196.

RESERVE OFFICER—NOT AN OFFICER WITHIN MEANING OF ARTICLE IV, SECTION 14, OHIO CONSTITUTION, WHEN ON INACTIVE DUTY—OPPOSITE CONCLUSION WHEN ON ACTIVE DUTY.

*SYLLABUS:*

1. *A Reserve Officer of the United States Military Forces when not on active duty or when simply on duty in a training camp does not hold an "office of profit and trust" under the authority of the United States within the meaning of Article IV, Section* 14 *of the Constitution of Ohio.*

2. *A Reserve Officer of the United States Military Forces when called to active duty other than duty in a training camp, becomes an officer under the authority of the United States within the meaning of Article IV, Section* 14 *of the Constitution of Ohio.*

COLUMBUS, OHIO, March 8, 1933.

HON. FRANK D. HENDERSON, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—You have submitted for my consideration two questions concerning the status of Reserve Officers in the United States military forces. These questions may be stated thus:

> (1) Does a reserve officer in the United States military forces, not in active duty, hold an office of profit and trust under the United States, as that term is used in Article IV, Section 14 of the Constitution of Ohio?
>
> (2) In case question (1) is answered in the negative does he hold an office of profit and trust under the United States at such times as he is called to active duty?

Section 14 of Article IV of the Constitution of Ohio reads in part, as follows:

> "The judges of the supreme court, and of the court of common pleas, * * shall receive no fees or perquisites, nor hold any other office of profit or trust, under the authority of this state, or the United States."

The sole question presented is whether or not a reserve officer of the United States Military Forces holds an office of profit or trust under the United States, within the meaning of the section of the Constitution of Ohio just quoted.

Provision is made for the organization of an Officers' Reserve Corps by Sections 351 et seq. Title 10 of the United States Code; the pertinent sections thereof read as follows:

> "Section 351. For the purpose of providing a reserve of officers available for military service when needed there shall be organized an Officers' Reserve Corps consisting of general officers, of sections corresponding to the various branches of the Regular Army, and of such additional sections as the President may direct. The grades in each

section and the number in each grade shall be as the President may prescribe.

352. Reserve officers shall be appointed and commissioned by the President alone, except general officers, who shall be appointed by and with the advice and consent of the Senate.

355. All persons appointed reserve officers shall be commissioned in the Army of the United States.

360. Promotions and transfers shall be made under such rules as may be prescribed by the President, and shall be based so far as practicable upon recommendations made in the established chain of command.

361. A reserve officer shall not be entitled to pay and allowances except when on active duty. When on active duty he shall receive pay and allowances as provided in sections 362 and 366 of this title, and mileage from his home to his first station and from his last station to his home.

362. When officers of the Reserve Force of the Army are authorized by law to receive Federal pay, those serving in grades corresponding to those of colonel, lieutenant colonel, major, captain, first lieutenant, and second lieutenant of the Army shall receive the pay of the sixth, fifth, fourth, third, second, and first periods respectively.

369. To the extent provided for from time to time by appropriations for this specific purpose, the President may order reserve officers to active duty at any time and for any period; but except in time of a national emergency expressly declared by Congress, no reserve officer shall be employed on active duty for more than fifteen days in any calendar year without his own consent."

Section 372 of Title 10 of the United States Code, as amended by Act of Congress of July 1, 1930 (46 Stat. 841) provides:

"Reserve Officers while not on active duty shall not, by reason solely of their appointments, oaths, commissions, or status as reserve officers, or any duties or functions performed or pay or allowances received as reserve officers, be held or deemed to be officers or employees of the U. S., or persons holding any office of trust or profit or discharging any official function under or in connection with any department of the Government of the United States."

The mere declaration of Congress as to what does or does not constitute an "office of trust or profit" as the expression is used in the Federal Constitution and laws, is not binding on state courts in construing a similar phrase in the Constitution of their own state. Such a legislative interpretation or declaration may have some weight with the state courts but it is not conclusive. What constitutes an "office of trust or profit" within the meaning of Article IV, Section 14 of the Constitution of Ohio, so as to disqualify the holder of such an office from holding the office of Judge of the Supreme Court or Judge of the Court of Common Pleas, is a question which would be decided by a state court in Ohio in a proper case in accordance with its independent judgment, unfettered by a declaration of Congress with respect to a similar expression contained in the Federal Constitution or the laws of Congress.

