1262.

APPROVAL, BONDS OF SELMA RURAL SCHOOL DISTRICT, CLARK COUNTY—$12,000.00.

COLUMBUS, OHIO, November 15, 1927.

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

1263.

TAX AND TAXATION—OIL AND GAS LEASES—COUNTY AUDITOR MAY REQUIRE STATEMENT OF AMOUNT OF PRODUCTION TO BE USED IN DETERMINING VALUATION.

SYLLABUS:

1. *Amount of production may be considered by the county auditor, in connection with other elements of value in assessing oil and gas leases for taxation.*

2. *The county auditor may require from the lessees a statement of the amount of production of oil and gas wells, to be used by him as an element in determining valuation; upon refusal to furnish said information the county auditor may obtain the same otherwise, by the means provided by law.*

COLUMBUS, OHIO, November 15, 1927.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your recent communication which reads as follows:

> "Enlosed we send you:
>
> Copies of three leases under which The Cambridge Glass Company, as assignee and lessee, operates certain gas wells on the lands of Clinton L. Brill situated in Guernsey County and on lands of Alice M. Brown in the same county.
>
> Copies of returns made by said lessee to the auditor of said county on a form of tax report prepared and prescribed by this commission.
>
> Copy of letter of said lessee company to the auditor of said county refusing to complete said returns or furnish any further information.
>
> Feeling as he does that failure at this juncture would result in his being unable to get returns from other operating companies, the auditor has appealed to the tax commission for assistance and guidance in the matter. On its part the commission wants to make no mistake and therefore it asks you to examine the whole method of taxing gas wells in Ohio to see if the same is in accordance with law.

If such method is approved by you, what course, or alternative courses, may the auditor follow in order to compel the company to furnish the information necessary to enable him correctly to assess its property for taxation?"

The leases submitted are substantially alike, and read as follows:

"THIS AGREEMENT, Made and entered into this _____ day of _____ A. D. 192__ by and between _____hereinafter called the Lessor, and _____ the Lessee.

WITNESSETH: That the said Lessor, in consideration of the sum of one dollar, the receipt of which is hereby acknowledged and of the covenants and agreements hereinafter contained, does hereby grant unto the Lessee all of the oil and gas and of the constituents of either, in and under the lands hereinafter described, together with the exclusive right to drill for, produce and market oil and gas and their constituents and also the right to enter thereon at all times for the purpose of drilling and operating for oil, gas and water and to possess, use and occupy so much of said premises as is necessary and convenient in removing the above named products therefrom, by pipe lines or otherwise, for a term of five (5) years and so much longer thereafter as oil, gas, or their constituents are produced in paying quantities thereon, all of that certain tract of land situate in Section No. _____, Township of _____, County of _____ and State of Ohio, bounded substantially as follows:

On the North by the lands of_____

On the East by the lands of_____

On the South by the lands of_____

On the West by the lands of_____

containing _____ acres, more or less, being all the land owned by Lessor in said township. It being understood, however, that no well shall be drilled within_____feet of the barn or dwelling on said premises without the consent of Lessor.

In consideration of the premises the said parties covenant and agree as follows:

Lessee to deliver to the Lessor in tanks or pipe lines one-eighth (⅛) of the oil produced and saved from the premises and to pay for the product of each gas well from the time and while gas is marketed an annual rental of one-eighth of gas (⅛) marketed from premises Dollars ($_____), payable quarterly.

Lessee to drill a well on said premises within _____ from this date or pay to Lessor _____ Dollars ($_____) each _____ thereafter until such well is drilled or this lease surrendered. If a gas well be completed before the end of the term for which rental has been paid for delay, the unearned portion of said rental shall be a credit on the gas well rental.

Lessee to bury, when so requested by Lessor, all pipe lines used to conduct gas or oil off the premises and to pay all damage to growing crops caused by operations under this lease.

