388.

APPROVAL, BONDS OF JEFFERSON SCHOOL DISTRICT, MUSKINGUM COUNTY, $13,345.00, TO FUND CERTAIN INDEBTEDNESS.

COLUMBUS, OHIO, May 25, 1923.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

389.

APPROVAL, LEASE TO PRESTON OIL COMPANY, LANDS SITUATE IN STARR TOWNSHIP, HOCKING COUNTY, STATE OF OHIO.

COLUMBUS, OHIO, May 26, 1923.

HON. JOSEPH T. TRACY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval a lease executed May 23rd, 1923, wherein the State of Ohio, through the Auditor of State, grants to The Preston Oil Company a lease covering the Casing Head gas upon the following lands:

> "Situate in the Township of Starr, County of Hocking and State of Ohio, dated January 9th, 1915, and covering all the land in Section Number Twenty-nine (29), Township Twelve (12), Range Sixteen (16), and all of Section Number Sixteen (16), Township Twelve (12), Range Sixteen (16), except the northwest quarter thereof."

Finding said lease executed in accordance with the provisions of the statute I have this day approved the same as to form and return the same herewith to you.

Respectfully,
C. C. CRABBE,
Attorney General.

390.

RECESS APPOINTMENT—SENATE NOT IN SESSION WITHIN MEANING OF SECTION 12 G. C.—VACANCY DOES NOT OCCUR AT EXPIRATION OF FIXED PORTION OF TERM.

SYLLABUS:

1. *There is at this time no vacancy in the office of trustee of Ohio State University now held by C. F. Kettering, within the meaning of Sections 12 and 7942 of the General Code, or of Section 3 of Article VII of the Ohio Constitution, and*

a person appointed at this time by the governor without the advice and consent of the senate, could not lawfully assume the duties of the office.

2. *The senate is not, at the present time, "in session", within the meaning of section 12 of the General Code, but that fact would not warrant the governor in making a so-called recess appointment of a successor to Mr. Kettering, for the reason that there is now no vacancy in the office to be filled.*

3. *A vacancy in an office, appointments to which are subject to confirmation by the senate, does not occur at the expiration of the fixed portion of the term, in cases where there is no constitutional provision, preventing the incumbent from continuing in office thereafter, and the statutes under which he was appointed and confirmed, or which are applicable thereto, expressly authorize him to continue in office until his successor is appointed and confirmed.*

4. *An appointment to office in "anticipation of a vacancy" under section 12 of the General Code may only be made by the governor and senate—the governor nominating, the senate confirming—and not the governor alone.*

COLUMBUS, OHIO, May 26, 1923.

HON. A. V. DONAHEY, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—Your letter of recent date inquiring, first, whether you may now appoint a trustee of Ohio State University, as successor of Mr. C. F. Kettering, without the advice and consent of the senate, and the right of such unconfirmed appointee to assume the office, and, second, whether the senate is now "in session", within the meaning of that part of section 12 G. C. which makes provision for the filling of vacancies which occur "when the senate is not in session", was duly received.

1. In considering the first question, it is assumed that Mr. Kettering was duly appointed and confirmed by the senate for the full statutory term provided for in section 7942 G. C., and that he is now in office under that appointment.

The Ohio State University had its origin in the act passed March 22, 1870 (67 O. L. 20), which created the "Ohio Agricultural and Mechanical College." The institution was reorganized under the act passed May 1, 1878 (75 O. L. 126), and its name changed to "The Ohio State University." Both acts, as well as the laws now in force governing the university, clearly disclose that it is a "state institution", within the meaning of Article VII of the Ohio Constitution, and it also has been so held by the Supreme Court of Ohio in Neil v. Board of Trustees, 31 O. S. 15, 21, and by the Supreme Court of the United States in Thomas v. Board of Trustees, 195 U. S. 207. Indeed, it was said in the Neil case (p. 22), that the power of the general assembly to establish it "is found clearly granted in the Seventh Article."

Section 2 of Article VII provides that the trustees of state institutions shall be appointed "by the governor by and with the advice and consent of the senate", and also, that "upon all nominations made by the governor, the question shall be taken by yeas and nays, and entered upon the journals of the senate." This section discloses beyond doubt that the power of the governor is thereby clearly limited to the making of nominations, and that no appointment is made until and unless confirmed by the senate.

The same Article, in section 3, has also made special provision for the filling of vacancies—the provision being, that "The governor shall have power to fill all vacancies that may occur in the offices aforesaid, until the next session of the

general assembly, and, until a successor to his appointee shall be confirmed and qualified." But it will be observed that it is only "vacancies" that the governor is empowered to fill under the authority of the section.

