as against the bank. In an action so brought a decree against the superintendent would be conclusive upon him unless objection were made to the defect of parties defendant in the trial court. *Jackson, Superintendent,* vs. *Whitsell, supra.*

The following rule is stated in 16 O. Jur. 632:

> "A plaintiff who has invoked the jurisdiction of a court having jurisdiction of the subject-matter cannot object to a judgment unfavorable to himself on the ground that the court had no jurisdiction of the defendant."

In the case of *City of Fostoria* vs. *Fox,* 60 O. S. 340, the court held, as disclosed by the fourth branch of the syllabus:

> "A judgment rendered in an action in favor of a defendant in which the court had jurisdiction of the subject-matter, but not of the person of the defendant, is not erroneous, although the defendant made a timely objection and reserved an exception to the ruling of the court, and might, for this reason, have caused a judgment against him to be reversed."
> See also *Kennedy* vs. *Latchaw,* 100 O. S. 431.

In the light of the foregoing and in specific answer to your questions, it is my opinion that:

1. Section 710-92, General Code, requires that the superintendent of banks and the bank in liquidation be joined as parties defendant in an action to establish a claim for preference or set-off brought under authority of said section.

2. In an action under said section brought solely against the superintendent of banks in charge of the liquidation of the bank, unless the superintendent makes timely objection to the defect of parties defendant prior to the rendition of judgment or decree by the trial court, the validity of a judgment or decree against him will not be affected by such defect.

3. If a plaintiff elects to prosecute an action brought under favor of Section 710-92, General Code, against the superintendent of banks alone, and a judgment or decree is rendered against such plaintiff in the trial court, such judgment or decree will operate as a bar to any subsequent action involving the same issues against either the superintendent of banks or the bank.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2666.

CIVIL SERVICE—UNDER SECTION 486-10, GENERAL CODE, PERSON HAS NOT SERVED IN MILITARY FORCES OF U. S. UNTIL ACCEPTED FOR AND MUSTERED INTO MILITARY SERVICE—DISCHARGE FROM DRAFT BECAUSE OF PHYSICAL DEFICIENCIES.

SYLLABUS:

1. *A person who is inducted by a draft board by virtue of the Selective*

Service Act cannot be said to have served in the military forces of the United States, under Section 486-10, *General Code, until accepted for and mustered into the military service.*

2. *A person inducted into the draft by virtue of the Selective Service Act and subsequently discharged from the draft at a military camp for physical deficiencies cannot be held to have served in the military forces of the United States in the war with the Central Powers of Europe and to have been honorably discharged from that service, within the meaning of section* 486-10, *General Code.*

COLUMBUS, OHIO, May 16, 1934.

The Civil Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter which reads in part:

"We are enclosing herewith a photostatic copy of a 'Discharge from Draft' of Mr. Rudolph Werner, Jr. of Cincinnati, Ohio, on the basis of which Mr. Werner believes himself to be entitled to the twenty-percent additional credit allowed to ex-service men who file with this Commission a certificate of service and honorable discharge.

It is questionable to this Commission whether such 'Discharge from Draft' meets the full requirements of Section 486-10 of the General Code."

The "Discharge from Draft" referred to in your letter reads:

"DISCHARGE FROM DRAFT

To all whom it may concern:

This is to certify, That .....Rudolph Warner, Jr.....
(Christian name) (Surname)
.....4777226..... is hereby DISCHARGED from the
(Army serial number)
military service of the UNITED STATES by reason of Underweight slight build. Said Rudolph Warner, Jr., was inducted into the service from the jurisdiction of the Local Board for Div. No. 5, Cincinnati, State of Ohio, on the 30th day of August, 1918.

While this certificate discharges the person named herein from his present obligation to serve in the Army, it does not operate as a permanent bar to his subsequent entrance into the military service. Under Section 5 of the Act of May 18, 1917, all registered persons remain subject to the draft unless exempted or excused as in that Act provided. Therefore, this discharge does not excuse the holder from obedience to the process of Exemption Boards.

Given at Camp Greene, N. C., this 25th day of Sept., 1918.

By { order } of Colonel Keat .....

E. Rowe, ...

Asst. Personnel Adjutant.

Note.—This form will be used for discharge of aliens and alien enemies and of men rejected on account of physical unfitness, dependency, etc. It will not be used in cases of men who have been accepted for military service and are subsequently discharged."

It is evident from the reading of the "Discharge from Draft" that the person mentioned therein was drafted under the Selective Service Act of the United States; that on August 30, 1918, he was inducted into the military service of the United States from the jurisdiction of Local Board No. 5, Cincinnati, Ohio; and that on the 25th day of September, 1918, he was rejected for military service in the United States Army at Camp Greene, North Carolina, by reason of physical deficiencies.