As there are no cases in Ohio which deal with the status of reserve officers

or other military officers, so far as their holding an office of profit or trust under the authority of the United States is concerned, and the cases in other courts are not numerous, the question will be largely one of first impression when it is presented. Other courts, in determining whether or not a person holds an "office of trust or profit" within the meaning of constitutional or statutory provisions similar to those contained in Article IV, Section 14 of the Ohio Constitution, makes no distinction between civil and military officers (other elements necessary to constitute the position an office being present.) Thus, in the case of *Fekete* vs. *City of St. Louis,* 315 N. E. 692 (1924), which seems to be the latest reported case dealing with this question, it was held:

> "A city attorney accepting a commission in the United States Army vacates his office where the Constitution provides that no person holding an office of honor or profit under the government of the United States shall hold any office of honor or profit under the authority of this state."

See also *People ex rel. Ward* vs. *Drake,* 6 N. Y. S. 309, affirmed 161 N. Y. 642; *State ex rel. McMillan* vs. *Sadler,* 25 Nev. 132; *Oliver* vs. *Jersey City,* 63 N. J. L. 96, 42 Atl. 782.

It appears that the courts and text writers have almost invariably evaded the formulation of a general definition of the term "office of trust or profit" and have contented themselves with a discussion of specific cases and the particular facts which, in individual instances, have led the court to hold that a position comes within the term. 22 R. C. L. 383, 26 A. L. R. 142n. There are practically no precedents either of our courts or of this office that are helpful to any extent. The only instance, to my knowledge, where any of the higher courts, at least in this state have given expression to what constitutes an office of trust or profit is where Judge Spear, in deciding the case of *State* vs. *Hunt,* 84 O. S. 143, stated at page 153, in speaking of the position of supervising judge of a Court of Common Pleas said:

> "Surely, if an office at all, it is an office of trust."

It would serve no good purpose at this time to discuss the principles of law relating to what constitutes a public office. The decisions of courts are numerous and somewhat confusing on this proposition. The impossibility of formulating a general definition to fit all circumstances is well recognized. One definition frequently cited and applied is that stated by the Supreme Court of the United States in the case of *United States* vs. *Hartwell,* 6 Wallace, 385, as follows:

> "An office is a public station or employment conferred by the appointment of government. The term embraces the idea of tenure, duration, emolument and duties."

The Supreme Court of the United States applied this definition in the case of *United States* vs. *Germaine,* 99 U. S. 508, where it was held that a surgeon appointed by the Commissioner of Pensions to examine pensioners and applicants, was not a public officer because, as stated by the court, "his duties are not continuing and permanent and they are occasional and intermittent."

The Comptroller General of the United States applied the definition of a public office as stated in the Wallace case, when construing that part of Title 2, Section 201, of the Economy Act (Act of June 30, 1932);

> "All provisions of law which confer upon civilian or non-civilian officers or employees of the United States Government * * automatic increases in compensation by reason of * * promotion are suspended during the Fiscal Year ending June 30, 1933."

He said under date of November 5, 1932, to the Secretary of the Navy:

> "Apparently, Section 201 of the Economy Act, in its application to officers in the military and naval services, was intended to apply to those of the regular services and includes officers of the reserves only when in active duty status and whose duties are then continuous, and not those officers of the reserves in an inactive duty status, having no duties to perform, or only occasional or intermittent duties of such short duration as not to interfere with civilian employment."

In my opinion, the definition in the Hartwell case of an "office" can not be regarded as being a controlling and conclusive test of what in all cases is and what is not a public office as, for instance, with respect to justices of the peace and county coroners.

It is sufficient, I believe, for the purposes of this opinion, to say that no court, so far as I have been able to find, has ever considered a duly appointed military officer, an officer of the National Guard or a reserve officer when on active duty, as being other than a public officer. Courts have made a distinction, however, where the officer is not on active duty.