The constitution having made special provision for the filling of "vacancies" in the office of trustee of state institutions, it might successfully be claimed that general statutes enacted under authority of section 27 of Article II, making provision for the filling of vacancies generally have no application to the cases specially provided for in the constitution. And, section 27 of Article II, it should be stated, expressly provides that its authorization only extends to cases "not otherwise provided for by this constitution." Special provision having been made in section 3 of Article VII for the filling of vacancies in the office of trustee of state institutions, that portion of section 12 G. C. now under consideration might very properly be confined to vacancies other than those so specially provided for.

Coming now to a consideration of section 7942 G. C., which fixes the term of office of the trustees of Ohio State University, we find it expressly provided therein that the government of the university shall be vested in a board of seven trustees (see also 154-56 G. C.), "who shall be appointed", not by the governor alone, but by the governor "with the advice and consent of the senate"; and that one trustee shall be appointed each year for a term of seven years from May 14th, who shall serve "until his successor is appointed and qualified." This statute, in the respects just noted, means and clearly provides that no trustee, whether he may have been one of the original seven, or whether he be one of their successors, can be legally appointed to office by the governor alone, but only "by the governor, with the advice and consent of the senate."

This statute also makes provision for the filling of vacancies in the office of trustees, as follows: "A vacancy in the office of trustee shall be filled by an appointment to be made in the same manner as an original appointment, but only for the unexpired term." Here, again, it will be observed that there must be a "vacancy" in the office to be filled, and not only that, but it will be noticed that even a vacancy, when one occurs, must be filled "in the same manner as an original appointment"—that is, "by the governor, with the advice and consent of the senate." Now, then, if this provision of the statute is to prevail, can it be successfully contended that a vacancy, should one occur, may be filled by the governor alone, when an original appointment was required to be made by the governor and the senate jointly?

But whether the filling of a vacancy in the office of trustee of Ohio State University is to be governed by section 3 of Article VII of the Constitution, or by section 7942 or by section 12 of the General Code, and waiving all that has been said on the subject with respect to the difference in the forms of expression, the fact remains that under all three provisions there must be a "vacancy" in the office to be filled, before the governor would be entitled to make an appointment, for, as was aptly said in State v. Bryson, 44 O. S. 457, 465, "The office could not be regarded as vacant while filled by one lawfully entitled to it, nor could an appointment made ostensibly to fill a vacancy create one." See, also, State v. Howe, 25 O. S. 588, 595, where the Court says, "It is hardly necessary to deny, as no one contends, that a vacancy was created in the office by the mere appointment of a successor. Also, State v. Wright, 56 O. S. 540, 554, that "It is not apparent how any action * * * in making an appointment to the office can operate to create a vacancy to be filled, where none otherwise existed."

Is there a "vacancy" in the office of trustee of Ohio State University by reason of the fact that the seven-year portion of Mr. Kettering's tenure may have terminated on May 13, 1923? His full tenure, as prescribed by section 7942

G. C. at the time of his appointment, and also now, was "seven years from the 14th day of May of such year", and "until his successor is appointed and qualified."

I gather from your letter and also assume that it is your understanding that a "vacancy" occurs in an office, appointments to which are subject to confirmation by the senate, upon the expiration of the fixed statutory portion of the term, but such is not the case where there is no constitutional provision preventing the incumbent from holding over, and the statute or statutes applicable to his appointment expressly authorize him to continue in office until his successor is appointed and confirmed or qualified. The governor, upon the expiration of the fixed portion of the term, might be justified in making a nomination, but his nominee could not assume the office unless he was confirmed. And also, the governor and the senate, but not the governor alone, may make an appointment in anticipation of a vacancy (State v. Cowen, 96 O. S. at p. 285; State v. Howe, 25 O. S. 588), whereupon the confirmed appointee would be entitled to assume the office upon the expiration of the fixed portion of the incumbent's tenure. But in neither case could an unconfirmed appointee assume the office when it is in the possession of an incumbent entitled to hold it until his successor is confirmed by the senate.

As we pointed out in a recent opinion addressed to you a few days ago, the law is well settled in this state that an office cannot be regarded as vacant while filled by one lawfully entitled to hold it; and that where the statute under which an incumbent has been duly appointed and confirmed by the senate, expressly provides that his tenure shall be for a certain fixed period, and "until his successor is duly appointed and confirmed or qualified", or words of similar import, the so-called hold over portion of his tenure is as much a part of his term as the fixed portion, and he is entitled to continue in the office until his successor also is duly appointed and confirmed or qualified.