Lessor may lay a line to any gas well on said lands and take gas produced from said well for use for light and heat in one dwelling house on said land, at Lessor's own risk, subject to the use and the right of abandonment of the well by Lessee. The first two hundred thousand cubic feet of

gas taken in each year shall be free of cost, but all gas in excess of two hundred thousand cubic feet taken in each year shall be paid for at the current published rates of the Lessee in the town nearest the premises above described and the measurements and regulation shall be by meter and regulators set at the tap on the line. This privilege is upon condition that Lessor shall subscribe to and be bound by the reasonable rules and regulations of the Lessee relating to the use of free gas.

It is agreed that the acreage rentals paid and to be paid, as herein provided, are and will be accepted by Lessor as adequate and full consideration to render it optional with Lessee as to whether or not it shall drill a well or wells to offset producing wells on adjoining or adjacent premises. Should it be determined that Lessor is not the owner of the entire tract above described then and thereupon Lessor shall receive a proportional amount in accordance with the rentals and royalties for any fraction of the above premises so owned.

Payment of all moneys due on this lease may be made by cash or check, to ---------- by deposit to ---------- credit in The ---------- Bank of ---------- Ohio; or by check made payable to ---------- order and mailed to ---------- at ---------- Ohio.

Lessor agrees that Lessee is to have the privilege of using sufficient oil, gas or water, for fuel, in operating premises and the right at any time to remove any machinery or fixtures placed on said premises and further upon the payment to the Lessor of one dollar and all amounts due hereunder, said Lessee shall have the right to surrender this lease or any portion thereof by written notice to Lessor describing the portion of the above tract that it elects to surrender or by returning to Lessor the lease with the endorsement of surrender thereon or recording the surrender of this lease on the margin of the record hereof, either of which shall be a full and legal surrender of this lease, to all of said tract or such portion thereof as said surrender shall indicate and a cancellation of all liabilities under same of each and all parties hereto, to the extent indicated on said surrender, and the acreage rental hereinbefore set forth shall be reduced in proportion to the acreage surrendered. ----------

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All covenants and conditions between the parties hereto shall extend to their heirs, executors, successors and assigns and the Lessor hereby warrants and agrees to defend the title to the lands herein described; Lessor further agrees that the Lessee shall have the right at any time to redeem for Lessor, or otherwise acquire by payment, any mortgages or any other liens upon the above described lands which in any manner affect the Lessee's interest therein in the event of default of payment by Lessor and be subrogated in full to all the rights of the holder thereof the same as if Lessee were the original owner of said mortgage or lien.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals.

Signed and Acknowledged
in the Presence of:

By----------"

The instruments were executed and acknowledged, as is required by law for a deed of land, and duly recorded. The lessee entered upon the premises under said lease, bored wells and found oil and gas in paying quantities.

The county auditor in order to enable him to fix a value upon said gas leases requested the lessee to make return of the oil and gas properties upon the blanks prescribed by the Tax Commission of Ohio for this purpose and furnished by the county auditor to said lessee. Said lessee objected to filling in said blanks or to making the report prescribed by the Tax Commission and required by the county auditor, and the Commission's question is as to what course may the county auditor pursue in order to compel the lessee to furnish information necessary to enable him correctly to assess said property for taxation.

As said lessee refuses to report the number of cubic feet of gas produced, no claim is made that the interest or right of the lessee is overvalued. As the lessee in its answer to the auditor declines to give the information, but refers the county auditor to the lessor for said information, the question is raised as to the authority to tax the interest of the lessee at all, separate from the fee of the soil.

It will be necessary first to determine what, if any, interest the lessee has to tax. It has been determined that the owner of lands containing separable minerals may give or grant four distinct classes of privileges or rights, with respect to the minerals.

(1) He can simply license one to dig or carry away the mineral. This will exempt the party from an action in trespass, for entering and taking the mineral, and give him the property in what he actually digs and takes under it. But the license is revocable at the pleasure of the giver and is not assignable. It is a bare authority to do an act or series of acts on the land of the licensor, without possessing any estate therein, and is gone if the owner of the land transfers his title to another, or either party die; *Cook* vs. *Stearns*, 11 *Mass.*, 533.

