

1467.

APPROPRIATION—CONSTRUCTION OF THE WORD "ITEM" IN SECTION 16, ARTICLE II OF CONSTITUTION OF OHIO—DISCUSSION OF APPROPRIATION TO DEPARTMENT OF COMMERCE.

SYLLABUS:

1. *The word "Item" as used in Section 16, Article II, of the Constitution of Ohio means an article; a separate particular, a detail; a distinct and severable part of an appropriation act.*

2. *The appropriation of \$6,000.00 to the Department of Commerce—Division of Public Utilities under the classification "Personal Service A 3. Unclassified—Reporting and Transcribing Testimony," contained in the column designated "Year," page 34, House Bill No. 502, passed by the 87th General Assembly, is an item within the meaning of Section 16, Article II of the Constitution of Ohio, and the disapproval of such item by the Governor was a valid exercise of the constitutional powers conferred upon him by said Section 16.*

3. *The appropriation of \$3,000.00 to the Department of Commerce—Division of Public Utilities under the classification "A 3. Unclassified—Reporting and Transcribing Testimony," contained in the column designated "Six Months," page 34, House Bill No. 502, passed by the 87th General Assembly, may by the terms of Section 1 of House Bill No. 502, be expended to pay liabilities incurred during, and is for, the eighteen months' period, July 1, 1927, to December 31, 1928. Notwithstanding the veto by the Governor of the appropriation of \$6,000.00 under the same classification in the column designated "Year," if there be a deficiency in said appropriation of \$3,000.00 by the terms of Sections 2313, et seq. of the General Code, the Emergency Board is authorized and empowered to make allowances to the department in question, from the current contingent appropriation for the uses and purposes of the Emergency Board, if such board finds that a deficiency does in fact exist in said appropriation, and deems such allowances proper.*

4. *Likewise the Controlling Board may authorize transfers to such classification, from other detailed classifications under the same general heading, viz.: "Total Maintenance," in the appropriation made to said department and division.*

COLUMBUS, OHIO, December 30, 1927.

HON. WILLIAM KLINGER, JAMES W. HUFFMAN, AND FRANK B. MAULLER, *Commissioners*
The Public Utilities Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—You have submitted a request for my opinion reading as follows:

"The Public Utilities Commission of Ohio desires to submit the following state of facts to you and requests your opinion thereon:

Sec. 499-15 G. C., provides for hearings before the Commission to ascertain the value of the property of public utilities, and contains the following:

'All public utilities or railroads affected, and any municipality in which the whole or the major portion of said utility or railroad is located, shall be entitled to be heard and to introduce evidence at such hearing or hearings. The Commission is empowered to resort to any other source of information available. The evidence introduced at such hearing shall be reduced to writing and certified under the seal of the Commission.'

Sec. 528 G. C. provides for the investigation by the Commission of any existing rate or charge of a public utility, either upon its own motion or upon complaint, and for a hearing thereon.

Sec. 529 G. C. provides:

'A full record shall be kept of the proceedings before the Commission on such investigations. All testimony shall be taken by the stenographer appointed by the Commission.'

Secs. 544, 545 and 546 G. C. refer to proceedings in error to the Supreme Court from a final order of the Commission.

Sec. 546 G. C. provides:

'Upon service or waiver of the summons in error the Commission shall forthwith transmit to the Clerk of the Supreme Court a transcript of the journal entries, original papers or transcript thereof and a certified transcript of all evidence adduced upon the hearing before the Commission in the proceeding complained of, which shall be filed in said Court.'

Sections 614-84 to 614-102 G. C. inclusive, provide for the regulation by the Commission of motor transportation companies.

Sec. 614-89 G. C. provides:

'In all respects in which the Public Utilities Commission has power or authority under this act applications and complaints may be made and filed with such commission, processes issued, hearings held, opinions, orders and decisions made and filed, petitions for rehearings filed and acted upon, and all proceedings before the Supreme Court of this State considered and disposed of by such Court in the manner, under the conditions and subject to the limitations and with the effect specified in the sections of the General Code governing the supervision of other public utilities by the Commission.'

Sec. 493-1 G. C. was enacted at the last session of the Legislature, and provides in part as follows:

'The Commission shall appoint one or more examiners for the purpose of making any investigation or holding any inquiry or hearing which the Commission may be required or permitted by any law to make or hold, * * * Unless otherwise provided in the order appointing the examiner, such examiner shall report his findings and recommendations to the Commission, and file therewith the testimony taken before him. The findings and recommendations of such examiner shall be advisory only and shall not preclude the Commission from taking further evidence. Any such findings made or order recommended by any such examiner, which shall be approved and confirmed, or modified by the Commission and filed in its office, shall be deemed to be the findings and order of the Commission.'

By H. B. 502, (p. 37) the General Assembly appropriated funds for the salaries of such Attorney Examiners.

By the same Act (pp. 34 and 37) the General Assembly appropriated funds for reporting and transcribing testimony, as follows:

'Division of Public Utilities.

| | Six Months | Year | Eighteen Months |
|-----------------------------------------------------------------|---------------|-------------|--------------------|
| Personal service— | * * * * | * * * * | |
| A-3 Unclassified — Reporting and transcribing testimony----- | \$3,000 00 | \$6,000 00' | |

'Division of Motor Bus Public Utilities Commission.