A case almost parallel with the Kettering case, and directly involving Article VII of the Constitution, was before the Supreme Court several years ago. In the case referred to, State v. Howe, 25 O. S. 588, it appears that Howe, the same as Kettering, had been appointed and confirmed by the senate as trustee of the reform school for boys, a "state institution" under Article VII. The statute under which he was appointed provided that trustees should be appointed "by the governor, by and with the advice of the senate," and also that their term of office should be for three years, "and until their successors are appointed and qualified." While Howe was still in office under his appointment, the governor, without the advice and consent of the senate (the general assembly not being then in session), appointed, or assumed to appoint, one Harper as the successor of Howe. The appointment of Harper was sought to be sustained under a provision of the statute pursuant to which Howe had been appointed, that "Vacancies shall be filled as the original appointments are made, except when the general assembly is not in session, and then by the governor, until the 20th day of the next session of the general assembly," a provision following closely the "vacancy" provision of section 7942 G. C.

After referring to the statute involved, and also to Article VII of the Constitution, and stating that the right of Howe to hold the office would have been indisputable had the governor not assumed to appoint his successor, and that "It is manifestly the design of the constitution, as well as of the statute, to secure to such office, an incumbent who possesses the confidence and approval not only of the governor, but also of the senate of the state," the Court said:

"The only question in the case, therefore, is, was there a vacancy in the office at the time Harper's appointment was made? If not, his appointment was unauthorized, and the defendant (Howe) is lawfully entitled to hold the office.

"It is hardly necessary to deny, as no one contends, that a vacancy was created in the office by the mere appointment of a successor to the defendant. And it is almost as palpable, that if a successor had not been appointed, the defendant would have continued to hold, not merely as a de facto officer but as an officer de jure. This must be so, if effect be given to the provision of the statute authorizing him to hold over his three years, until a successor shall be appointed and qualified. *The successor here meant cannot be the appointee of the governor alone,* who comes into the office temporarily to fill a vacancy, *but the appointee of the governor, by and with the consent of the senate.* Were it otherwise, it would be necessary to hold that a vacancy was created by an appointment to fill a vacancy, or that, in contemplation of law, an office is to be regarded as vacant while in the possession of an officer who is rightfully and lawfully entitled to hold it * * *

"Let it be conceded that the defendant's term was limited to three years, from April 16, 1872; it is nevertheless true that the same statute which imposed the limitation also provided that the right of the defendant to hold the office should continue thereafter until his successor was appointed and qualified.

"The plain and obvious import of this statute is, *that a vacancy shall not occur at the end of three years from the incumbent's appointment.* It is true, a successor may be appointed by the governor, *by and with the advice of the senate,* either before or after the expiration of the three years; and when so appointed and qualified, the right of the incumbent to hold the office ceases whenever the three years from the date of his own appointment have elapsed. In such case, there is no interregnum or vacancy in the office. It passes in succession. The end of one tenure, and the beginning of the next, occur at the same time. But if no successor be qualified, the old incumbent continues in office, not as a mere de facto officer, or locum tenens, but as its rightful and lawful possessor until such successor be duly appointed and qualified.

"That the framers of the constitution in providing for filling vacancies in office, did not regard an office as vacant, when an incumbent might lawfully hold over his definite term until a successor was elected or appointed and qualified, is manifest from other provisions of the instrument." (Here follows a reference to several constitutional provisions.)

At this point the Court referred to section 20, of Article II of the Constitution, which requires the general assembly to "fix the terms of office of all officers", etc., and said:

Let it be conceded that the term must be fixed to a certain and definite period, so that the expiration of the period closes the term of an incumbent, and brings in the term of a successor if one be duly appointed and qualified. In such case there would be no vacancy in the office, and the successor must be a person appointed by the governor, by and with the advice of the senate. But it is claimed, if a successor be not appointed by the governor and senate at the expiration of the incumbent's term, a vacancy then occurs. Undoubtedly, this would be so, if the incumbent may not lawfully hold over pro tempore. But the right to so hold is given by this statute, as we have shown, * * *.

