this last named section remain in full force and effect.

It does not require the citation of authority to sustain the right of the Legislature to impose the penalty in question on the defaulting county treasurer. With respect to the sureties on the bond of such county treasurer, however, it will be noted that such penalty is not imposed as a liability of such sureties by reason of any dereliction on their part; and consistent with the requirement of due process of law in the enactment of statutes of this kind, the penalty provided by Section 2695, General Code, can be sustained against the sureties on such defaulting county treasurer's bond only for the reason that by legal intendment this penalty is to be read into the bond considered as a contract with the obligee therein named. In the case of *National Surety Company* vs. *Leflore County,* 262 Federal 325, the United States Circuit Court of Appeals for the Fifth Circuit had under consideration the liability of said National Surety Company as a surety on the bond of a banking company which was a depository of monies of Leflore County, Mississippi. One of the questions presented and decided by the court was with respect to the liability of said surety for the penalty provided for by a section of the County Depository Act of said state. This section provided that when a county depository failed to pay over money when demanded, the board of supervisors of the county might employ counsel for its collection, and that counsel fees, together with a penalty of one per cent per month for delay in paying over such funds should be allowed as a charge against such depository and the sureties on its bond. Touching the liability of such surety for such penalty in an action against it on such bond, the court in its opinion says:

> "We think it was competent for the Mississippi Legislature to provide that public depositories should be liable, in case of default, for penalties for delay, and for counsel fees. The terms of the statute in this respect enter into the contract between the county and the depository. The depository was free to accept or reject this added liability. For a like reason it was competent for the Legislature to provide that the depository's bond should secure the penalties and counsel fees to the extent of the penalty of the bond. The surety accepted the added responsibility voluntarily, by executing the bond with knowledge of the terms of the statute. *Fidelity & D. Co.* vs. *Wilkinson County,* 109 Miss. 879; *Fidelity Mut. L. Asso.* vs. *Mettler,* 185 U. S. 308."

On the foregoing considerations, it would seem that Section 2695, General Code, still has its proper place as a part of the statutory law of this state, and that on a state of facts making the same applicable resort may be had to an action under the provisions of this section to recover on the bond of a defaulting county treasurer, not only the amount due, but also the penalty therein provided. In this connection it may be said that, depending upon the facts in the particular case, any one of three separate actions may be brought to recover on the bond of a defaulting county treasurer, to-wit, the action authorized by Section 2695, General Code, that provided for in Section 286-4, General Code, above quoted, and that provided by Section 2712, General Code, which makes it the duty of the prosecuting attorney to bring such action where examination of the county treasurer's office by the committee appointed under Section 2710, General Code, discloses a breach of the terms of his bond.

However, the question made in your communication is whether a recovery can be had in the action now pending, not only for the amount ascertained and found to be due from said county treasurer, but also for the ten per cent penalty provided for in Section 2695, General Code. This suggests the further question as to whether or not said Section 2695, General Code, is applicable to the situation of fact dis-

closed in your communication. This section was originally enacted as Section 25 of the act of March 12, 1831, 29 O. L. 294, and said Section 25 of the act of 1831 has not since been amended other than as its provisions have been changed in the revisions that have been made from time to time of the statutes of the state. Said Section 25 of the act of March 12, 1831, provided as follows:

> "That if any county treasurer shall fail to make return, fail to make settlement, or fail to pay over all money with which he may stand charged, at the time and in the manner prescribed by law, it shall be the duty of the county auditor, on receiving instructions for that purpose from the auditor of state, or from the county commissioners of his county, to cause suit to be instituted against such treasurer and his securities, in the Court of Common Pleas of his county; and it shall be lawful for such court, at the first term thereof after the commencement of such suit, if the process issued against such treasurer and his securities shall have been duly served and returned, to render judgment against them for the amount due from such treasurer, with legal interest, and a penalty of ten per cent thereon; from which judgment there shall be no appeal, nor shall there be any stay of execution; and the property of such delinquent treasurer and his securities may be sold without appraisement, to satisfy such judgment: Provided, that if the court shall be satisfied that justice cannot otherwise be done, they may continue such cause; but in no case shall they grant more than two continuances."