In earlier opinions this office has taken the position that National Guard officers when on active duty, are public officers holding positions of trust or profit and that such offices may not be held by judges of the Court of Common Pleas or of the Court of Appeals. See Opinions of the Attorney General for 1919 page 1354 and for 1928 page 2258. These opinions, however, do not discuss the question of whether or not such officers held offices of trust or profit under the *authority of the United States.*

The constitutional and statutory inhibition against judges holding other offices of trust or profit includes those under the authority of this state as well as those under the authority of the United States. Clearly, a National Guard officer would not hold an office under the authority of the United States unless the unit of the National Guard of which he was a member was called into actual service by the United States Government and he thereby became subject to the orders of the President of the United States as Commander in Chief of the Army. Until then, he is a part of the military forces of the state, subject to the orders of the Governor, and as such, holds an "office of trust or profit" under the state, at least when in active service, upon the call of the Governor. Whether or not he holds such an office when not in active service has not been the subject of an opinion by this office or by any court of this state. The case of *State* vs. *Coit,* 35 Bull. 32, goes merely to the question of whether or not an officer in the National Guard is a civil officer.

The opinions referred to above are directly supported by the case of *Lowe* vs. *State* (1918) 83 Tex. Crim. Rep. 134, 201 S. W. 986. In this case the court took

the view that a judge who in 1917 became an officer in the National Guard and was placed on the payroll of the Federal Government as an officer in the military service, thereby vacated his office as judge under the constitutional provision that no person holding or exercising any office of profit or trust under the United States should be eligible to hold or exercise any "office of trust or profit" under the state.

In a later case, *Ex Parte Dailey* (1922) 246 S. W. 91, the Texas Court of Criminal Appeals held that an officer in the National Guard who had not been called into service of the United States is not within the constitutional provision that no person holding an "office of trust or profit" under the United States shall hold one under the state, so as to preclude his holding the office of district judge under the state.

So far as I know, the only reported case involving the status of reserve officers is the case of *Simmons* vs. *United States,* 55 Court of Claims, page 56, where it is held:

> "An attorney holding a commission in the Officers' Reserve Corps, and on inactive status therein, is not barred from prosecuting a claim in this court by section 5498 of the Revised Statutes."

In the course of the opinion, after citing *Tyler's Case,* 105 U. S. 144, (which holds that an army officer on the retired list is in the miliary service) and the cases of *United States* vs. *Hartwell,* and *United States* vs. *Germaine, supra,* the court said:

> "The reasoning of these cases, holding a person to be an officer of the United States, would exclude the conclusion that a member of the Officers' Reserve Corps is also an officer of the United States. The act of June 3, 1916, 39 Stat., 189, creates certain reserve corps and defines the status of officers of the Reserve Corps of the Regular Army. It provides, among other things, that a member of that corps 'shall not be subject to call for service in time of peace, and whenever called upon for service shall not, without his consent, be so called in a lower grade than that held by him in said Reserve Corps,' and the provision fixing an age limit is expressly declared to be inapplicable to appointment or reappointment of officers of the Judge Advocate and some other sections. Unlike an officer on the retired list, an officer of the Reserve Corps has no salary or emolument of office. He is not in time of peace, except perhaps while discharging some duty to which he may have been lawfully called and assigned under the act of June 3, 1916, or other act, amenable to the Army regulations or court-martial. He has no defined duties to discharge; his position is more analogous to that of an officer honorably discharged from the service than to that of a retired officer."

The above case was decided on January 5, 1920. It should be noted that Section 37 of the act of June 3, 1916 (39 Stat. 189), which was referred to by the court and which then provided that a member of the Reserve Corps of the army "shall not be subject to call for service in time of peace, and whenever called upon for service shall not without his consent be so called in a lower grade than that held by him in said Reserve Corps", was amended by the act of June 4, 1920 (41 Stat. 776), to provide that the President may within appropriations for the specific

purpose, order Reserve Officers to active duty at any time and for any period with the exception that only in times of national emergency expressly declared by Congress could Reserve Officers be employed, without their own consent, on active duty for more than fifteen days in any calendar year. (Section 369 U. S. Code, supra.) This amendment renders the holding in the Simmons case of little value, so far as our present inquiry is concerned.