We are aware that the executive department of the state has, on divers occasions since the adoption of the present constitution, assumed to fill vacancies in office by appointment, when according to the foregoing views, vacancies did not exist. And, on the other hand, the legislative department has adhered to a different construction of its constitutional powers, in providing against the occurrence of vacancies in numerous offices, by authorizing incumbents to hold over the fixed terms, until successors should be chosen and qualified. This court is now called upon, for the first time, to declare the true limit of powers in this regard as

between these co-ordinate branches of the government. After a careful examination of the question, in the light of both principle and authority, we are led to the conclusion that the general assembly may provide against the occurrence of vacancies by authorizing incumbents to hold over their terms in cases where the duration of their tenures is not fixed and limited by the constitution.

"By this solution, public trusts and offices are preserved to the administration of those agents who may be chosen in conformity to the general policy of the state, as declared by its constitution and laws providing for their election or appointment and, at the same time, all the evils contemplated as likely to result from vacancies in office are guarded by confining the exercise of the power to fill vacancies in office to those cases where no one is authorized by law to discharge the public duties."

In State v. Bryson, 44 O. S. 457, it appears that Tresenrider had been duly appointed and confirmed by the city council to the office of city engineer. The ordinance under which he was appointed provided that such officer should be appointed by the Mayor, "by and with the advice of the city council," and that he should hold office for one year, "and until his successor is appointed and qualified." It was also provided that "Vacancies in said office shall, in like manner, immediately upon the vacancy occurring, be filled by appointment for the unexpired term," etc. The language is strikingly similar to that employed in section 7942 G. C., under which Mr. Kettering was appointed. On or about the expiration of the one-year portion of Tresenrider's tenure, and while he was still in office under his appointment, the Mayor appointed one Bryson to the office, but the city council refused to take any action upon the nomination, except to refer it to a committee. Notwithstanding the fact that the council refused to confirm his appointment, Bryson undertook to assume the office under a claim that a vacancy occurred in the office upon the expiration of the one-year portion of Tresenrider's term. The court held that no vacancy had occurred in the office, and that since the council failed to confirm Bryson's appointment, he could not lawfully assume and hold the office, but that Tresenrider was the lawful incumbent and entitled to hold until his successor was duly confirmed.

In the opinion (p. 465), the Court said:

"It would seem clear that when the ordinance has provided a mode of appointment, to-wit, 'by the mayor by and with the advice and consent of the city council,' and that the engineer shall hold 'until his successor is appointed and qualified,' there is hardly room for doubt that the purpose was to require, as a necessary element in an appointment, the consent of council; or for doubt that before the tenure of one who has been appointed by the mayor and confirmed, and has qualified for a regular term, can be considered at an end, not only must the year have elapsed, but his successor must have been, in like manner, appointed and confirmed and qualified. The tenure might expire at the end of a year by the appointment and confirmation and qualification of a successor, but if no successor be so constituted, the incumbent continues as the lawful and rightful possessor of the office. * * *

"The office could not be regarded as vacant while filled by one lawfully entitled to it, nor could an appointment made ostensibly to fill a vacancy, create one. It is manifestly the design of the ordinance to secure to such office an incumbent who possesses the confidence and approval, not only of the mayor, *but also of the city council.* Beyond this, the engineer is to hold his office, not only for one year, but 'until his successor is appointed and qualified.'"

At this point the Court takes up the manner in which a vacancy can be filled, when the statute or ordinance requires the appointee to be appointed "in the same manner" as an original appointment—as does section 7942 G. C.—or "in like manner"—as did the ordinance in question—and says:

"As regards an appointment to fill a vacancy, it is not apparent that any different cause of proceeding has been provided for. After making provision for the appointment of a successor to an engineer holding for a full term, and indicating what steps are necessary to complete such an appointment, the ordinance next provides that 'all vacancies in said office shall, *in like manner,* immediately upon the vacancy occurring, be filled by an appointment for the unexpired term, and until a successor is appointed and qualified.' This seems to require precisely the same formality of action by council, whether the appointment be for a full term or to fill a vacancy. * * *

"The nomination by the mayor not having been consented to by the council, no successor had been appointed. Hence, the term of the incumbent had not expired, and there was no vacancy."

The same doctrine is also announced and applied in State v. Wright, 56 O. S. 540, which cites and quotes with approval from State v. Howe, and State v. Bryson, supra. In that case, a mayor had been elected for a term of two years with authority to serve until his successor is qualified. Council, in case of a vacancy in the office, was authorized to fill it by appointment, and, while Wright was still in office under his election, a resolution was adopted declaring the office vacant and assuming to appoint his successor. In the opinion (p. 553) the Court said:

"His lawful term, expressly fixed by statute, is not only for two years, but also until his successor shall be qualified. His right to serve after the expiration of the designated period, until the qualification of his successor, being conferred by statute at the time of his election, is no less a part of his statutory term of office than the fixed period itself; and while he is serving there can be no vacancy in the office, in any proper sense of the term, for there is an actual incumbent of the office legally entitled to hold the same."

