2050.

CANAL LANDS—CITY OF CINCINNATI—BOARD OF ARBITRATION—PROCEDURE AND DUTIES OF BOARD.

1. *The board of arbitration appointed under the acts of the general assembly of May* 15, 1911, (102 *O. L.* 168) *and April* 18, 1913, (103 *O. L.* 720), *now designated as sections* 14188-1, *et seq, in the appendix to the General Code, is without authority to compel attendance of witnesses, punish witnesses for refusal to answer, or require the production of books, papers and plans.*

2. *A witness who offers himself before said board and to whom an oath is administered by an officer authorized by law to administer oaths, is subject to the penalties of section* 12842 *G. C. if in giving his testimony he states a falsehood as defined in the last-named section.*

3. *Said board of arbitration may determine the time and place of its sittings and may prescribe its own rules of procedure. It may allow witnesses reasonable compensation for time and expenses, including mileage.*

4. *Said board of arbitration in fixing the value of the property subject to appraisement, is not authorized to take into account the present or potential value of water rentals which accrue or might accrue from said property; nor to order the city of Cincinnati to install a conduit, nor to add to the land valuation the capitalized value of royalty from a pole line right of way lease. (Opinions of Attorney-General* 1912, *Vol.* 11, *p.* 960; *Op.* 1914, *Vol.* 1, *p.* 553; *and Op.* 1915, *Vol.* 1, *p.* 838, *referred to.) The board, however, may properly take into consideration as an element of value the presence of a ridge of merchantable sand and gravel on the property to be appraised.*

COLUMBUS, OHIO, May 6, 1921.

The Board of Arbitration for Cincinnati Canal Lands, Columbus, Ohio.

GENTLEMEN:—You have recently submitted to this department for opinion a series of questions relating to the mode of procedure to be followed by your board and to the duties of your board in certain respects as hereinafter stated. Before taking up your questions, a brief reference may properly be made to the statutes out of which such questions arise.

Under date May 15, 1911, the general assembly passed an act (102 O. L. 168) entitled "An act to provide for the leasing of a part of the Miami and Erie canal to the city of Cincinnati as a public street or boulevard, and for sewerage and subway purposes." The first and second sections of the act provide for a perpetual lease from the state to the city of a part of the canal in question and attach certain conditions to be observed by the city. The third and fourth sections of the act, now known as sections (14188-3) and (14188-4), G. C. read respectively:

> "Section 3. Upon the passage of this act the governor shall appoint three (3) arbitrators, none of whom shall be residents of Hamilton county, who shall, whenever the council of said city decides that such canal be used for all the purposes mentioned in section one (1) hereof, proceed to act as provided in section four (4) of this act."
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> "Section 4. The arbitrators thus selected shall constitute a board of arbitration whose duty it shall be, without reasonable delay, to ascertain and fix the actual value of the property of the state specified in section one hereof. The annual rental to be paid by the city of Cincinnati to the state for the use of such property shall be a sum equal to four (4) per cent of such valuation so ascertained and fixed. Such board of arbitrators shall

report the valuation as above provided for in writing to the governor and the council of such city respectively. And such board of arbitration shall have authority to hear the testimony of witnesses as to the fair value of such canal land so to be taken by said city, to employ such assistants as it may deem necessary, and to fix their compensation, and to incur the expenses incident to its work. Each arbitrator shall receive for his services not exceeding twenty-five dollars a day for the period of time actually employed in the work of acting as arbitrator on such board; and all such expenses and such compensation shall be paid by said city, one-half of the amount so paid to be a credit upon the first installment of rent payable under the lease that may be entered into pursuant to this act. In case of any vacaney occurring in such board from any cause, such vacancy shall be filled in the same manner in which the appointment so becoming vacant was made. Provided that all rentals accruing to the state under this act, shall be paid into the state treasury to the credit of the general revenue fund."

Subsequently, the general assembly by act of April 18, 1913 (103 O. L. 720), provided for the leasing by the state to the city of an additional section of canal land. The third section (Sec. 14188, G. C.) of the last mentioned act reads:

"Section 3. The rental to be paid by the city of Cincinnati for said part of such canal shall be determined in the manner and by the method provided in sections 3 and 4 of the act of May 15, 1911, 'To provide for leasing a part of the Miami and Erie canal to the city of Cincinnati as a public street or boulevard, and for sewerage and subway purposes.'"

Your board has been appointed in conformity with the provisions of the last-mentioned act, so that its powers and duties are as defined in above-quoted section 4 of the act of May 15, 1911, since that section has been incorporated by reference into the act of April 18, 1913.