(2) The owner may grant a right to mine which is irrevocable or extends to one of his heirs but is not exclusive. This grant is an incorporeal hereditament, and cannot be regarded as a mere license; *Marble Company* vs. *Ripley*, 10 *Wall.* 339.

(3) A lease of land for a fixed term of years, leaving a reversion in the lessor, may be given with the right to mine and take away minerals, which will grant an interest in the land, be a chattel real, and liable to seizure and sale in execution; *Brown* vs. *Beecher*, 120 *Pa. St.* 590.

(4) The mineral may be granted in place, and its ownership thereby severed from the remaining land; *Knight I. C. I. Co.*, 47 *Ind.* 195.

The purposes which now prevail in respect to a grant of minerals in place, are clearly stated in the case of *Jones* vs. *Wood; I. O. N. P. p.* 155, as follows:

> "The minerals under a tract of land may be conveyed by naming them, or by granting the full right, title and privilege of digging and taking away the minerals to any extent the grantee may think proper. The giving of the right to mine and take away all the minerals amounts to a grant of the minerals themselves. No man can acquire any greater estate in minerals than the exclusive right in himself, his heirs and assigns, to mine and remove the whole of them. By the grant of such a right the minerals become severed and the title thereto becomes vested in the grantee."

The doctrine thus set forth makes it evident that the operation and effect of grants of minerals is always fundamentally a question of intention. Consequently, regardless of the form of an instrument by which a grant of rights in or to minerals is made, if it appears that the purpose was to give to the licensee, lessee or grantee, whichever he may be called, the privilege of mining and taking away the entire

movable body or deposit of a mineral to which it refers, the title passes, and the ownership of the mineral in place is severed; *Scranton* vs. *Phillips*, 94 *Pa. St.* 22; *Sanderson* vs. *City*, 105 *Pa. St.* 469.

Section 5562 of the General Code reads in part:

"At the time of making the list of personal property, the assessor shall make a list of petroleum, oil, and natural gas wells, * * * or works of any kind designed for the production of minerals of any kind, which have been begun or constructed since the last preceding quadrennial appraisement.

If, by reason of the discovery of such minerals, the construction of such works, the commencement of such operations, or the development of such minerals, * * * within the year, the value of the lands containing or producing such minerals, or any of them, or the value of any right to such minerals, listed and taxed separately from such lands, shall increase in value to the amount of one hundred dollars or more, the assessor shall increase the assessment of such land on the right to the minerals therein to its true value in money in the name of the owner thereof. If the assessor finds that rights to minerals contained or produced in or upon any lot or parcel of land has been previously created and not separately assessed for taxation, he shall report the same together with his aggregate valuation of the lot or parcel and the right or rights to minerals therein, to the county auditor, who shall apportion such aggregate valuation as provided in Section 5563 of the General Code.

If the value of any lot or parcel of land containing or producing petroleum, oil, natural gas, coal, ore, limestone, fire-clay, or other minerals, or of any right to the minerals therein, shall decrease within the year, by reason of the exhaustion of any such minerals or by the failure to find or develop such minerals, the assessor shall determine, as nearly as may be practicable, how much less valuable such lot or parcel is in consequence of such exhaustion or failure to find or develop, in case the fee of the soil and the right to the minerals is owned and assessed for taxation against the same person, and make return thereof to the county auditor; where the title to the fee of the soil is in one or more persons, and the right to the minerals therein, or any of them, is in another person, the assessor shall determine, as nearly as practicable, how much less valuable such right to the minerals therein is by reason of such exhaustion or failure to find or develop, and make return thereof to the county auditor. If the county auditor finds that the value of any such lot or parcel of land or any such right to the minerals therein has decreased to the amount of one hundred dollars or more, by reason of such exhaustion or of such failure to find or develop, he may reduce the valuation of such lands or of such rights to the minerals therein, as the case may be, so as to place such valuation at its true value in money." (2792 R. S.)