In State v. McCracken, 51 O. S. 123, the Court (p. 129) say:

"In contemplation of law there can be no vacancy in an office so long as there is a person in possession of the office legally qualified to perform the duties. This conclusion is distinctly supported by the holding in State v. Howe, 25 O. S. 588."

See also a general review and discussion of the Ohio cases in State v. Metcalfe, 80 O. S. 244.

Based upon the foregoing decisions of the Supreme Court, the conclusions cannot be escaped that Mr. Kettering is lawfully in possession of the office of trustee of Ohio State University, and that he may lawfully continue in office until his successor is confirmed by the senate, for the simple reason that he is, under the express language of section 7942 of the General Code, entitled to hold the office not only during the period of seven years which began on the 14th day of May of the year of his appointment, but also "until his successor is appointed and qualified," and his successor, to be "appointed and qualified", must be appointed "by the governor, with the advice and consent of the senate." See, also, section 2 of Article VII of the Constitution.

That part of section 7942 G. C. which provides for the filling of a "vacancy" in the office, has no application to the question under consideration, for the reason that there is now no vacancy in the office, since Mr. Kettering is entitled, under his appointment, to hold office until his successor is confirmed by the senate, and

there can be no vacancy as long as the office is held by a person lawfully entitled to its possession. And even should it be assumed that a vacancy occurred in the office on May 13, 1923, by reason of the expiration of the seven years portion of the term, the governor alone would be without authority to fill it under section 7942 G. C., because that section expressly provides and clearly requires that even an appointment to fill a vacancy shall be made "in the same manner as an original appointment." And section 3 of Article VII, of the Constitution, also, the same as section 7942 G. C., likewise requires a "vacancy" before the governor is authorized to make an ad interim appointment, and, as above stated, there is now no vacancy in the office which Mr. Kettering is now holding.

All that has been said applies with equal force to section 12 of the General Code, because, under that section, the authority of the governor to act in cases to which it may be applied, is also predicated upon a "vacancy" in the office. Hence, where there is no vacancy, as above explained, no appointment can be made, because an appointment made ostensibly to fill a vacancy, cannot create one, nor can a vacancy be created by the mere appointment of a successor.

2. Is the senate of the 85th session of the general assembly now "in session", within the meaning of those words as used in section 12 of the General Code, which provides that if a vacancy in an office filled by appointment of the governor, with the advice and consent of the senate, occurs "when the senate is not in session", the governor shall fill the vacancy and report the appointment to the next session, etc.

Section 12 G. C. deals only with appointments to office which are required to be made "with the advice and consent of the senate", and, it should be observed, it is only when a "vacancy occurs" that the governor is authorized to exercise the so-called recess appointing power. So that, under the doctrine of the Supreme Court decisions referred to in the first part of this opinion, it must first be found that a vacancy has occurred before the governor alone can, under any circumstances, fill it. If there be no vacancy in a particular office, there is, of course, no vacancy to fill, as, for example, where an officer is in office under an appointment which has been confirmed, and whose tenure is for one or more years "and until his successor is appointed and qualified," or words of similar import. The mere expiration of the fixed portion of such a term, where there is no positive constitutional limitation or provision prohibiting him from holding over, does not bring his term to an end or create a vacancy, where the statute under which he was appointed or another which is applicable thereto, expressly vouchsafes to him the right to hold over until his successor is appointed and confirmed or qualified. It is this feature, probably, that has caused some misunderstanding, since the erroneous opinion is more or less prevalent that the mere expiration of the fixed statutory portion of the term, ends the term and creates a vacancy, but that is not true of the class of officers who are legally entitled to continue in office thereafter until their successors are appointed and confirmed.

Recurring to the question, is the senate now "in session," within the meaning of section 12 G. C.?