You inquire whether your board has the right to issue subpoenas, punish as for contempt if a person refuses to attend as a witness, or, if attending, refuses to answer questions put to him; and whether your board may require the production of books, papers and plans bearing on the subject before you. The answer to all these questions is in the negative. Clearly, your board has only such powers as the statute expressly or by necessary implication confers upon it. Those powers are of very limited scope, and point to a legislative intent that your board's inquiry is to be of an informal character, calling for the exercise of the sound judgment of your board itself as to values, rather than to a hearing of judicial character. So far as concerns witnesses, the statute goes no farther than to provide for "authority *to hear* the testimony of witnesses as to the fair value of such canal so to be taken"; and this language does not carry with it either expressly or by implication the power to compel attendance, punish for contempt, etc.

You then inquire whether if a witness gives intentional false testimony, is he guilty of perjury? This question, while not free from difficulty, is answered in the affirmative. Section 12842 G. C. reads:

"Whoever, either orally or in writing, on oath lawfully administered, wilfully and corruptly states a falsehood as to a material matter in a proceeding before a court, tribunal or officer created by law, or in a matter in relation to which an oath is authorized by law, including an oath taken by any person making any affidavit required for verifying or filing a nominat-

ing, initiative, supplementary or referendum petition, or part thereof, is guilty of perjury and shall be imprisoned in the penitentiary not less than one year nor more than ten years."

As already noted, your board is *"authorized* to hear the testimony of witnesses." While in a strict legal sense, the words "testimony of witnesses" have reference to statements made by a person under oath in a judicial proceeding, yet even in common acceptation the word "testimony" implies the general idea of an oath or affirmation. In Webster's dictionary, testimony is defined as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact," and this definition is followed by a note reading in part:

> "Such affirmation, in judicial proceedings, may be verbal or written, but must be under oath or affirmation."

In 38 Cyc. 248, the following text is given with citation of authorities:

> *"Testimony.* A statement of facts by witnesses; a statement made under oath in a legal proceeding; the evidence of a witness given under oath; the statement made by a witness under oath, or affirmation; the declaration of a witness under oath or affirmation; a solemn declaration or affirmation made for the purpose of establishing or proving some fact, any species of proof or probative matter legally presented at the trial of an issue by the act of the parties, and through the medium of witnesses, records, documents, concrete objects, etc., for the purpose of inducing belief in the minds of the court or jury as to their contention."

It does not appear that the courts in Ohio have defined the word "testimony," except to point out the distinction between "testimony" and "evidence" as used in the Code of Civil Procedure (see Knapp vs. Scherck, 2 O. C. C. (N. S.) 589; affirmed without report 70 O. S. 472). The general assembly, when enacting the statute from which your board derives its authority, was not using the expression "testimony of witnesses" in a strict legal sense, because it was not dealing with judicial proceedings; but from the broad character of the expression, both in a legal sense and in common acceptation, there is clearly to be deduced a legislative intent that an oath is authorized. It therefore follows that if your board, prior to hearing the statement of a person coming before it, causes an oath to be administered to such person by an officer authorized by statute to administer oaths, such person is guilty of perjury if he states a falsehood as defined in section 12842, since he would be stating the falsehood "in a matter in relation to which an oath is authorized by law."

You ask whether your board has authority to include among its expenses, reasonable witness fees with or without mileage, and whether an expert witness may be paid "a larger compensation * * * than for original witness fees." These questions are answered by the statement that your board may allow all witnesses such reasonable compensation for time and expenses, including mileage, as your board may deem reasonable,—this conclusion being based on the authority conferred on your board in the words "to incur the expenses incident to its work."

Further questions submitted by your board are as to what rights it has in determining the time and place of sitting, and whether it has power to prescribe its own rules of procedure. These questions have in a sense been answered above by the statement that the board's proceedings are to be informal, and that it has no power to compel attendance of witnesses. It may be stated generally, however, that

your board has power to determine the time and place of sitting for the hearing of witnesses and to prescribe its own rules of procedure, insofar as your board may, within the limited scope of its powers as already described, find such sittings and rules of procedure to be proper.

