taxation. In regard to real estate values the county auditor is the assessor in his county for purposes of taxation and he may assess all property in said county at what he determines the real value in money subject to complaint being filed with the county board of revision, and appeal taken therefrom to the Tax Commission of Ohio.

It is therefore my opinion that if the leaseholders in the instant case refuse to give information or answer questions propounded by the county auditor in order to enable him to correctly assess the property of said lessees for taxation, he may avail himself of the statutes enforcing the compliance with rules prescribed by the Tax Commission of Ohio and also with the statutes authorizing said auditor to proceed to assess said property and to determine the value thereof from information gained otherwise than from said leaseholders.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1264.

FUNDS—DUE CONTRACTOR FOR WHOM RECEIVER HAS BEEN APPOINTED—SHOULD BE PAID TO RECEIVER—SURETY UPON THE BOND OF THE CONTRACTOR HAS NO CLAIM TO SAID FUND.

SYLLABUS:

Where a receiver has been appointed for a contractor after he has performed all of the work required of him under a contract with the state for a road improvement, and there remains certain funds by virtue of a final estimate due the contractor, the amount so remaining due should be paid by the Director of Highways and Public Works to such receiver, and the surety upon the bond of the contractor has no claim to said fund by reason of the fact that certain labor claims or material bills in connection with said contract have not been paid.

COLUMBUS, OHIO, November 15, 1927.

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

DEAR SIR:—Receipt is acknowledged of your recent communication requesting my opinion as follows:

> "This department has been requested by the attorney for a bonding company (who is surety for a contractor doing state work; this contractor having completed the work called for in the contract) to turn over to the bonding company the balance due on the contract. It so happens that this contracting company is now in the hands of a receiver.
>
> The agent for this bonding company, P. H. B. of the firm of B. & D. with offices in the X Building, Columbus, Ohio, cites as his authority for making this request the decision in the case of *State ex rel. The Southern Surety Company* vs. *Schlesinger, Director of Highways and Public Works, et al.,* which was decided by the Supreme Court on March 16, 1926, and is to be found in 151 N. E. 177; 45 A. L. R. 371.

He quotes from the syllabus of this case as follows:

'A surety on the bond of a contractor for public work, who completes the work after abandonment by the contractor, is subrogated to all the rights of the state in the fund remaining at the time of declaration of forfeitures, and entitled to priority of payment of the balance of said fund as against the assignee of such contractor, to whom the balance of said fund had been assigned to secure loans received by him, the proceeds of which were used in making payment of the claims of laborers and material men, even though the surety on such bond was obligated to pay all claims of such laborers and materialmen, and even though such money was loaned and such claims paid before declaration of forfeiture.'

The question is shall this department draw its voucher to the receiver for the contractor, who was in charge of the work, or shall the department draw its voucher to the order of The Indemnity Insurance Company, in care of P. S. B. Attorney at Law."

An examination of the facts upon which the decision in the case of *The State, ex rel. The Southern Surety Company* vs. *Schlesinger, Director of Highways and Public Works*, 114 O. S. 323, was based, reveals an entirely different situation than that which is presented for my consideration in the present instance.

In the above case the Director of Highways and Public Works, acting under the provisions of Section 1209, General Code, had declared a forfeiture of a contract for a road improvement, and upon notice to the surety company to that effect, the surety company elected to complete the work according to the terms of the contract of its principal. The contractor prior to the forfeiture as aforesaid, had made an assignment of money due under the provisions of said contract to a bank which had loaned it money for the purpose of carrying out the provisions of said contract.

The surety company claimed a right to said money, as against the bank, on the ground that it was entitled to the same by virtue of its having completed the work, and by so doing had placed itself in the same position as the State of Ohio, had the state completed said work. The court held:

"A surety on the bond of a contractor for public work, who completes the work after abandonment by the contractor, is subrogated to all the rights of the state in the fund remaining at the time of declaration of forfeiture, and entitled to priority of payment of the balance of said fund as against the assignee of such contractor, to whom the balance of said fund had been assigned to secure loans received by him, the proceeds of which were used in making payment of the claims of laborers and materialmen, even though the surety on such bond was obligated to pay all claims of laborers and materialmen, and even though such money was loaned and such claims paid before declaration of forfeiture."