The constitution itself apparently recognizes or draws a distinction between the "general assembly" and "sessions of the general assembly", on the one hand, and the "senate" and "sessions of the senate", on the other. Thus, in the first instance, we find it dealing with the "general assembly" in sections 1, 1c, 4, 16, 20, 21, 25, 27, 28, 31 and 32 of Article II, and with "sessions of the general assembly," both regular and special, in sections 1b, 12, and 25 of Article II, and in sections 4, 7 and 8 of Article III. And in the second instance, we find it dealing

with the "senate", "either house", "neither house", "each house", "both houses", "two houses", "each branch" (the senate necessarily being included in each expression), in sections 1, 1d, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 23, and 29 of Article II, and in section 9 of Article III; and with respect to "sessions of the senate", as distinguished from session of the general assembly, we refer particularly to section 17 of Article II, which provides that the presiding officer of each house shall sign all bills and joint resolutions in the presence of the house over which he presides, "while the same is in session, and capable of transacting business", thereby indicating that the senate, under certain circumstances, and also the house, may or may not be "in session", and capable or incapable, as the case may be, of transacting its business.

The constitution, as already indicated, has made provision for "regular sessions" and "special sessions" of the general assembly, the first in section 25 of Article II, the second in section 8 of Article III. See State v. Creamer, 83 O. S. at page 438. The time of commencement of the "regular sessions" is fixed by the same section, and the time of the convening of the "special sessions" is fixed in the governor's proclamation. It will be noticed, however, that while the time of the commencement of these sessions of the general assembly is provided for, no time is fixed for their ending, excepting only that in case of disagreement between the two houses as to the time, the governor may adjourn the general assembly to such time as he may think proper, but not beyond the regular meeting thereof. Section 9 of Article III. Provision also has been made covering adjournments of the senate, as well as of the house, in section 6 of Article II, and section 14 of Article II, the former providing that the members of "each house" may adjourn from day to day, and the latter that "Neither house shall, without the consent of the other, adjourn for more than two days," etc.

But while, by reason of the various constitutional provisions, the general assembly and its branches may, in legal contemplation, be considered as being always in existence and in session when once it has actually convened, until final adjournment, nevertheless we believe it not improper, in some cases, to classify its existence and sessions into actual and constructive, and to conclude that while, under some circumstances the general assembly and its branches may be constructively in session, it and they are not always necessarily or actually so. See State v. Harmon, 31 O. S. 250, 262, where the court said:

"The general assembly, in legal contemplation, is a continuing body, as enduring as the constitution; but when not in session it has merely a potential existence. Its members are at all times liable to be called together to act as an organized body, and it is only when they are thus convened that the general assembly can be said to be in session, or competent for the transaction of business."

The general assembly also, by the enactment of statutes which have been on the statute books for years, has also recognized a distinction between its own sessions and the sessions of its two branches. Thus, we find "sessions of the general assembly" referred to in sections 35, 37, 47 of the General Code, and in section 48 provision is made that each house shall be deemed to be "in session as a separate branch of the general assembly", when the two houses are in joint convention. Reference might also be made to section 50 G. C., and to 1919 Opinions of the Attorney General, Vol 1, at page 588, in which opinion it was held, speaking with reference to the general assembly, that "session", in one place, means "the space of time or period between the first meeting and the adjournment", and in another place, "the actual assembly of the members, actually sitting for the transaction of business."

The constitution also at different places discloses or rather indicates that the senate may do certain things independently of the house. See section 8 of Article II, "transaction of *its* business," and section 9 of the same Article, "*its* proceedings," etc.

Upon consideration, we believe that the collective effect of the several constitutional and statutory provisions hereinbefore referred to, justifies the conclusion that, while in contemplation of law, the "general assembly" may be said to be in session until final adjournment, the senate at this time is only constructively in session, and not in session in the sense of being capable of transacting legislative or senatorial business, since its members have dispersed to their repective homes throughout the thirty-three senatorial districts of the state, pursuant to a resolution which contemplates and authorizes their absence until December 31, 1924, unless, upon the happening of some contingency that may never occur, they are sooner called together by a committee composed of members and officers of both houses, which committee alone is made the sole judge to determine whether or not the contingency has happened upon which to predicate their recall. Non constat, that either the general assembly as such or its two branches will ever reconvene under the resolution, or that the 85th session will not expire by operation of law upon the convening of the 86th regular session in January, 1925.

The case of People v. Fancher, 50 N. Y. 288, while involving provisions of the New York Constitution different in some respects from our own constitutional and statutory provisions, may be referred to at this point as bearing upon the question under consideration. In that case, it appears that the New York Constitution provided that when a "vacancy" occurs in the office of judge of the Supreme Court, the governor, if the senate is not "in session", may fill the vacancy by appointment. A vacancy having occurred, within the meaning of the New York law, the governor proceeded to make an appointment during an adjournment of the senate from September 10th to November 20th of the same year. The governor's appointment was made on September 21st—eleven days after the adjournment was taken. "The governor," quoting from the report of the case, "in making this appointment assumed that the senate was not in session within the meaning of the Constitution, and that the power of appointment, without confirmation of the senate, was vested in him. The question, whether the senate was or was not in session at the time in question," said the court, "is submitted in this action."