Your board has submitted the following statement and inquiries under the head "Evidence as to value:"

> "In this connection the board desires to make a brief statement of facts thus far disclosed. The land required to be appraised by the board consists of about 7,500 feet in length of the Miami and Erie canal property, lying north of a point 300 feet north of the north line of Mitchell avenue in Cincinnati, Ohio. It contains flowing water now being used by divers lessees using water under limited term leases. Also a right of way is leased for a pole line for transmission of electric energy. These leases aggregate about $3,000 per annum, which income is now enjoyed by the state. Of the property proposed to be taken probably 2,000 feet at the northerly end is high ground, with so-called sand pits or depressions on either side. The body of ground sustaining the canal bed at this section presumably consists of a ridge of gravel and sand of merchantable quality, which upon being removed would leave the real estate level with the land abutting on each side. The reason for so leasing the north 2,000 feet is to provide a convenient outlet or spillway for the flow of water in the canal from the north.
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> In view of the above facts, in addition to the ordinary real estate value there is a value accruing from hydraulic and right of way purposes and a potential value arising from the presence of the body of sand and gravel in the north 2,000 feet.
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> As a mattre of law it is proper for us in ascertaining the actual value to take these elements into consideration?
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> If answered in the affirmative, then shall we consider the hydraulic value as based upon the present use and income, or upon such an income as is reasonably possible and likely to be developed.
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> We call your attention especially, to the original act found on page 168 etc. of 102 Ohio Laws; the second paragraph of section 2, especially provides for the continuance of water service to the lessees along the part of the canal being abandoned, for the purpose of enabling the state to carry out or discharge the obligations now resting upon it by virtue of certain contracts, etc. Also, note the wording in the last clause of section 1. This latter wording is repeated in section 1 of the amendment contained in 103 Ohio Laws, page 720, and the provision to supply water to the lessees abutting upon that part of the canal land described in the original act is reaffirmed in this amendment, while no provision whatever is made to continue service to the lessees obtaining water along this new stretch of canal land which under the amendment of the act, it is now our duty to appraise; the former board of arbitration in fixing the value of the land originally provided for in the first act, deducted from the actual value of the land, the estimated cost of a conduit to be built by the city for the purpose of supplying lessees along that part of the canal. It develops that this conduit was never built for the reason that the lessees along that part of the canal, for consideration or otherwise, permitted their leases to expire.
>
> The amended act under which we are now acting, makes provision for a conduit to take care of the lessees along the part of the canal taken under

the original act but makes no provision for such service to the lessees along the part covered by said amendment.

We are unofficially advised that certain water users south of that part of the canal taken under the original act, whose leases had neither expired nor been surrendered, were deprived of the service because of the abandonment of the canal and the failure of the city to construct the conduit as provided for in the act; that the city sought to settle with these parties by way of compensation for the damage thus done, but the payment was enjoined upon the ground that these leases were cancellable at the option of the city, that such water users had no legal right and were therefore entitled to no compensation from the city. We refer to this for your attention and advice as to its bearing upon the legal rights of such water users as now exist along the line of that part of the canal which we are appraising, with special reference as to whether this board can require the construction of a conduit to take care of these water users.

Under these facts can the board figure the actual real estate value of the land and add to it the difference between the capitalized value of the net income now received for water service along the portion of the canal being appraised, and the cost of installing a conduit adequate to furnish water service as at present, assuming that the city will continue the water service and collect the rentals therefor.

Similarly, can we properly add to the land valuation the capitalized value of the income from the pole line right of way lease."

Principles which clearly indicate the answer to be given the several questions embodied in the statement just quoted, have been laid down in previous opinions of this department relating directly to the lease authorized by the original act of May 15, 1911.

In an opinion dated February 9, 1912, (Opinions Attorney-General, 1912, Vol. II, p. 960), directed to the arbitration board appointed in conformity with the terms of the original act, Attorney-General Hogan reached these conclusions as summarized in the last two paragraphs of the head note:

"The lease is subject to no easement in behalf of the lessees of water rights and the state might abandon their contracts at any time, and therefore no value may be deducted for such an easement. Furthermore, the water rights are a source of definite income and in reality a value to be considered in themselves.

The board shall in accordance with the act, fix the actual value of the property as it exists at the time, without regard to the purposes for which the property is intended to be used."

In a subsequent opinion dated April 27, 1914, (Opinions Attorney-General 1914, Vol. I, p. 553), the same Attorney-General, in reply to an inquiry from the superintendent of public works, expressed the view (underscoring mine):

"I am of opinion, therefore, that the superintendent of public works may renew leases for the use of surplus water along the part of the canal leased to the city of Cincinnati, *subject to termination when the city constructs the works provided for in section two of the act of* 102 *Ohio Laws,* 168. Such leases should be entered into for definite terms, *subject to termination as above stated.* The right of the state to renew leases or to continue renewed leases as above granted, after the construction of such works, is not herein passed upon."