The sole question raised by your letter and enclosure is whether a person who is inducted into the military service of the United States under the Selective Service Act by a local draft board and subsequently rejected for military service at a military camp because of physical deficiencies and given a certificate of discharge from the draft, has served in the military forces of the United States in the war with the Central Powers of Europe and has been honorably discharged therefrom, within the meaning of section 486-10, General Code of Ohio, which reads in part:

"All applicants for positions and places in the classified service shall be subject to examination which shall be public, and open to all, within certain limitations, to be determined by the commission, as to citizenship, residence, age, sex, experience, health, habits and moral character: provided, however, that any soldier, sailor, marine, member of the army nurse corps or Red Cross nurse *who has served in the army,* navy, or hospital service of the United States in the war of the rebellion, the war with Spain, or the war with the central powers of Europe between the dates of April 6th, 1917 and November 11th, 1918, who have been honorably discharged therefrom and is a resident of Ohio, may file with the civil service commission a certificate of service and honorable discharge, whereupon he shall receive additional credit given in any regular examination in which he receives a passing grade of twenty per cent of his total grade. * * * " (Italics the writer's.)

It is to be noted that the word "served" in section 486-10, General Code, is not qualified or restricted in any manner. When a person was drafted and ordered to report for military service under the Selective Service Act of the United States, subject to physical examination, his status immediately changed from that of a civilian to one who was subject to military law and orders.

In the case of *Franke* vs. *Murray*, 248 Fed. 865, it was held in the third paragraph of the syllabus that:

> "Articles of War, art. 109, requiring every soldier at the time of his enlistment to take an oath of allegiance, applies only to voluntary enlistment, and one certified into military service under the Selective Draft Act cannot escape liability to military law because he had not taken the required oath."

To the same effect is the case of Ex parte Thieret, 268 Fed. 472, wherein the Circuit Court of Appeals for the Sixth Circuit, in the sixth paragraph of the syllabus, held:

> "Under Selective Service Act, § 2 (Comp. St. 1918, Comp. St. Ann. Supp. 1919 § 2044b), declaring all persons drafted into the service to be subject to the laws governing the regular army, and Articles of War, art. 2, making persons lawfully called to duty or for training in the military service subject to military law, a person ordered by the district draft board to entrain for an encampment for induction into the military service is subject to military law, and liable to punishment by a military court for desertion."

The court in a per curiam opinion at page 478 said:

> "In contemplation of law appellant was inducted into the military service of the United States on the 1st day of April, 1918, when he received his preliminary instructions and his order to report for entrainment. Failure to so report subjected appellant to military law. This is so, not only by virtue of section 2 of the Selective Service Act (Comp. St. 1918, 1919 Supp. to Comp. Stat. 1916, § 2044b), which declares that 'all persons drafted into the service of the United States * * * shall, from the date of said draft or acceptance, be subject to the laws and regulations governing the regular army,' but also by virtue of article 2 of the Articles of War (Comp. St. § 2308a), which makes subject thereto, and thus 'subject to military law,' not only officers and soldiers belonging to the regular army, as well as volunteers, but also—
>
> 'all other persons lawfully called, drafted or ordered into, or to duty or for training in the said service (the military service of the United States) from the dates they are required by the terms of the call, draft or order to obey the same.' U. S. Comp. Stat. 1916, § 2308a; *Franke* vs. *Murray*, *supra*, 248 Fed., at page 868, 160 C. C. A. 623, L. R. A. 1918E, 1015, Ann. Cas. 1918D, 98.
>
> Appellant was thus subject to summary arrest and delivery to the military authorities. U. S. Comp. Stat. 1916, §§ 2296, 2297."

Whether the fact that a drafted man who was ordered to report for military duty is subject to military law and orders is sufficient to constitute such person as having served in the military forces of the United States, is a question with which the authorities are in conflict. See *Hurley, et al.*, vs. *Crawley*, 50 Fed. (2d) 1010, 1012; and *Dunn* vs. *Commissioner of Civil Service*, 183 N. E. 889, 891 (Mass.).

In the case of *Hurley, et al.*, vs. *Crawley, supra*, it was held that a man who

was inducted into the military service of the United States under the Selective Service Act and, in compliance with an order of a local draft board, reported to a military camp wherein he remained for a period of nine weeks and thereafter was discharged from the draft and military service because physically unfit, was a soldier of the United States within the meaning of a rule adopted by the United States Civil Service Commission which read in part:

> "Honorably discharged soldiers, sailors and marines shall have five points added to their earned ratings in examinations for entrance to the classified service."