Section 5563, General Code, provides that:

"Where the fee of the soil and the minerals, or part of either, of a lot or parcel of land has been previously assessed for taxation in the name of the same person, but the title to the fee of the soil is in one or more persons, and the title to such minerals, or any of them, or any right to the minerals therein, or any of them, is in another person, the county auditor shall

ascertain from the returns made to him by the assessor as provided in Section 5562 of the General Code, or from any other source of information at his command, the aggregate value of such lot or parcel of land and the minerals or rights thereto, and shall equitably divide, and apportion such aggregate valuation between the owner or owners of the fee of the soil and the owner or owners of such minerals and rights thereto so held separately from the fee of the soil, according to the relative value of the interests so held by such owners of the fee of the soil and such minerals or rights thereto, respectively." (2792a R. S.)

In the case of *J. T. Jones* vs. *W. T. Wood, Vol. I, O. N. P.* 155, construing Section 2792 R. S., it was held that:

"1. The Revised Statutes, Section 2792, provides that when 'the fee of the soil' of land is in one person, and the 'right to any minerals therein,' in another, these estates shall be separately listed, and taxed to the parties owning the same, respectively. Held: (1) That the phrase, 'right to any minerals,' means a title which severs them from the soil or remaining land. (2) That petroleum oil and natural gas are to be regarded as minerals, within the purview of this statute.

2. A grant of the full right and privilege of digging and taking away the minerals under a tract of land, to any extent the grantee may think proper, conveys them in situ; and the giving of the right to mine and take away all minerals also amounts to a grant of the minerals themselves. A variety of privileges or rights may be given in or to a deposit of minerals, yet where what purports to be a 'lease,' executed and acknowledged as is required for a deed, granted to the lessee, his heirs or assigns, the 'exclusive right' to go upon a certain tract of land, for the 'purpose of operating and drilling for petroleum and gas, to lay pipe-lines, erect necessary buildings, release and subdivide' the land, and so 'to hold' the same for five years, and 'so long thereafter as oil or gas can be produced in paying quantities' the lessee covenanting as a part of the consideration to deliver one-eighth of the oil mined, in the pipe-line to the grantor's credit; the instrument containing provisions for forfeiture and for surrender, in certain contingencies; but it also appearing that the grantee was in possession, having sunk wells which were producing oil in quantity to be highly profitable. Held: (1) That this was a lease of the land described, for the purpose of mining oil and gas. (2) That the duration of the right granted, was not the specified terms of years, but the time during which oil or gas can be mined at a profit. (3) That so construed, the grant is of the right to take the whole body of these minerals, if found; as when the purposes and objects of the instrument are perfected, they would be exhausted. (4) That as a consequence, this 'lease' operated to convey the oil found, in place, and so the ownership of what thus remains, is in the grantee, the plaintiff here, and it therefore is subject to taxation, separate from the 'fee of the soil' as his property."

The leases submitted in said case, were executed and acknowledged as is required by law for the deed of land, and duly recorded. Sibley, Judge, in deciding this case stated:

"The three points in contention will be considered in the order of their statement.

1. What is the true reading of Section 2792, Revised Statutes of Ohio, on the point here in dispute?

1. The provision in question originally appeared in our legislation as the last clause of Section 10 of an act passed April 5, 1859, in these words: 'Where the fee of the soil of any tract, parcel or lot of land is in any person or persons, natural or artificial, and the right to any minerals therein, in another or others, the same shall be valued or listed agreeably to such ownership in separate entries, and taxed to the parties owning the same, respectively.'

Thus it stood until the codification of 1878, after which, with slight additions, immaterial to the controversy here, it became Section 2792 of the Revised Statutes. As amended in 1891, though enlarged in important particulars, this original clause is essentially unchanged. Nothing is added affecting its interpretation, as applied to this case.