* * * * *

| | | |
|----------------------------------|------------|-------------|
| A-3 Unclassified — Reporting and | | |
| Transcribing----- | \$2,000 00 | \$4,000 00' |

The Governor included in his veto of items of the bill the two sums of \$6,000.00 and \$4,000.00 respectively listed under the heading of 'year', but did not veto the sums of \$3,000.00 and \$2,000.00 respectively, listed under the heading 'six months.'

Necessarily the Commission cannot comply with the above provisions relating to testimony; the Attorney Examiner idea cannot be carried out; nor can the Commission properly handle the multitude of cases passing before it, many of them involving complicated and important questions of valuations and rates without having a record of the testimony submitted.

The Commission has read opinion No. 824 dated Aug. 3, 1927, directed to Hon. D. O. Thompson, Chief, Division of Fish and Game, containing a discussion of the powers of the Emergency Board and Board of Control. Based on the principles there laid down we desire to suggest for your consideration the following propositions:

First:

Section 1 of H. B. 502 contains the following:

'The sums herein appropriated in the column designated "Six Months," or in the column designated "Eighteen Months" shall not be expended to pay liabilities or deficiencies existing prior to July 1, 1927, or incurred subsequent to December 31, 1928.'

It follows that the sums of \$3,000.00 and \$2,000.00 listed under the heading 'Six Months' can be used to pay liabilities incurred at any time after July 1, 1927, and to and including December 31, 1928. In other words, while the General Assembly appropriated \$15,000.00 for reporting and transcribing, the effect of the veto was to reduce the amount to \$5,000.00. As pointed out in the opinion above mentioned, the Governor is only empowered to veto an 'item' in toto, and not to reduce the amount thereof. It would seem that since the sum listed under the heading 'six months' can be spread over the entire eighteen months, an 'item' in this case would consist of the entire \$9,000.00 covered by the language 'A-3. Unclassified—Reporting and transcribing testimony—\$3,000.00—\$6,000.00' If so, the attempted veto was not only of part of an item, but the effect was to reduce the amount rather than to veto an item. The same would apply to the other item appropriated to the Bus Division.

Second:

If it be determined that the attempted veto is effective to make unavailable the \$6,000.00 listed under the heading 'Year' there still remains \$3,000.00 available for the entire period, or as long as it lasts. When it is gone there would then appear to be a situation covered by the provisions of Sec. 2313 G. C. which provides in part as follows:

'In case of any deficiency in any of the appropriations for the expenses of an institution, department or commission of the State for any biennial period, * * * the officers of such department or commission may make application to the emergency board for authority to create obligations within the scope of the purpose for which such appropriations were made * * *.'

In this discussion we use only one of the items. Of course the same reasoning would apply as well to the \$2,000.00 appropriated to the Bus Division.

Stated specifically our questions are:

First: Was the action of the Governor effective to veto the sum of \$6,000.00 and \$4,000.00 respectively listed under the heading of 'Year?'

Second: When the sums of \$3,000.00 and \$2,000.00 respectively listed under the heading 'Six Months' are exhausted will there then be a deficiency in an appropriation for current expenses for which the Emergency Board could entertain an application?

Third: Is there any other way in which funds may be provided for the very necessary expenditure by the Commission?"

The parts of the general appropriation act passed by the 87th General Assembly, viz.: House Bill No. 502, entitled "An Act—To make general appropriations," pertinent to your questions, read as follows:

Sec. 1. "The sums set forth herein designated 'Total Personal Service,' 'Total Maintenance' and 'Total Additions and Betterments,' for the purposes therein specified, are hereby appropriated out of any moneys in the state treasury not otherwise appropriated. * * * The sums herein appropriated in the column designated 'Six months,' or in the column designated 'Eighteen months' shall not be expended to pay liabilities or deficiencies existing prior to July 1, 1927, or incurred subsequent to December 31, 1928; those appropriated in the column designated 'Year' shall not be expended prior to January 1, 1928, nor to pay liabilities incurred subsequent to December 31, 1928. (Page 1).

* * * * *

DEPARTMENT OF COMMERCE
Division of Public Utilities

| | Six Months | Year | Eighteen Months |
|-----------------------------------------------------------------|---------------|-------------|--------------------|
| Personal Service— | | | |
| * * * * * | | | |
| A-3 Unclassified — Reporting and Transcribing Testimony----- | \$3,000 00 | \$6,000 00 | |
| Total Personal Service----- (Pages 33 and 34.) | \$48,570.00 | \$97,140 00 | \$145,710 00 |

* * * * *

DEPARTMENT OF COMMERCE
Division of Motor Bus—Public Utilities Commission

| | Six Months | Year | Eighteen Months |
|-------------------------------------------------------|---------------|-------------|--------------------|
| Personal Service— | | | |
| * * * * * | | | |
| A-3 Unclassified — Reporting and Transcribing----- | \$2,000 00 | \$4,000 00 | |
| Total Personal Service----- (Pages 36 and 37.) | \$22,350 00 | \$44,700 00 | \$67,050 00' |