(Note: The "works" referred to by my predecessor, consist in part of the conduit referred to in your board's communication).

Attorney-General Turner in an opinion of date May 25, 1915, (Opinions Attorney-General 1915, Vol. I, p. 838), directed to the superintendent of public works, arrived at the conclusion as shown by the head note:

"The superintendent of public works has authority to renew water leases on that part of the Miami and Erie canal leased to the city of Cincinnati under an act found in 102 O. L. 168, being sections 14188-1 to 14188-8 of the appendix to the General Code. It must be expressly provided in such leases that the same are made subject to the right of the city of Cincinnati to at any time and without previous notice begin the work of improving the leased property, and that at such time as the city has completed the outlet referred to in the first paragraph of section 2 of the act, or at such time as it becomes necessary for the city in the construction of such outlet to shut off the water in the canal, and without any notice, such leases shall terminate, and that the lessees shall not have any right against the city of Cincinnati to have said city construct a conduit to supply water to them, or any right to receive water from such a conduit when constructed."

In the course of his opinion, my predecessor said (underscoring mine):

" * * * As to water needed to supply lessees under contracts in force at the time the law was passed and still effective at the time the lease was executed, it is provided that the city shall adopt and construct appropriate works for the purpose of supplying water to these lessees of the state. It would seem clear that since the property leased was to be valued at its actual value, and since the rental to be paid by the city was to be calculated upon the full actual value, that the *primary purpose* of the second paragraph of section 2 of the act *was not to provide for a continuous, permanent and additional income to the state,* over and above the rental to be paid by the city, but that the purpose of this provision was to enable the state to deal honorably and fairly with its then lessees, by carrying out the contracts under which it had *already bound itself* to furnish certain quantities of water to them, and that the income to be derived by the state was only incidental, resulting from the desire and purpose of the state to keep faith with its lessee water users. * * * "

If the principles as thus stated by my predecessors be kept in mind, it is of course clear that your board is not to take into account in fixing the value of the property to be leased, the matter of water rentals, present or potential. The value of the water is a thing entirely apart from the value of the land; and the question whether the general assembly has preserved or attempted to preserve that water value to the state has no bearing on the subject of the value of the land, but is an entirely distinct question determinable by reference to whether the several acts of the general assembly have or have not reserved to the state *actual* water earnings from water which shall pass through the canal until such time as the city makes use of the canal land for other than canal purposes, and thereafter which shall pass through a conduit, if the general assembly has required the city to construct a conduit.

As to installing a conduit: Your board cannot require such installation, because the general assembly has not conferred authority on your board to that end. Further,

in that connection, it is to be observed that the question of the rights of the water users is referable to their existing lease contracts; and of course the law will protect such water users to the extent of their legal rights.

As to the pole line right of way lease: Your board will not be at liberty to add to the land valuation the capitalized value of the income from such lease; for as pointed out by this department in the previous opinion first above mentioned, the value which your board is to fix is the actual value, without regard to the purposes for which the property is intended to be used.

You refer to the presence of a ridge of merchantable sand or gravel on a part of the property to be appraised. That is an actuality which your board may properly take into consideration in arriving at the actual value of the property subject to appraisement.

Respectfully,
JOHN G. PRICE,
Attorney-General.

2051.

APPROVAL, FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS, JEFFERSON COUNTY, OHIO.

COLUMBUS, OHIO, May 6, 1921.

HON. LEON C. HERRICK, *State Highway Commissioner, Columbus, Ohio.*

2052.

APPROVAL, BONDS OF SYCAMORE RURAL SCHOOL DISTRICT, WYANDOT COUNTY, OHIO, IN AMOUNT OF $15,000.

COLUMBUS, OHIO, May 7, 1921.

Industrial Commission of Ohio, Columbus, Ohio.

2053.

DISAPPROVAL, BONDS OF THE UPPER SCIOTO DRAINAGE AND CONSERVANCY DISTRICT IN AMOUNT OF $266,900.

COLUMBUS, OHIO, May 7, 1921.

Industrial Commission of Ohio, Columbus, Ohio.

Re: Bonds of The Upper Scioto Drainage and Conservancy District in the amount of $266,900.00.

GENTLEMEN:—I am unable to find any provision of the General Code authorizing the industrial commission to purchase bonds of the upper Scioto drainage and conservancy district. Section 1465-58 G. C. authorizes the industrial commission to