2. * * * Long prior to its enactment, strata of coal and deposits of iron ore had been found and mined in Ohio and Pennsylvania. Out of a controversy over a grant of the right to take the coal under a tract of land, in the latter state, arose the leading case in this country, decided in 1858, holding that minerals may be conveyed, distinct from the surface, by grant of an unlimited right to take them, without livery of seisin. (*Caldwell* vs. *Fulton,* 31 *Pa. St.* 475, 72 *Am. D.* 760). Very probably the doctrine of that decision gave rise to this statute. But, however that may be, the act of itself clearly makes the phrase 'right to any minerals,' convertible with 'ownership;' and as the latter is a term of definite legal import, it will determine the meaning to be given the phrase. The obvious consequence is, that the provision must be held to apply not to cases of licenses to take minerals, or of chattels, or incorporeal rights thereto, but only to such an ownership of, or title to a mineral as operates to sever it from the 'fee of the soil.'

3. A question of more difficulty has been raised by my own investigations, and that is, whether the term 'minerals,' in this act, includes petroleum. * * * This statute has been retained as a permanent feature of our tax system. In its technical scientific sense, it clearly covers petroleum, oil and natural gas, * * * petroleum or mineral oil in place, as well as natural gas, are held like coal and iron to be a part of the realty, though severable in ownership; * * * The conclusion then, is that petroleum and natural gas are covered by the term 'minerals,' in the statute under consideration, and as a consequence, properly taxable separate from the 'fee of the soil,' if so owned and held. * * *

The effect is to give the plaintiff, his heirs or assigns, the exclusive right to mine and take from these lands all the oil and gas that can be found in paying quantity, regardless of the time it requires—to exhaust the two minerals; for it would be an affront to common sense and the general business understanding, to say that such is not the meaning of this provision. In that aspect of the case, the late Ohio decision is in point. (*Edwards* vs. *McClurg,* 39 *Ohio St.* 41). The grant in this case was of all coal which the grantees could mine at 'a profit,' on a royalty of thirty cents a ton. The holding is, that 'all minable coal, in place passed absolutely to the grantees.' As has been shown, it is clear that to give to one and his heirs the exclusive right to enter upon lands and take all of a given mineral therein, is the legal effect a grant of it in place. * * *

The obvious consequence, is that in this mineral there is and can be no reversion to the grantor, which is a crucial circumstance in determining

whether they are to be regarded as leases or conveyances upon condition of its being found, of the oil in situ. 'What is termed a mineral lease is frequently found to be an actual sale of a portion of the land. It differs from an ordinary lease in this, that although both convey an interest in land, the latter merely conveys the right to its temporary use and occupation, whilst the former conveys absolutely a portion of the land itself. It is one of the essentials of a lease that its duration shall be for a determinate period, shorter than the duration of the estate of the lessor, hence the estate demised is called a term, and necessarily implies a reversion * * *' Hence, notwithstanding the lease contained a reservation of rent, with provisions for distress and forfeiture, in case of default, it was held to operate as a severance and sale of the coal in place. The consequence is that the plaintiff must be regarded as the owner of the oil mineral in the lands in question, separate from the 'fee of the soil,' in which view, so far as this branch of the case is concerned, its value is properly on the duplicate for taxation as his property."

In Opinions of the Attorney General for 1921, Volume I, page 595, it was held:

"Mineral (oil) rights in land required by law to be separately listed and valued for taxation are considered as real estate for taxation purposes. If the taxes on such separate entry become delinquent, such taxes may be certified to the auditor of state as delinquent land tax."

The Commission has prescribed for use, and submitted copy of blank entitled "Return of Oil and Gas Properties for 1927." Said blanks when filled in give information which is deemed necessary in determining the value of the oil and gas leases.

As regards that portion of the form relating to the return for taxation of gas properties the following statements are required for the information of the county auditor:

1. A pipe line statement of monthly production of the well beginning with April 1st and ending March 31st.
2. The total yearly gross production.
3. Average daily production in cubic feet. This result to be obtained by dividing the gross production by the number of days in operation.
4. After the average daily production has been obtained the daily income is to be ascertained by multiplying the number of thousands of cubic feet by the price per M. This reduces the daily production to terms of dollars and cents.
5. When daily income in dollars has been determined the result is to be divided by the average monthly price of Pennsylvania oil. This calculation then results in interpreting daily gas production income in terms of oil in barrels.
6. The working and royalty interest is then to be apportioned to the respective owners and the portions of each multiplied by the schedule values adopted for different fields at the annual meeting of the county auditors interested.