In the present case there was no forfeiture of the contract and the contracting company has completely fulfilled its obligations under the provisions of said contract, and the improvement has been accepted by the state.

While it is true that a receiver has been appointed by the court to administer the affairs of the contractor, yet this receivership did not occur until after the agreement with the state had been completely fulfilled.

There being a balance now due in the nature of a final estimate which was withheld until the work contemplated in said contract was completed, the surety company is making claim to this balance apparently on the ground that the contractor failed

to make payment either for certain materials furnished or labor performed, or both, in connection with said work.

The bond in this instance was furnished pursuant to the provisions of Section 1208 of the General Code, which provides in part:

> "The state highway commissioner may reject all bids. Before entering into a contract the commissioner shall require a bond with sufficient sureties; conditioned as provided in Sections 2365-1 to 2365-4 inclusive of the General Code, and also conditioned that the contractor will perform the work upon the terms proposed, within the time prescribed, and in accordance with the plans and specifications thereof, and that the contractor will indemnify the state, county or township against any damage that may result by reason of the negligence of the contractor in making said improvement. In no case shall the state be liable for damages sustained in the construction of any improvement under this chapter. * * * "

By the terms of said bond the surety became liable in case of the default of its principal, as provided in Sections 2365-1 and 2365-2 of the General Code "for the payment by the contractor, and by all subcontractors, for all labor performed or materials furnished in the construction, erection, alteration or repair of such building, works, or improvements."

In the case of *State, ex rel. The Southern Surety Company* vs. *Schlesinger,* 114 O. S. 323, supra, on pages 328 and 329 of the opinion, Chief Justice Marshall, who wrote the majority opinion of the court, after citing a long line of cases, says:

> "The foregoing cases declare that the surety is subrogated to the extent necessary to protect it from loss, *to all the rights which the state might have asserted by virtue of Section* 1209, *General Code, against the funds in its hands,* and that such right attaches at the time the contract is made, and is one of the valuable rights which accrue to the surety by reason of its obligations of suretyship, and is not defeated by an assignment of the funds to secure a loan of money by a bank."

Let us therefore look for the moment to the rights of the state which it may assert under the provisions of Section 1209 of the General Code, which provides in part as follows:

> "If, in the opinion of the state highway commissioner, the contractor has not commenced his work within a reasonable time, or does not carry the same forward with reasonable progress, or is improperly performing his work, or has abandoned, or fails or refuses to complete a contract entered into under the provisions of this chapter, the state highway commissioner shall make a finding to that effect and so notify the contractor in writing and the right of the contractor to control and supervise the work shall immediately cease. The state highway commissioner shall forthwith give written notice to the surety or sureties on the bond of such contractor of such action. If, within ten days after the receipt of such notice, such surety or sureties or any one or more of them notify the state highway commissioner in writing of their intention to enter upon and complete the work covered by such contract, such surety or sureties shall be permitted so to do and the state highway commissioner shall allow them thirty days after the receipt of such notice in writing from them, within which to enter upon the work and resume the construction thereof, unless such time be extended by the state highway commissioner for good

cause shown. If such surety or sureties so entering upon the work do not carry the same forward with reasonable progress or if they improperly perform the work, or abandon, or fail or refuse to complete the work covered by any such contract, the state highway commissioner shall complete the same in the manner hereinafter provided. If, after receiving notice of the action of the state highway commissioner in terminating the control of the contractor over the work covered by his contract, the surety or sureties on such contractor's bond do not within ten days give the state highway commissioner the written notice provided for above, it shall be the duty of the state highway commissioner to complete the work in the following manner: He shall first advertise the work for letting in the manner provided in Section 1206 of the General Code, and the estimated cost at which such work shall be so advertised shall be the difference between the original contract price therefor and the amount or amounts, theretofore paid to the original contractor, and at such letting the contract for the completion of the work shall not be let at a price in excess of such estimate. If no bids to complete the work for an amount not exceeding such estimate are received, the state highway commissioner shall cause that portion of the work still uncompleted to be re-estimated and shall re-advertise the same at the amended estimate in the manner provided in Section 1206 of the General Code, and relet the work for not more than such estimate. In reletting uncompleted work in the manner hereinbefore provided, the contract shall be awarded by the state highway commissioner to the lowest and best bidder. Before entering into a contract for the completion of any such improvement, the state highway commissioner shall require a bond with sufficient sureties, conditioned as provided in Section 1208 of the General Code, and in an amount equal to fifty percent of the estimated cost of completing the work, and the other provisions of Section 1208 of the General Code as amended herein, relating to the bonds of original contractors, shall apply to such bond. * * * "