The appropriation to the Emergency Board contained on pages 166 and 167 of House Bill No. 502 reads as follows:

“EMERGENCY BOARD

Maintenance—

F Contract and Open Order Service—

F 8 Contingencies—

Uses and Purposes..... \$150,000 00 \$350,000 00

* * * * *

Total Emergency Board.... \$225,000 00 \$425,000 00 \$650,000 00’

Section 3 of House Bill No. 502, so far as pertinent to questions asked in your letter, reads:

Section 3. “The sums set forth in section 1 of this act, opposite the several classifications of detailed purposes, shall not be expended for any other purposes, except as herein provided.

Authority to expend the monies appropriated for ‘Total Personal Service’ and ‘Total Maintenance’ in section 1 of this act otherwise than in accordance with such classification of detailed purposes, but within the purpose for which appropriation is made, may be granted to any department, institution, board or commission for which appropriations are made in said section, by a board to be known as the ‘controlling board,’ consisting of the governor, or a designated officer or employe, if appointed by the governor for such purpose, the chairman of the finance committee of the house of representatives and of the senate respectively, the attorney general and the auditor of state. * * *

* * * *Said board may authorize the expenditure of monies appropriated in said section 1 of this act within the purpose for which the appropriation is made, whether included in the detailed purpose for which such appropriations are distributed in said section or not.*

* * * * *

In case of any variance between the several specified sums in the column designated ‘Eighteen Months’ and the aggregate amount of said sums in such column, *the respective specified sums shall be deemed to have been appropriated;* and in case of any variance between the amount of any appropriation and the aggregate amount of the detailed allotments thereof, the controlling board shall, with the advice and assistance of the department, institution or board affected thereby, adjust the detailed allotments so as to correspond in the aggregate with the proper appropriation.” (Italics the writer’s.)

The parts of the Governor’s veto message relating to the appropriations referred to in your letter, contained on pages 185, 189, 199, 200 and 201 of House Bill No. 502, read as follows:

“EXECUTIVE DEPARTMENT

Office of the Governor,
Columbus.

May 11, 1927.

To the General Assembly:

I have filed with the Secretary of State House Bill No. 502 with my approval of all except the following items, totaling \$4,015,059.46, which are hereby disapproved.

* * * * *

“DEPARTMENT OF COMMERCE
Division of Public Utilities

Personal Service—

A-3 Unclassified—

Reporting and Transcribing Testimony for year----- \$6,000 00

* * * * *

DEPARTMENT OF COMMERCE

Division of Motor Bus—Public Utilities Commission

Personal Service—

A-3 Unclassified—

Reporting and Transcribing, \$4,000.00 for year.

* * * * *

The above named items are objected to because of the present and prospective condition of the state treasury.

* * * * *

With respect to appropriations, the Governor has the authority to veto specific items. * * *

* * * * *

My present duty, under the circumstances, it seems to me, is to veto items of lesser importance in the general appropriation act * * *. The result is far from satisfactory because under the constitution I cannot reduce items. I must veto an item in its entirety or approve it in its entirety.

* * * * *

Veto of some of the items will necessitate a readjustment of funds by the State Board of Control from time to time. * * *"

The appropriation to the Emergency Board above set forth must be read in connection with Sections 2312, 2313, 2313-1 and 2313-2, General Code, which respectively provide in part as follows:

Sec. 2312. "There shall be an emergency board to consist of the governor, or a designated officer or employee, auditor of state, attorney general, chairman of the senate finance committee, and chairman of the house finance committee. * * *"

Sec. 2313. "*In case of any deficiency in any of the appropriations for the expenses of an institution, department or commission of the state for any biennial period, or in case of an emergency requiring the expenditure of money not specifically provided by law, the trustees, managers, directors or superintendent of such institution, or the officers of such department or commission, may make application to the emergency board for authority to create obligations within the scope of the purpose for which such appropriations were made or to expend money not specifically provided for by law. * * **" (Italics the writer's.)

Sec. 2313-1. “* * * The applicant receiving such authority shall issue proper vouchers to the auditor of state, as provided by section two hundred and forty-four of the General Code. Upon receipt of such vouchers the auditor, if satisfied as provided in said section that the claim presented is due and payable, *shall draw his warrant on the treasurer of state against any appropriation for the uses and purposes of the emergency board.*” (Italics the writer’s.)

Sec. 2313-2. “The General Assembly may provide at the time of making the appropriations for the expenses of the various institutions, commissions and departments of state a *contingent appropriation for the uses and purposes of the emergency board. Such appropriation shall be applied exclusively to the payment of deficiencies in other current appropriations as provided by Sections 2312, 2313, 2313-1.* Except as provided in said sections, no officer, board, commission or department of state shall have authority to create any deficiency, nor to incur any indebtedness on behalf of the state. The emergency board provided for in said section may not in any biennial period authorize the expenditure of any sum or sums of money exceeding in the aggregate the amount appropriated for its uses and purposes as hereinbefore provided.” (Italics the writer’s.)