The status of Reserve Officers as fixed by the Federal Statutes, is closely analogous, in my opinion, to that of a retired chief of engineers in the army of the United States which case claimed the attention of the Supreme Court of New York in the case of *People* vs. *Duane,* 121 N. Y. 367, 24 N. E. 845, affirming 55 Hun, 315, 8 N. Y. Supp. 439. It was there held in substance that where the chief of engineers in the Army of the United States is retired and a new incumbent appointed to the office, the fact that the first incumbent retains his rank of brigadier general does not make him an officer within a statute providing that an aqueduct commissioner shall hold no other Federal, state, or municipal office, and he may be appointed to such position. The court, in the above case, makes a distinction between a rank and an office, in the following terms:

> "The right to the rank, uniform, and pay of a brigadier general, specially retained to the defendant on retirement by the statute, is no test of the question whether he in fact holds a Federal office. The liability to trial by court-martial, for offenses against the Military Code was assumed by the defendant when he joined the Army; and as his name is still retained upon the roll, and as he is permitted to wear the uniform and receive a portion of the pay of the rank upon which he was retired, the government still retains some control over his conduct, and, while relieving him from office, has retained this liability. A person may, of course, be subject to the rules and articles of war and to trial by courtmartial without, necessarily, holding a Federal office. He is liable to be assigned to duty at the Soldiers' Home, if selected for that purpose by the commissioners of that institution, and this selection is approved by the Secretary of War. Such appointment and approval might, and probably would, confer upon the appointee the character of a Federal officer, but, until that is done, it cannot be said that this liability is any proper test of the question under consideration; and this is also true in regard to the provision permitting a retired officer to be detailed, on his own application, to serve as professor in any college. It is suggested that, as defendant is still a member of the Army, as constituted by the Federal statutes, he is, for that reason, subject to be assigned to duty by the President and Congress. That may be so, and, when such an assignment is made, he may then hold a Federal office not held by him when the mayor made the appointment in question."

Reserve officers are in very much the same class as was the retired army engineer whose status was involved in the above case. While, in a sense, they are part of the military forces of the United States Government, they are merely part of the reserve forces, and in that capacity they have a rank, but until called to active duty, that rank can not, in my opinion, be considered as of the dignity of an office. Except while on active duty, they receive no pay or allowances and have no duties to perform. True, they are subject to the call of the President and, when so called for active duty other than training camp duty, have undoubt-

edly become officers of the United States Army and, in my opinion, they then hold an office of both profit and trust under the authority of the United States Government. Service in a training camp for a period limited to fifteen days and at a time which does not cause interference with their civilian duties does not, in my opinion, constitute them, for those fifteen days, officers of the Federal Government holding offices of profit and trust within the meaning of that term as used in Article IV, Section 14 of the Constitution of Ohio, even though there are some pay and allowances granted to them on account of the training camp service.

Respectfully,
JOHN W. BRICKER,
*Attorney General.*

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197.

APPROVAL, BOND FOR THE FAITHFUL PERFORMANCE OF HIS DUTIES AS ASSISTANT RESIDENT DIVISION DEPUTY DIRECTOR OF HIGHWAYS—A. W. SHERWOOD.

COLUMBUS, OHIO, March 8, 1933.

HON. O. W. MERRELL, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—You have submitted a bond, in the penal sum of $5,000, with surety as indicated, to cover the faithful performance of the duties of the official as hereinafter listed:

A. W. Sherwood, Assistant Resident Division Deputy Director in Division No. 10—The Century Indemnity Company of Hartford, Connecticut.

The above listed bond is undoubtedly executed pursuant to provisions of sections 1182-2 and 1182-3, General Code. These sections, in so far as pertinent, read:

"Sec. 1182-2. The director may appoint * * * such other engineers, inspectors and other employes within the limits of the appropriation as he may deem necessary to fully carry out the provisions of this act; * * *"

"Sec. 1182-3. Each employe or appointee under the provisions of this act, in cases other than where the amount of the bond is herein fixed, may be required to give bond in such sum as the director may determine. All bonds hereinbefore provided for shall be conditioned upon the faithful discharge of the duties of their respective positions, and such bonds * * * shall be approved as to the sufficiency of the sureties by the director, and as to legality and form by the attorney general, and be deposited with the secretary of state. * * *"

Finding the above bond to have been properly executed pursuant to the above statutory provisions, I have approved the same as to form, and return it herewith.

Respectfully,
JOHN W. BRICKER,
*Attorney General.*