The second paragraph of the headnotes reads:

> "Drafted man who, in obedience to mailed order, reported for duty and performed duties assigned until discharged for physical disqualification, held 'soldier' ad interim, as respects civil service preference.
>
> Facts were that petitioner, after receiving notice from local draft board to report for duty, obeyed order and was sent to camp, where he arrived on September 3, and following day he was admitted to base hospital for treatment of infected thumb, and was discharged from hospital September 26, when he was ordered back to duty, and thereafter performed duties which included moving of cots which had been occupied by influenza patients, and similar services, until he was taken ill with influenza and sent to hospital for treatment on October 3, where he remained until November 9, when he was examined, found physically disqualified for military service, and discharged from hospital, the draft, and military service."

Hitz, Associate Justice, in the course of his opinion at page 1012, said:

> "The question thus presented for decision is whether a man so inducted into the military service of the United States and remaining there for nine weeks becomes a soldier of the United States within the meaning of the law.
>
> * * * * * * * * *
>
> If a drafted man ordered by mail to report for duty, who contends the order was never received, and the receipt of which is not established, can be punished by court-martial as a deserting soldier, surely such a man who receives such an order, and obeys it, reports for duty, and performs whatever duty is assigned until discharged for physical disqualification, is entitled to be treated as a soldier, ad interim.
>
> Can the military authorities demand and obtain a wide and liberal construction of penal provisions, incidentally necessary to the execution of a great purpose, and, at the same time, a narrow and exclusive construction of remedial provisions created by Congress and the President in their mercy?
>
> We think not."

The opposite conclusion on a similar question was reached in the recent case of *Dunn vs. Commissioner of Civil Service, supra,* decided by the Supreme Judicial Court of Massachusetts on January 5, 1933. The veterans' preference

statute under consideration in that case contained language similar to that in Section 486-10, General Code, and read in part as follows:

> "The word 'veteran' as used in this chapter shall mean any person *who has served in the army,* navy or marine corps of the United States in time of war or insurrection *and has been honorably discharged from such service* or released from active duty therein, * * *." (Italics the writer's.)

Wait, Judge, at pages 890 and 891 said:

> "The admitted facts are perfectly consistent with a history that the petitioner was drafted under the selective service act of the United States, was ordered to report at Camp Devons by virtue of this draft, was there found to be physically unfit for service and and was discharged—all within eight days. No acceptance as a member of the army appears. Does such a history make out that the petitioner has 'served in the army * * * of the United States in time of war or insurrection' within the fair interpretation of the statute? * * *.
>
> No case deciding the interpretation to be given to the word 'served' in our statutes referred to has been called to our attention, and we find none. In substance, the petitioner's contention is that it means: *Has been subject to control as a member of the army, navy or marine corps of the United States*—while the respondent's gives it the meaning: Has performed duty (rendered service in aid, comfort or assistance) for the United States as a member of its army, navy or marine corps. *From the time of the order to report until the discharge, the petitioner may have been subject to punishment by military law for failure to obey, and thus have been in the 'service' of the United States within the meaning which he seeks to attach to the word.* He may, even, though this does not appear, have been notified when ordered to report, that, from and after the notice, 'you will be a soldier in the military service of the United States.' * * * Nevertheless, we think our Legislatures in using the word had no intent to recognize such a history as basis for the title of veteran, or as ground for preference in the public service. *We think the Legislature had in mind participation in situations where army, navy and marine corps were engaged in performing the objects for which they were called into being and the individual members were acting their several parts.* So understood, *service is not necessarily confined to combat with enemy forces.* The essential characteristic of the conduct which constituted the basis for the preference given in the line of statutes which we have referred to has been service performed in the army or navy. *The beneficiary has been the man who 'served', not merely one who has been 'mustered in' or 'inducted'.* In the case chiefly relied upon by the petitioner, *Hurley* vs. *Crawley,* 60 App. D. C. 245, 50 F. (2d) 1010, in the Court of Appeals of the District of Columbia, *Crawley* vs. *Hurley,* 58 Wash. Law Rep. 754, in the Supreme Court of the District, stress is laid on the work done by the petitioner in assisting in hospital duty during an epedemic of influenza, under orders from officers of the depot corps with which he was connected during the period between the order to report on September 2 and his discharge for disability on November 9. The decision dealt with a federal statute giving a preference to 'soldiers, sailors and marines', and goes upon the ground that the

petitioner was a 'soldier' within the meaning of the statute from the date of notice to report after being drafted. It is not controlling here." (Italics the writer's).