The provisions of the Constitution of Ohio necessary to be considered in this opinion are Sections 1 and 22 of Article II, having to do with the powers of the legislature in the matter of appropriations, and Section 16 of the same article relating to the Governor’s veto power. These sections read in part as follows:

Section 1. “The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives but the people reserve to themselves the power to propose to the general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. They also reserve the power to adopt or reject any law, section of any law or any item in any law appropriating money passed by the general assembly, except as hereinafter provided * * *.”

Sec. 22. “No money shall be drawn from the treasury, except in pursuance of a specific appropriation, made by law; and no appropriation shall be made for a longer period than two years.”

Sec. 16. * * * “Every bill passed by the general assembly shall, before it becomes a law, be presented to the governor for his approval. If he approves, he shall sign it and thereupon it shall become a law and be filed with the secretary of state. If he does not approve it, he shall return it with the objections in writing, to the house in which it originated, which shall enter the objections at large upon its journal, and may then reconsider the vote on its passage. If three-fifths of the members elected to that house vote to re-pass the bill, it shall be sent, with the objections of the governor, to the other house, which may also reconsider the vote on its passage. If three-fifths of the members elected to that house vote to re-pass it, it shall become a law notwithstanding the objections of the governor, except that in no case shall a bill be re-passed by a smaller vote than is required by the constitution on its original passage. * * * *The governor may disapprove any item or items in any bill making an appropriation of money and the item or items, so disapproved, shall be void, unless re-passed in the manner herein prescribed for the re-passage of a bill.*” (Italics the writer’s.)

From a reading of Section 16, supra, it is readily apparent that the governor "may disapprove any item or items in any bill making an appropriation of money."

Coming to a consideration of the appropriations referred to in your letter, it is necessary to determine whether the sum of \$6,000 in the column designated "Year" (H. B. 502, p. 34), appropriated by the legislature to the "Department of Commerce—Division of Public Utilities," under the classification "A-3 Unclassified—Reporting and transcribing testimony" is an "item" as that word is used in Section 16, supra, or whether, as suggested in your letter, the "item" appropriated to the division and for the purpose specified is composed of and includes both the sum of \$3,000 in the column headed "Six Months" and the sum of \$6,000 in the column designated "Year," the item really being the total of \$9,000 for the eighteen months period.

Although the question is not entirely free from difficulty, and while there is some force to the argument that with reference to the appropriation under consideration the item consists of the entire amount appropriated for the eighteen months' period, such amount being separated by the legislature only for the purpose of conveniently placing limitations as to time upon the expenditure of parts of the total amount appropriated, it is my opinion that the sum of \$3,000.00 in the column designated "Six Months" is one item and that the sum of \$6,000.00 in the column designated "Year" is a separate item.

In Webster's New International Dictionary the word "item" is defined as:

"An article; a separate particular in an enumeration, account, or total; a detail; as, the *items* in a bill."

Funk & Wagnalls New Standard Dictionary defines the word "item" as:

"A separate article or entry in an account or schedule; a sum entered."

Words and Phrases, (second series) citing *United States vs. Young*, 128 Fed. 111, 114, gives the following definition:

"An 'item' means an article, an entry; anything which can form part of a detail; the particulars of an account."

In the case of *Commonwealth vs. Barnett*, supra, the court said as follows:

"The general idea conveyed by the word 'item' is well understood, and with that in our minds the precise meaning in the Constitution is shown by the context to be the particulars, the details, the distinct and severable parts of the appropriation."

I see no reason to assume that the word "item" was used in Section 16, supra, in any different sense or with any different meaning than it is generally and commonly used, and that, as therein used, it means a separate particular, that is, a distinct and severable detail, in an appropriation bill.

The history of the form of the appropriation bill enacted by the various general assemblies in recent years is of interest and throws some light on the question here under discussion. Prior to 1915 it was the general practice to pass a separate appropriation bill for each year of the biennial period. See House Bill No. 616 making general appropriations to pay liabilities incurred on and after February 16, 1912 (102 v. 393); House Bill No. 590 making general appropriations to pay liabilities incurred on and after February 16, 1913 (103 v. 611); and House Bill No. 670 making general appropriations to pay liabilities incurred on and after February 16, 1914 (103 v. 627).

In 1915 a single general appropriation bill was passed, Section 2 of the bill containing appropriations to pay liabilities from July 1, 1915, to June 30, 1917, and Section 3 containing appropriations to pay liabilities incurred from July 1, 1916, to June 30, 1917. See House Bill No. 701 (105-106 v. 666). In 1921 the form of the act making general appropriations was changed, and from that time until the present, the form in which House Bill No. 502, supra, was drawn and passed has been followed. See House Bill No. 301 (109 v. 415).