In the opinion the court said:

"The governor cannot, without the advice and consent of the senate, if that body is in session, fill a vacancy in the office of justice of the supreme court, and the claim of the relator is, that notwithstanding the interruptions of the sittings and the adjournment from September 10th to November, without the possibility of having a regularly organized and constituted senate in actual session, or a senate convened capable of advising or consenting to an appointment during the intervening months by any act or assent of the body itself or the individual members, the senate was 'in session' within the meaning of the Constitution, requiring the assent of that body to the appointment, * * *. But little aid will be derived by a resort to lexicographers for the technical meaning of the word 'session' with a view to determine what was understood and intended by the words 'in session', as applied to the senate in that part of the Constitution under review. Indeed, the science of words alone cannot control in the construction of a written constitution, which must be rather interpreted with reference to its special or

general intent and ordinary and usual sense of the phraseology than to the literal and technical meaning of the words used.

"To give the phrase 'in session', the effect claimed for it by the relator, and to hold that the senate is now and has been from the 14th of May (the date of convening) 'in session,' within the meaning of the Constitution, so that no appointment to fill a vacancy in the office of justice of the supreme court occurring during that time can be made, except by and with the advice and consent of the senate, practically nullifies the provision and defeats the remedy intended to be provided for the possible evils resulting from a vacancy in the office by making an appointment impossible for several months at a time.

"The senate adjourned on the 10th of September to meet again on the 20th of November. To declare, by resolution, on the 10th day of September that their next meeting should be on a future day, several weeks distant, and to adjourn to that day, was virtually to declare that the senate would not be in session, the senators would not assemble or meet in a body in the interim. Nothing is proved by saying, in conformity with the definition of the term 'session', as given by Bouvier and other lexicographers, that the extraordinary session of the senate, which commenced on the 14th day of May, when it convened by the governor, still continues and will only end when it shall finally adjourn sine die, or by the meeting of the senate at the commencement of the next annual session of the legislature.

"The session of the senate, like the sessions of the legislature or of congress, or the term of a court, continues, notwithstanding repeated recesses or adjournments, until the final close or end in some way provided by law. It is true that should the senate not come together pursuant to the adjournment, and so the session fail (and that that will not be the case cannot now certainly be known), a question would arise whether the session did not in fact terminate on the 10th of September, the day of the last adjournment. This question may never arise, but it illustrates the difficulty of holding that the senate was 'in session' on the 13th or 21st of September. The term, as thus used, conveys a distinct idea of the time within which a body has a continuing existence for certain purposes, not affected by adjournments from day to day or from time to time. The legislature holds ordinarily but one session, known as the annual session, and it may be continued by adjournment over intervening months, and yet the session will be the same.

"The word 'session', as thus used conveys a different idea, and indicates a period or term of time in the abstract, while the words 'in session', as used in the clause under review, indicates a present acting or being of the senate as a body. * * *

"It is not denied that a single 'session' may be interrupted and consist of several actual sittings, with weeks or months intervening. In that case the session will be continued over the intervening time, and the several sittings will be connected together as one session by the adjournments. Although the months between the several sittings will be between the commencement and the final termination of the session, in no proper sense will they be included as a part of the session. They are only constructively, if at all, a part of the session. * * * But when the sittings are terminated by an adjournment for months, and the actual meeting or sitting of the body thus interrupted, although the session is continued, it cannot be said that the body is 'in session'. The spirit and intent of the Constitution would be sacrificed to what is claimed to be the letter of the instrument, to hold that the senate was 'in session' during all the months during which it might adjourn, and thus extend an ordinary or extraordinary session.

"The constitution, designed for practical purposes, had respect to realities, and was not dealing with fictions or a constructive condition of things. It had respect to a senate actually and duly convened, and in readiness to act upon the nominations of the governor and the transaction of other business pertaining to that body, and not to a constructive session of a body not actually or potentially existing. It was not intended for a condition of things when as in this case, the senate was not actually convened, and when it was not to convene for months to come, and when a call of the executive would be necessary to enable that body to advise in reference to the nominations." * * *

"It is very palpable that it is not the intent of the Constitution that the senate should be regarded as 'in session' during these long adjournments, or that any such constructive session or sitting should deprive the governor of the right to fill the vacancy or the people of the services of a justice of the supreme court."