In considering this information in connection with that from other sources as to value, the county auditor endeavors to arrive at the taxable value of the oil and gas leases.

The Commission asks me to examine the whole method of taxing gas wells in Ohio to see if the same is in accordance with law.

It is evident from the provisions of Section 5562 and 5563, General Code, that the lessee having become the owner of the oil and gas underlying certain described

lands, it is the duty of the assessor to make a list of such oil and gas wells, and also to report the status of said gas wells as to whether the lands upon which said wells are situated have increased or diminished in value, and that said assessors shall also report the same together with his aggregate valuation of the lot or parcel and the right or rights to minerals therein to the county auditor, who shall apportion such aggregate valuation as provided in Section 5563 of the General Code.

If it is found that the title of the fee of the soil is in one or more persons and the right to the minerals therein is in another person, the assessor shall determine as nearly as practicable how much less valuable such right to the minerals therein is, by reason of the exhaustion or failure to find or develop said wells.

It is also provided in Section 5563 that where the fee of the soil and minerals has been previously assessed for taxation in the name of the same person, but the title to the fee of the soil is in one or more persons and the right to the minerals therein is in another person, the county auditor shall ascertain from the returns made to him by the assessor or from other sources, the aggregate value of such lot or parcel of land and the minerals or rights thereto and shall equitably divide and apportion such aggregate valuation between the owner of the fee of the soil and the owner of such minerals and rights thereto held separately from the fee of the soil according to the relative value of the fee of the soil or of the minerals or rights thereto.

Your suggested method of securing information by the county auditor to be used by him in determining the valuation of oil and gas leases, or of the interest in minerals and mineral rights, is evidently one of the plans that he may adopt to enable him to fix the value. That is, that the annual production of gas in cubic feet is figured in terms of Pennsylvania oil in barrels and the annual productive value of each gas well is thus obtained. This productive value in consideration with the equipment of lessee and also in consideration of any decreased or increased valuation, and any other elements of value ordinarily considered, may be used in determining the valuation for taxation purposes.

Article XII, Section 2, of the Ohio Constitution provides that:

> "Laws shall be passed, taxing by uniform rule, * * * all real and personal property according to its true value in money, * * *"

Section 5328 of the General Code provides:

> "All real or personal property in this state belonging to individuals or corporations, * * * shall be subject to taxation, * * *"

The method suggested by the Tax Commission and adopted by the county auditor for obtaining information to be used by him in connection with other elements of value in determining the true value in money of the interest in oil and gas leases and in minerals and in rights and interests in minerals underground, is apparently not in conflict with any constitutional or statutory provision for determining said valuations.

Various methods of assessment of oil and gas properties have been adopted. Leaseholds in the State of Arkansas are not assessed as such, but there is a tax known as "severance tax" of 2½% of the value of the oil and gas, at the time and at the place of production. The producer is liable for the amount of taxes on the working interest and the royalty owner on his interest. The equipment and the property owned and used by the producer is assessed on an ad valorem basis, in the munic-

ipality or municipalities where same is situated on assessment date and bears the same tax rates as other property

In Kansas, producing leaseholds as well as all equipment are assessed as personal property. The non-producing lease is not assessed. The equipment used on the producing lease is assessed in accordance with a schedule of values which is adopted each year by the county assessors of the oil producing counties. The schedule provides the uniform value on each article of equipment used in the production of oil and gas. The lease operator's interest, commonly known as the working interest, is assessed to the owner of the lease and the royalty interest is assessed separately to the owner of the royalty interest.

In Louisiana, leaseholds, either producing or non-producing, are not subject to taxation as such. That state has what is known as a "severance tax" of 3% of the gross market value of oil and gas, at the time and place of production.

Oklahoma has a gross production tax, the law providing that the producer and royalty owner shall each pay quarterly a tax of 3% of the actual cash value of the oil and gas produced. This tax is in lieu of all taxes by the state, county, city, township and school district upon any property rights attached, to or inherent to the right of said minerals, upon leaseholds, and all machinery, equipment, etc., used in and about producing wells.