When separate appropriation bills were passed for each year or for any other specified period of the biennium certainly it could not be seriously contended that the stated amount appropriated for a given purpose for such year or period was not an item. Neither could it be seriously contended that such an appropriation was not an item when contained in an entirely separate section of the same act. It seems to me clear that the legislature has adopted the present form in enacting biennial general appropriation acts in the interest of economy of space, of clearness and efficiency, and I feel that in determining what is an item undue emphasis should not be laid upon the change in the form of appropriation acts and that the substance of the act should be looked to rather than the mechanics of its makeup.

In the case of *Fulmore vs. Lane*, 104 Tex. 499; 140 S. W. 405, a question somewhat similar to the one here under consideration was presented to the court. In that case the legislature of Texas had made an appropriation reading in part as follows:

“Be it enacted by the Legislature of the state of Texas:

Section 1. That the following sums of money, or so much thereof as may be necessary, be, and the same are hereby appropriated out of any money in the state treasury not otherwise appropriated for the support of the state government from September 1, 1911, to August 31, 1913. * * *

* * * * *

Attorney General's Department.

For the Years Ending—
August 31, 1912—August 31, 1913.

| | | |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|--------------|
| For the support and maintenance of the Attorney General's department including * * * * | | |
| there is hereby appropriated the sum of eighty-three thousand and one hundred and sixty (\$83,160.00) dollars, to be expended during the two fiscal years ending August 31, 1912, and August 31, 1913, to be paid by the Treasurer on warrants drawn by the Comptroller upon vouchers approved by the Attorney General..... | \$41,580 00 | \$41,580 00” |

The governor's veto message to the legislature read in part as follows:

“Executive Office,
Austin, Texas, Aug. 29, 1911.

To the Senate and House of Representatives:

* * * I regret that the Legislature felt it incumbent upon itself to seek to deprive the Governor of the constitutional prerogative of vetoing any item for any department where in his judgment such appropriation was excessive or unnecessary. In the bill as filed with the Secretary of State I have exercised this prerogative, nevertheless, and vetoed the lump sum

of \$83,160.00 appropriated to the Attorney General's department. After making this lump appropriation in one item, the Legislature divided the same into two items of \$41,580.00 each for the fiscal years ending August 31, 1912, and 1913, respectively. By striking out the lump appropriation and the words describing the same, and the appropriation of \$41,580.00 for the second year, the sum of \$41,580.00 is left subject to the use of the Attorney General for the maintenance of his department for the two fiscal years named, any portion of which can be used, under the language of the bill, for any purpose in carrying on the duties of his office * * *."

His veto statement filed in the office of the Secretary of State read in part:

"Executive Office,

Austin, Texas, August 29, 1911.

To the Secretary of State:

* * * * *

* * * Attorney General's Department.

(1) On page 30, the item in words as follows, 'the sum of eighty-three thousand and one hundred and sixty (\$83,160.00) dollars', is objected to and disapproved * * *.

(2) The item on page 30 of \$41,580.00 for the fiscal year ending August 31, 1913, is objected to and disapproved. The remaining item of \$41,580.00, as appropriated, is available for use until exhausted, and may be applied during both of the fiscal years ending August 31, 1912, and August 31, 1913, * * *."

The second, third and fourth headnotes of this case as reported in 140 S. W. 405, read as follows, Ramsey, J., dissenting to the holding of the court as set forth in the fourth branch of the headnotes:

"2. Under the rule that the Governor's veto power, when exercised, is a legislative and not an executive function, the purport of a veto message must be construed by an application of the same rules as govern legislative acts.

3. The veto power of the executive is not inherent in such officer as a legislative function, but is a power confided in him by the supreme authority of the state, and while, in exercising the function, he is not confined to rules of strict construction, he must nevertheless find his authority to exercise the power in the Constitution.

4. Const. Art. 4, Section 14, requires bills to be presented to the Governor for signature; but, if he disapproves a bill, he shall return it, with his objections. The Governor is also permitted to veto part of the items of an appropriation bill, while approving the others, by appending a statement of such items, and such items will not take effect, unless passed over his veto. On August 26, 1911, the Legislature made specific appropriations for the general government for the two years ending August 31, 1912, and August 31, 1913. Among the appropriations was one for the Attorney General's department 'for the years ending August 31, 1912—August 31, 1913,' \$83,160, to be expended during the two fiscal years specified, and to be paid by the treasury on warrants drawn by the Comptroller on vouchers approved by the Attorney

General, \$41,580—\$41,580. The act then provided that, for the guidance of the Attorney General in the expenditure of such sums out of the above item of appropriation of \$83,160, specific sums should be expended for salaries and other specified requirements. The Governor vetoed this appropriation, by striking out the sum \$83,160, and the second set of figures, \$41,580, and all of the part of the act 'for the guidance of the Attorney General in the expenditure of the sums appropriated,' letting the \$41,580 for the year 1912 stand, and in his message stated that the appropriation for the two years was excessive, and that the \$41,580 which was not stricken would probably be sufficient for the two years, and, if not, the deficiency could be otherwise provided. *Held*, that the two sums specified for each year could be treated as separate items and, as such the veto was available as to the one for 1913, but that the Governor had no constitutional authority to veto a portion of a bill or language qualifying an appropriation or directing the method of its expenditure."