This section was carried in this form until the revision of 1880, when, as Section 1126, Revised Statutes, it was made to read as follows:

> "If the county treasurer fails to make any settlement required by law, or to pay over any money at the time and in the manner prescribed by law, the county auditor, on receiving instructions for that purpose from the auditor of state, or the county commissioners, shall cause suit to be instituted against such treasurer and his sureties, for the amount due from him, with ten per cent penalty thereon, which suit shall have precedence of all other civil business, and be prosecuted with all convenient speed."

Thereafter no change was made in the provisions of this section until by the enactment of the General Code the same became Section 2695 therein and was made to read as above quoted.

In the case of *Marqua* vs. *Martin,* 109 O. S. 56, it was held:

> "Although there is a presumption, where a statute has undergone revision and consolidation by codification, that the construction thereof will be the same as prior thereto, yet, where the language of the revised statute is plain and unambiguous, it must be given the meaning and effect required by the plain and ordinary signification of the words used, whatever may have been the language of the prior statute."

Conformable to the rule of statutory construction above noted, recognition must be given to the fact that in the enactment of the General Code this section has been so changed as to authorize the county commissioners, as well as the county auditor, to cause suit to be instituted against the county treasurer and his sureties "if the county treasurer fails to make a settlement or to pay over money as prescribed by law." However, likewise conformable to an established rule of statutory

construction noted in the case of *Marqua* vs. *Martin*, supra, it must be held that neither the county commissioners nor the county auditor are authorized to cause suit to be brought against the county treasurer and his sureties under this section of the General Code, unless instructions for that purpose are received from the auditor of state. Aside from any other question with respect to the application of Section 2695, General Code, suggested by the facts stated in your communication or omitted therefrom, it does not appear that said action was instituted on instructions for the purpose received from the auditor of state. Inasmuch as the provisions of Section 2695, General Code, provide for a penalty, they should be strictly construed, "and the meaning and application thereof can not be extended by judicial interpretation beyond the plain letter of the statute." *Marqua* vs. *Martin, supra.*

Although in a case properly brought under the provisions of Section 2695, General Code, a recovery may be had on the official bond of a defaulting county treasurer for the amount due and the penalty provided for by said section, it does not appear from your communication that the pending action is one properly brought under the provisions of this section; and, for this reason, I am of the opinion that no penalty can be recovered in said action on the official bonds of the defaulting county treasurer mentioned in your communication.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1774.

FEES—MARRIAGE FEES OF MUNICIPAL COURT OF CINCINNATI.

SYLLABUS:

Where fees for solemnizing marriages have been retained by judges of the Municipal Court of Cincinnati in pursuance of specific advice from the Attorney General, no findings against such officials should be made for fees retained prior to the issuance of Opinion No. 1295, *dated November* 25, 1927.

COLUMBUS, OHIO, February 28, 1928.

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

GENTLEMEN:—Referring to Opinion No. 1295, rendered to your department under date of November 25, 1927:

I am in receipt of the following letter from Honorable John D. Ellis, City Solicitor of Cincinnati:

> "The Bureau of Inspection and Supervision of the State of Ohio has referred to me your opinion under date of November 25, 1927, relating to the right of Municipal Judges to retain marriage fees collected by them.
>
> Judge Samuel W. Bell, the presiding judge of our Municipal Court, has also handed me two letters of Attorney General Crabbe, one dated January 19, 1925, and the other January 22, 1925, which appear to be in conflict with your most recent opinion. I do not know whether or not you had these rulings of Mr. Crabbe before you, and I am simply writing to inquire whether or not they would cause you to change your opinion in any way."