After careful consideration, the conclusion has been reached that while the general assembly which commenced on the first Monday of January, 1923, may now, in legal contemplation, be potentially in existence and constructively in session, including its two branches, and may so continue until a formal sine die adjournment, nevertheless the senate cannot at this time be said to be "in session", within the meaning of the phrase as used in section 12 of the General Code. If a constructive session is meant by the words "in session" (as distinguished from a session of the senate whose sittings are merely interrupted by a recess taken for the purpose of enabling committees or officers to perform duties appertaining to legislative matters then before it or in contemplation; or from a session during which a short recess is taken for the purpose of enabling the members to have the benefit of the periods of rest or cessation from labor usually recognized and enjoyed in business and legislative work—instead of a recess taken under a resolution which can admit of no other reasonable interpretation than that the members considered the business of the session virtually at an end—then section 12 of the General Code might become a receptacle of idle and meaningless words, for under such an interpretation a recess appointment could never be made, since, if we are to be encircled by the doctrine of potential existence and constructive sessions, the senate would, under that doctrine, be always in existence and in session.

It is true that in some cases, for instance where the constitution specifically requires certain facts or entries to be entered on the journals, the journals import absolute verity and are conclusive, but under the doctrine announced and applied by our Supreme Court, particularly in Ritzman v. Campbell, 95 O. S. 246, which reviews the earlier cases, it can hardly be said that the journals are conclusive on the question as to whether the senate is now "in session", within the meaning and purpose indicated by section 12 G. C. See also 1919 Opinions of the Attorney General, Vol. 2, page 1099. If anything, the journals disclose the opposite.

The senate having virtually ended its work on April 28, 1923, and all of its members having dispersed and gone to their respective homes, pursuant to a joint resolution which shows that in all probability it may not return until December 31, 1924, and which fails to disclose any present or reasonably certain intention of returning before that time, and no reason appearing therein or otherwise as to the reason or necessity for such a long recess, and nothing to indicate any unfinished business to be disposed of at a later sitting, or that there is any particular business in contemplation, to be considered in the meantime by committees or officers for ultimate disposition, we are unable to reach the conclusion that the senate can, in any proper or reasonable sense, be said to be now "in session."

We do not wish to be understood as intimating that the general assembly or senate may not recess or adjourn from time to time, and for such lengths of time, as it may desire, and our only holding on this point is that the senate under the circumstances now involved, is not at this time "in session", within the meaning of section 12 of the General Code. We are not dealing with the question whether or not the senate is or is not in session for any other purpose.

From the foregoing discussion relative to section 12 G. C., it may be concluded:

(a) That the section refers only to appointments which are required to be made by the governor by and with the advice and consent of the senate;

(b) That before an appointment may be made under its authority, there must be a vacancy in the office to be filled; provided, however, that an appointment may be made in "anticipation of such vacancy," in the manner referred to in subsequent paragraph (d) hereof;

(c) That there can be no vacancy in an office so long as it is held by a duly appointed and confirmed incumbent who is entitled to hold it until his successor is appointed and confirmed;

(d) That while an appointment may be made in anticipation of a vacancy, such an appointment may only be made by the governor and senate—the governor nominating, the senate confirming—and not by the governor alone;

(e) That the words "by expiration of term," as used in the expression, "by expiration of term or otherwise," refers to vacancies in office which result from constitutional or statutory provisions either expressly or by necessary implication prohibiting or preventing the incumbent from holding over or continuing in office after a certain prescribed time, and as distinguished from an incumbent who is entitled to continue in office until his successor is appointed and confirmed; and the words, "or otherwise," as used therein, refer to vacancies caused by death, resignation, removal from office for cause pursuant to law, forfeiture of office, and the like.

You are, therefore, advised, in answer to your two questions, as follows:

1. That if Mr. Kettering was duly appointed by a former governor and confirmed by the senate as trustee of Ohio State University, and is now in office under that appointment and confirmation, there is at this time no vacancy in the office to be filled, within the meaning of sections 12 or 7942 of the General Code, or of section 3 of Article VII of the Constitution. His successor, therefore, whoever he may be, must be confirmed by the senate before he can lawfully assume the office.

2. That the senate at this time is not "in session", within the meaning of section 12 of the General Code, but that fact does not empower you to make a recess appointment thereunder of a successor to Mr. Kettering, for the reason that, as above held, there is no vacancy in the office he is now holding.

Respectfully,
C. C. CRABBE,
Attorney General.