In the opinion of Judge Dibrell, it was said as follows:

"It is clear to our minds that the Legislature intended to and did appropriate two items, of \$41,580 each, for the support of the department of the Attorney General, and that the language referring to the sum of \$83,160 was employed to designate the aggregate sum that was intended to be appropriated for that department for the two fiscal years before mentioned. * * * This construction is perfectly consistent with the other provisions of the appropriation, and the construction contended for by the relator and respondent that a single item of appropriation is made cannot, in our judgment, be harmonized with the other provisions making the appropriation, as heretofore indicated. We therefore hold that there were two items of appropriation for the Attorney General's department."

In the case of *People ex rel. vs. Brady*, 277 Ill. 124; 115 N. E. 204, the General Assembly of Illinois had appropriated to "the State Board of Agriculture the sum of \$153,150.00 for the two years beginning July 1, 1915, and ending June 30, 1917, to be used as follows: * * *" The bill then specified forty-four separate purposes and opposite each a specific amount was set down. In most of them the amounts of the expenditures were set down in the first column, headed "Per annum," and the total in the final column, with footings of the first column as \$88,400 and of the column of totals \$153,150.00.

The governor's veto message was as follows:

"In Section 1, paragraph (a), I veto the item 'For coal, coke and wood, \$155 per annum.' In Section 1, paragraph (a), I veto the item 'For forage, \$720 per annum.' In Section 1, paragraph (a), I veto the item 'For cattle barns, \$20,000.' In Section 1, paragraph (a), I veto the item 'For construction of a sanitary kitchen and toilet for Boys' State Fair School, \$5,000.' In Section 1, paragraph (a), I veto the item 'For construction of permanent and sanitary eating houses, \$10,000.' In Section 1, paragraph (a), I veto the item 'For reconstructing seating capacity of coliseum, \$5,000.' In Section 1, paragraph (a), I veto the item 'For constructing free grand stand, \$20,000.'"

It was contended that the governor had no power to veto the items in question on the ground that the only distinct item of the appropriation was the whole amount of \$153,150 and that what followed was only an apportionment of that item, or directions as to how it should be used. The court held:

“The general appropriation of the total sum specifies no purpose or object, but declares that the sums appropriated are to be used for the purposes thereafter named. The general appropriation, without the following items, would not be in compliance with the Constitution, and to hold that it was the only distinct item of the appropriation would be to nullify the power given by the Constitution to the Governor to withhold his approval from distinct items. The word ‘item’ is in common use and well understood as a separate entry in an account or a schedule, or a separate particular in an enumeration of a total which is separate and distinct from the other particulars or entries, and the items vetoed by the Governor come within that meaning. * * * The Governor had power to veto the particular items in the bill in question in this case, and, having done so, the items vetoed did not become any part of the law.”

A similar question was presented in the case of *Fairfield vs. Foster*, (Ariz.) 214 Pac. 319. In that case an appropriation had been made as follows:

“Subdivision 5. For the Corporation Commission:
 For salaries and wages ----- \$53,880
 For the following positions not to exceed the annual rates herein specified:
 * * * * * * * *
 1 rate clerk----- \$2,100 per annum.
 * * * * * * * *”

The governor vetoed the appropriation “1 rate clerk—\$2,100 per annum.” Here again it was contended that the only item, which could be considered by the governor, was the whole appropriation for the corporation commission which amounted to \$72,880, or, at the most, the appropriation of \$53,880, for salaries and wages and that the positions and salaries specified were merely a direction by the legislature as to how the monies were to be expended. Lockwood, Judge, speaking for the court said as follows:

“I am compelled to say that I can in no wise agree with such a construction. It is not in accord with the ordinary definition of the word ‘item.’ The International Dictionary gives ‘item’ as a ‘separate particular in an enumeration, account or total.’ See also, *Lovell vs. Drainage District*, 159 Ill. 188, 42 N. E. 600; *Baldwin vs. Morgan*, 73 Miss. 276, 18 South, 919.

But the conclusive argument to my mind against the construction contended for by plaintiff is that it renders utterly nugatory the attempt of the constitutional convention to meet the very definite evil above referred to. If we follow that line of reasoning, the Legislature may simply make a separate appropriation in any lump sum for each department, or, by proper language in the general appropriation bill, consolidate the funds for almost the entire state government, and, under guise of ‘directing’ the expenditure of the money, limit its application to matters and amounts which the Governor believes to be highly injurious in part to the best interests of the state, practically compelling him to choose between abandoning the veto power, or suspending the operation of the government, thus nullifying the provisions of the Constitution under consideration, and going back to the very conditions its makers sought to avoid.

The form of the appropriation bill under consideration, if we take the view of plaintiff, is a step in that very direction. Like the bill in *Regents, etc. vs. Trapp*, supra, (28 Okla. 83; 113 Pac. 910) it endeavors to make a lump ap-

propriation for a certain department of the government, and then to determine exactly to the last dollar just how that money shall be spent; yet, according to plaintiff the Governor must either take the nauseous dose to the last drop, or stop the operation of the Corporation Commission for two years. If this construction be upheld, obviously the next step for a Legislature hostile to a future Governor will be a further consolidation of the 'items' of the appropriation bill, with a 'direction' of how the money shall be spent, until the special veto is practically abolished. * * *

For the reasons above set forth, it is my opinion that the appropriation of \$3,000 in the column designated "Six Months" is an item within the meaning of Section 16, Article II of the Constitution of Ohio, and that the appropriation of \$6,000 in the column headed "Year" is a separate item within the meaning of the same constitutional provision.