In *Bannister* vs. *Soldiers' Bonus Board,* 43 R. I. 346, it was held that a person drafted by the United States by virtue of the Selective Service Act, who in obedience to orders from the War Department presented himself at the place designated in the order for induction into the service and which order stated that on and after the hour named "you will be a soldier in the military service of the United States," was not within the terms of a statute providing a bonus for "each commissioned officer, enlisted man, field clerk, and army and navy nurse, duly recognized as such by the War or Navy Department, *who was mustered* into the federal service and reported for active duty on or after April 6, 1917, and prior to November 11, 1918," where the draftee is sent to a military camp and rejected from the draft ten days later because of physical disability. The court in that case was of the opinion that the legislature did not intend to provide a bonus for one whose "experience with the draft never brought him to the stage where it was possible for the Army or War Department to order him to attack the enemy or endure other perils of war". The act providing the bonus was entitled "An act in recognition of the patriotic services of residents of the State who *served* in the Army and Navy of the United States during the war with Germany".

A question similar to the one under consideration herein was passed upon by my immediate predecessor in office in an opinion which may be found in the Opinions of the Attorney General for 1930, page 1212. The syllabus reads:

> "A person inducted into the military service of the United States by a local draft board on the 27th day of August, 1918, and discharged from the draft on the 2nd day of September, 1918, because of physical deficiency, upon filing such certificate of service and discharge with the civil service commission is not entitled to receive additional credits in a regular examination in which he receives a passing grade, as provded in Section 486-10 of the General Code."

At page 1215, it is stated:

> "The facts in the case of the applicant before me are very similar to those in the Bannister case, and while the court held in that case that the petitioner was not mustered into the federal service, or enrolled into the service, it supports the view expressed by me that the applicant in the case before me had not served in the army, for if such an individual is not mustered into the service he certainly is not one who had served in the army and honorably discharged therefrom within the meaning of Section 486-10, General Code."

In determining the question presented by your letter, I am inclined to the view that the reasoning and the holding of the court in the case of *Dunn* vs. *Commissioner of Civil Service, supra,* should be followed in determining the meaning of the words "served" and "honorably discharged therefrom", as used in section 486-10, General Code. Interpreting the word "served," as used in section 486-10, General Code, in the light of the case of *Dunn* vs. *Commissioner of Civil Service, supra,* it is apparent that the draftee named in the Discharge from Draft, here under consideration, cannot be said to have rend-

ered military service in the World War entitling him to the additional credit afforded by section 486-10, General Code, to a person who has served in the military forces of the United States in the war with the Central Powers of Europe and who has been honorably discharged therefrom because he was not and could not be actually available for military service against the enemies of the United States, until he was mustered into the federal service. It is obvious that a person rendered available for induction or inducted into the military forces of the United States through registration or draft did not obtain the status of a soldier until such person was actually accepted and mustered into the federal military forces. The certificate of Discharge from Draft plainly indicates that the person named therein was never accepted for military service by the federal government. This conclusion is supported by the following language contained in the certificate of Discharge from Draft:

> "Note.—This form will be used for discharge of aleins and alien enemies and of men rejected on account of physical unfitness, dependency, etc. *It will not be used in cases of men who have been accepted for military service and are subsequently discharged.*" (Italics the writer's.)

The certificate of Discharge from Draft was in effect a release from military service to be rendered by the person selected for such service by virtue of the Selective Service Act, but in no sense of the word was such discharge an honorable discharge from the military service of the United States as contemplated by the legislature in the enactment of section 486-10, General Code. The dicharge of a person from the draft for physical deficiencies is at most only a rejection or exemption from military service and is not a termination of military service, as was in the mind of the legislature when it expressly provided in Section 486-10, General Code, that only persons who were honorably discharged from the military service of the United States in the wars and rebellions enumerated in that section were to be given the benefits contained in that section as a result of such military service. It is quite evident that the legislature intended to give the additional credit for military service provided for in section 486-10, General Code, only to those persons who were actually accepted for and mustered into their respective branches of the military service of the United States and the legislature did not intend to include drafted men who may have been subject to military orders and military law pending their acceptance into the military service.

Summarizing, it is my opinion that:

1. A person who is inducted by a draft board by virtue of the Selective Service Act cannot be said to have served in the military forces of the United States, under section 486-10, General Code, until accepted for and mustered into the military service.

2. A person inducted into the draft by virtue of the Selective Service Act and subsequently discharged from the draft at a military camp for physical deficiencies cannot be held to have served in the military forces of the United States in the war with the Central Powers of Europe and to have been honorably discharged from that service, within the meaning of section 486-10, General Code.

Respectfully,
JOHN W. BRICKER,
Attorney General.