In Texas, oil and gas leaseholds are taxable. A producing lease is assessed at a value per barrel based on the average daily settled production. The equipment on the leaseholds is assessed as personal property. All property bears the same rates as other personal and real property in the respective municipalities. In addition all producers are required to pay what is known as a gross receipts tax on the entire production of the lease, the rate is 2½% of the value of oil and gas produced and is payable quarterly.

In Wyoming, the producers are required to file with the State Board of Equalization not later than the second Monday of January each year a statement showing the number of barrels of oil and the number of cubic feet of gas produced during the previous calendar year. The State Board of Equalization determines the average market value per barrel of oil and the average price per cubic feet of gas during the previous calendar year. The basic value per unit thus determined is applied by the board to the total number of barrels of oil and the number of cubic feet of gas produced and reported, and by this method it determines the assessed value to be placed on the tax rolls in the county where said mineral is produced, which in a measure may be termed leasehold value, and it bears the same rate of taxation as other real and personal property in the respective municipalities. The equipment is assessed ad valorem, based on a schedule of valuation agreed upon by the assessors of the oil producing counties.

It therefore appears that other states consider a tax on the production of gas and oil wells the most fair and equitable method, as no other method seems to have been discovered or devised by them that does or will do justice to the taxing district of the state and to the taxpayers alike.

While it is generally recognized that production is a proper basis for the taxation of oil and gas interests, yet it is conceivable that in many instances production alone would not reflect true value in money, which is the basis of Ohio property taxation.

It is therefore my opinion that the method suggested by the Tax Commission and adopted by the county auditor, may be used by the county auditor in connection with other elements of value in determining the valuation of gas and oil leaseholds.

You also inquire as to what course the county auditor may follow in order to compel the company to furnish the information necessary to enable him correctly to

assess said company's property for taxation. It seems evident that the same method may be pursued in this instance that is pursued by the county auditor in assessing other property, where there is a failure or partial failure of the owner to give information to the county auditor that will enable him to correctly value said property.

Section 5624 of the General Code provides as follows:

"The Tax Commission of Ohio shall from time to time, prescribe for and furnish to all * * * county auditors blank forms for all oaths of office, statements, returns, reports, * * * relating to the assessment, levy or collection of taxes, or * * * any rules, regulations, orders or instructions of the Commission. County auditors * * * and all other officers and all persons required to list property for taxation shall use true copies of such blank forms."

Section 5624-2 of the General Code, provides:

"For the purpose of enforcing its rules, regulations, orders or instructions and compelling the observance and use of the forms prescribed by it, the Tax Commission of Ohio may institute, or cause to be instituted any proceeding, either civil or criminal, provided by law as a punishment for the neglect, failure or refusal to obey any lawful requirement or order by the Commission, or as a means of preventing the violation or disobedience of such orders or compelling their enforcement."

It will be noted from the foregoing sections that the Tax Commission has authority not only to prescribe the blank forms named therein, but also to enforce their use.

Section 5548 of the General Code provides that:

"The county auditor in addition to his other duties, shall be the assessor for all the real estate in his county for purposes of taxation."

Section 5548 of the General Code also provides that the county auditor may ascertain:

"Such facts, description, location, character, dimension of buildings and improvements, and such other circumstances reflecting upon the value of such real estate as will aid the county auditor in fixing its true value in money. Said county auditor may also, if he deems it necessary or advisable, summon and examine any person under oath in respect to any matter pertaining to the value of any real property within the county."

Section 5548-1, General Code, provides that:

"In any year after the year in which an assessment has been made by the county auditor of all the real estate in any subdivision as herein provided, it shall be the duty of such county auditor to revalue all or any part of the real estate contained in such subdivision where he finds the same has changed in value or is not on the duplicate at its true value in money."

The county auditor may use the means provided by law for obtaining information which he considers necessary in determining the value of property subject to

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.