In this connection it should be pointed out that, as was stated in an opinion of this office reported in Opinions, Attorney General, 1915, Vol. II, page 1154, to adopt any other view would be "to disregard the plain intention of the executive whose acts in this respect are entitled to the same presumption of validity as is accorded the acts of the General Assembly, and unless clearly unconstitutional, it would be the duty of the courts to uphold same."

This brings me to your second question. It will be observed that by the express directions of the last sentence of Section 1 of House Bill No. 502, supra, it is provided that "The sums * * * appropriated in the column designated 'Six Months' * * * shall not be expended to pay liabilities or deficiencies existing prior to July 1, 1927, or incurred subsequent to December 31, 1928." In other words, the items contained in the column designated "Six Months" are for the eighteen months' period ending December 31, 1928. It cannot be said, therefore, that there is no appropriation under the classification "A-3. Unclassified—Reporting and Transcribing Testimony" for the year 1928. It is true that the governor has vetoed the item of \$6,000 for the same purpose contained in the column designated "Year," which by the terms of the last sentence of Section 1, supra, could not "be expended prior to January 1, 1928, nor to pay liabilities incurred subsequent to December 31, 1928. So far as the appropriations under consideration are concerned, therefore, there is an appropriation for the eighteen months' period.

As above pointed out, the appropriation act must be read in connection with Sections 2312, 2313, 2313-1 and 2313-2, General Code, which provide in substance that in case of any deficiency in any of the appropriations for the expenses of an institution, department or commission of the state for any biennium period, allowances may be made by the Emergency Board from the "contingent appropriation for the uses and purposes" of such board which is to "be applied exclusively to the payment of deficiencies in other current appropriations."

Frankly, I have doubt as to the validity of the use of any part of the appropriation to the Emergency Board for the purposes of making up any deficiency in any of the appropriations for the expenses of any department of the state government.

Under Section 22 of Article II of the Ohio Constitution, quoted above, no money may be drawn from the state treasury except in pursuance of a specific appropriation made by law. I am inclined to the view that Sections 2313, et seq. violate said last mentioned constitutional provision in so far as they attempt to authorize monies appropriated to the Emergency Board to be used to make up deficiencies in operating expenses. This seems to be an authorization of the very abuse prohibited by said constitutional provision. It may be argued that emergencies come in this same classification but I can see wherein the courts would be justified in upholding an appropriation for emergencies, that is, unforeseen contingencies in government. To my mind to create a board to look after unforeseen contingencies and to appropriate a reason-

able amount of money to that board for such purposes only is not a violation of the above last mentioned constitutional provision.

Inasmuch as:

(a) I am not clear beyond reasonable doubt that such an appropriation is unauthorized.

(b) In 1912 the people of this state amended the Constitution so that it is now provided in Section 2 of Article IV that—

“No laws shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the Court of Appeals declaring a law unconstitutional and void.”

(c) there is a presumption of validity to be accorded to acts of the General Assembly and unless clearly unconstitutional it is the duty of courts to uphold the same,

(d) notwithstanding the Budget Classifications and Rules of Procedure provide that “F-8 Contingencies” is a classification which should be used only for “unforeseeable expenses,” I am informed that there has grown up a practice by the Emergency Board of using monies appropriated under this budget classification for any and all purposes set forth in Section 2313, et seq.

until our Supreme Court holds otherwise, I shall assume that the Emergency Board has the power to use the monies appropriated to it under said classification for any of the purposes set forth in Sections 2313, et seq.

As a matter of law, therefore, in the cases under consideration the Emergency Board is authorized and empowered to grant authority to your commission to create obligations within the scope of the purpose for which the \$3,000 appropriation was made, if it finds that a deficiency does in fact exist and, if in the exercise of its discretion, the board sees fit so to do; and such authority may be granted at any time during the eighteen months' period.

It might be contended that such action on the part of the Emergency Board would have the effect of overriding or destroying the governor's veto. The answer, however, to such a contention is that the governor with a knowledge of the provisions of Sections 2312, et seq., supra, not only did not veto the items of \$150,000 and \$350,000 to the Emergency Board under the classification “F 8. Contingencies—Uses and Purposes,” but in his veto message specifically said that the “veto of some of the items will necessitate a readjustment of funds by the State Board of Control from time to time.” While this statement mentioned the Controlling Board and made no reference to the Emergency Board, it shows, on the part of the governor, an appreciation of the fact that a transfer of funds was authorized under the law, at least in some cases where items were vetoed.