It will be seen from a reading of the foregoing section of the Code that the only right which the state, acting through its Department of Highways and Public Works, may assert, is to declare a forfeiture of a contract for any one or more of the causes therein enumerated, and to apply the balance of the money remaining to complete the improvement, provided the surety does not elect to complete the same.

It cannot be contended with any force that the state highway department can withhold funds due a contractor simply because claims are filed with said department to the effect that the contractor has failed to pay bills for material or labor claims growing out of said work.

If the state has not such power, certainly a bonding company, applying the rule laid down by Judge Marshall in the Southern Surety Company case, supra, cannot have a greater right than the state may assert.

If the contention of the bonding company is tenable in this instance, then there is nothing to prohibit a bonding company at any time after it becomes surety upon a contract from filing a claim with the Director of Highways and Public Works for estimates due the contractor. Such a state of affairs would result in interfering with public work in that the contractor in many cases would not be able to have sufficient money to finance a project, which would work to the detriment of the interests of the state. The bonding company, acting as surety upon a contract receives a valuable consideration in that it receives a premium for assuming any risk that it may run by reason of its suretyship, and it cannot after a contract has been completed be in a better position than the state which has no authority to withhold a final estimate after the work has been completed and accepted.

It is quite apparent to me that the holding in the case of *State, ex rel. The Southern Surety Co.* vs. *Schlesinger,* supra, does not go so far as the bonding company is claiming. The law of the case is set forth in the syllabus, and a reading of the same will clearly reveal that the legal principle there laid down was based upon facts which placed the surety in the same position as the state would have been had it completed the work after a forfeiture of the contract, instead of the bonding company completing same.

The holding in that case is therefore not applicable to the facts at hand, and the principle of law therein enunciated can be pertinent only in those cases where a bonding company acting as surety completes work upon the contractor's failure to perform.

Therefore, it is my opinion that where a receiver has been appointed for a contractor after he has performed all of the work required of him under a contract with the state for a road improvement, and there remains certain funds by virtue of a final estimate due the contractor, the amount so remaining due should be paid by the Director of Highways and Public Works to such receiver, and the surety upon the bond of the contractor has no claim to said fund by reason of the fact that certain labor claims or material bills in connection with said contract have not been paid.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1265.

DOG REGISTRATION TAG—VALID IN ANY COUNTY OF THE STATE—HOUSE BILL NO. 164, 87TH GENERAL ASSEMBLY, DISCUSSED.

SYLLABUS:

A dog registration tag issued under the provisions of House Bill No. 164, (112 *Ohio Laws, p.* 347), *is valid in any county of the state.*

COLUMBUS, OHIO, November 16, 1927.

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

GENTLEMEN:—Permit me to acknowledge receipt of your request for my opinion as follows:

> "You are respectfully requested to furnish this department your written opinion upon the following:
>
> Under House Bill No. 164, passed at the recent session of the General Assembly, if the owner of a dog residing in one county sells such dog to a person residing in another county of the state, would the new owner of such dog be required to register such dog in the county of his residence and pay the registration fee required, or are the dog licenses and tags issued in one county good in any county of the state?"

Section 5652 of the General Code, 112 Ohio Laws, p. 347, provides as follows:

> "Every person who owns, keeps or harbors a dog more than three months of age, annually, before the first day of January of each year, shall file to-