The case here presented is entirely different from the case where both the item in the column designated “Six Months” and the item in the column designated “Year” is vetoed, the appropriation thus being destroyed in its entirety. In such a case there is no appropriation whatever for the eighteen months' period, and there being no appropriation, there can, from the very nature of things, be no deficiency in any appropriation.

This conclusion was reached in Opinion 731, rendered under date of July 12, 1927, to the chairman of the Ohio State Library Board, the syllabus of which reads:

“1. The Emergency Board has no authority to allot any part of the money appropriated to it for the purpose of continuing the work of the Ohio State Library from July 1, 1927, to January 1, 1929.

2. The act of the Governor in vetoing appropriations to carry on the work of the Ohio State Library does not create a 'deficiency in any of the appropriations for the expense of an institution, department or commission of the state for any biennial period,' nor does it constitute an 'emergency requiring the expenditure of money not specifically provided by law.' "

In this opinion it was said as follows:

"It is apparent that before there can be a 'deficiency in any of the appropriations for the expense of * * * (a) department,' an appropriation must first be made. No appropriation was made for your Board. Therefore, there is no deficiency 'in any of the appropriations for the expense' of your Board.

* * * * *

In the situation before me at this time, the legislature made provision for the funds necessary to carry on the activities of the State Library, but the Governor by his veto rendered such provisions void. In the exercise of the Governor's veto power and the failure of the legislature to override such veto, we have an expression of part of the law-making body of the state that no money should be expended for State Library purposes during the present eighteen months' period. Such intent can not be defeated by the Emergency Board authorizing an expenditure of money for a purpose for which the law-making body expressed a contrary intent."

See also Opinion No. 824 of this year, above cited, in which the power of the Controlling Board was under consideration and in which it was said as follows:

"As a corollary it seems clear that where the Governor has exercised the power conferred upon him by the constitution and, by vetoing an entire item of the appropriation act, has entirely wiped out a certain classification, the Controlling Board is without authority to restore such classification, or to authorize a transfer of funds thereto. To restore such classification would have the effect of nullifying the Governor's veto power."

Summarizing my conclusions it is my opinion that:

1. The word "item" as used in Section 16, Article II of the Constitution of Ohio means an article; a separate particular; a detail; a distinct and severable part of an appropriation act.

2. The appropriation of \$6,000.00 to the Department of Commerce—Division of Public Utilities under the classification "Personal Service A 3. Unclassified—Reporting and Transcribing Testimony," contained in the column designated "Year," page 34, House Bill No. 502, passed by the 87th General Assembly, is an item within the meaning of Section 16, Article II of the Constitution of Ohio, and the disapproval of such item by the Governor was a valid exercise of the constitutional powers conferred upon him by said Section 16.

3. The appropriation of \$3,000.00 to the Department of Commerce—Division of Public Utilities under the classification "A 3. Unclassified—Reporting and Transcribing Testimony," contained in the column designated "Six Months," page 34, House Bill No. 502, passed by the 87th General Assembly, may by the terms of Section 1 of House Bill No. 502, be expended to pay liabilities incurred during, and is for, the eighteen months' period, July 1, 1927, to December 31, 1928. Notwithstanding the veto by the governor of the appropriation of \$6,000.00 under the same classi-

fication in the column designated "Year," if there be a deficiency in said appropriation of \$3,000.00, by the terms of Sections 2313, et seq., of the General Code, the Emergency Board is authorized and empowered to make allowances to the department in question, from the current contingent appropriation for the uses and purposes of the Emergency Board, if such board finds that a deficiency does in fact exist in said appropriation, and deems such allowances proper.

4. Likewise the Controlling Board may authorize transfers to such classification from other detailed classifications under the same general heading, viz., "Total Maintenance," in the appropriation made to said department and division.

Specifically answering your questions in the order asked:

1. It is my opinion that the action of the governor was effective to veto the sums of \$6,000.00 and \$4,000.00 listed under the heading of "Year."

2. When the sums of \$3,000.00 and \$2,000.00 respectively, listed under the heading "Six Months" are exhausted, there legally may be a deficiency in an appropriation for current expenses for which the Emergency Board may entertain an application.

3. There is no other way, except as above pointed out, whereby funds may be provided for the necessary expenditures of your commission.

Respectfully,

EDWARD C. TURNER,
Attorney General.

1468.

APPROVAL, BONDS OF WILLOUGHBY VILLAGE SCHOOL DISTRICT,
LAKE COUNTY—\$50,000.00.

COLUMBUS, OHIO, December 30, 1927.

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

1469.

APPROVAL, LEASES TO MIAMI AND ERIE CANAL LANDS.

COLUMBUS, OHIO, December 30, 1927.

Department of Highways & Public Works, Division of Public Works, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter of December 27, 1927, in which you enclose the following leases executed in triplicate, for my approval:

| <i>Miami & Erie Canal</i> | | <i>Valuation</i> |
|-------------------------------|-----------------|------------------|
| Theodore Fluhart, | Land Lease..... | \$24,750 00 |
| East Dayton Realty Co., | “ “ | 3,334 00 |
| Middle West Supply Co., | “ “ | 1,800 00 |
| Lowe Brothers | “ “ | 1,666 67 |