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1. OHIO SOLDIERS' AND SAILORS' ORPHANS' HOME—ADMISSION OF CHILDREN TO—SECTION 5909.09, R. C.—“DURING ANY WAR”—INCLUDES EVERY SO-CALLED “PUBLIC WAR” BETWEEN THE UNITED STATES AND ANOTHER NATION.
2. WORLD WAR II—WITHIN MEANING OF SECTION 5909.09, R. C.—BEGAN DECEMBER 7, 1941.
3. KOREAN CONFLICT—WITHIN MEANING OF SECTION 5909.09, R. C., BEGAN JUNE 27, 1950.
4. WORLD WAR II—GERMANY—WAS TERMINATED OCTOBER 19, 1951.
5. WORLD WAR II—JAPAN—WAS TERMINATED APRIL 28, 1952.
6. “PUBLIC WAR”—WITHIN MEANING OF SECTION 5909.09, R. C., STILL EXISTS BETWEEN THE UNITED STATES AND NORTH KOREA.

SYLLABUS:

1. The expression “during any war,” as used in Section 5909.09, Revised Code, relative to the admission of children into the Ohio Soldiers' and Sailors' Orphans' Home, refers to the existence not only of a formally declared or so-called “lawful war,” but includes every contention by force between the United States and another nation under authority of their respective governments in a so-called “public war.”

2. As to World War II, within the meaning of Section 5909.09, Revised Code, a state of “public war” began with the attack on United States forces by the forces of Japan on December 7, 1941.

3. As to the so-called Korean conflict, within the meaning of Section 5909.09, Revised Code, a state of “public war” began on June 27, 1950, with the commitment by presidential order of the armed forces of the United States to combatant activities in the Korean area on that date.

4. The war with Germany, World War II, was terminated by joint resolution of Congress on October 19, 1951, Public Law 181, 82nd Congress; 65 Stat. 451.

5. The war with Japan, World War II, was terminated on April 28, 1952, the effective date of the Treaty of Peace signed on September 9, 1951, Volume III, Part 3, Department of State, United States Treaties, etc., page 3169.

6. Within the meaning of Section 5909.09, Revised Code, a state of “public war” still exists between the United States and the government of North Korea.

Columbus, Ohio, July 12, 1956

Mr. Floyd R. Hartpence, Superintendent,
Ohio Soldiers' & Sailors' Orphans' Home, Xenia, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"In April, 1950, I addressed the following request to your office and received opinion No. 2075 dated July 26, 1950:

"The Board of Trustees of this Home has directed me to request an opinion on the following question:

"For purposes of admission of children of veterans to this Home, what date should be considered as ending service of the veteran of World War II?

"The question is raised because Section 1932 of the General Code uses the phrase, "who served honorably in the military or naval forces of the United States during any war." The Board is fully aware that peacetime service does not constitute eligibility and has been using the date of August 14, 1945, the period when hostilities ceased, as the determining date for admission. This policy has now been challenged and the Board is anxious to have an official ruling on the matter."

"The Board of Trustees of this Home has directed me to request a second opinion on the same question as it is uncertain whether a state of war still exists.

"Section 1932 which is mentioned is now Section 5909.09 of the Revised Code."

Subsequently you have requested that my response be expanded to establish a beginning and ending date for both World War II and the Korean conflict.

The syllabus of Opinion No. 2075, addressed to you in 1950 is as follows:

"A state of war still exists in reference to the conditions set out in Section 1932 of the General Code governing the admission of children to the Ohio Soldiers' and Sailors' Orphans' Home."

Section 1932, General Code, thus referred to, is now codified without substantive change in Section 5909.09, Revised Code, as follows:

"Under such rules and regulations as it adopts, the board of

trustees of the Ohio soldiers' and sailors' orphans' home shall receive into such home such children of deceased, permanently disabled, or indigent soldiers, sailors, marines, and nurses who served honorably in the military or naval forces of the United States *during any war*, as are destitute of means of support and education. No child shall be admitted to the home, unless said child, and the parent, or the person having the legal custody and control of said child, has been a resident of the state for at least one year immediately prior to the filing of the application for admission. Admission of a ex-soldier to the United States national military home, from another state shall not constitute the child of such soldier eligible for admission into the Ohio soldiers' and sailors' orphans' home." (Emphasis added.)

The question of when a state of war is in existence is discussed in 56 American Jurisprudence, 135, Section 4, as follows:

"Every contention by force between two nations, in external matters, under the authority of their respective governments, is not only war, but public war. If war is formally declared it is called 'solemn' war and is of the perfect kind; all the members of the nation declaring war are authorized to commit hostilities against all the members of the other, in every place and under every circumstance. In such a war all the members act under a general authority, and all the rights and consequences of war attach to their condition. But hostilities may subsist between two nations, more confined in nature and extent, being limited as to places, persons, and things; and this is more properly termed 'imperfect' war, because not solemn, and because those who are authorized to commit hostilities act under special authority, and can go farther than to the extent of their commission. Still, however, it is a public war, because it is an external contention by force between some of the members of the two nations, authorized by the legitimate powers. It is a war between the two nations, although all the members are not authorized to commit hostilities as in a solemn war where the government restrains the general power. Indian wars are of this latter class."

As to the necessity of a formal declaration of war it is said in the same work, pages 135, 136, Section 5:

"Belligerent rights can be acquired only upon the ground of the existence of a state of lawful war. The commencement and termination are to be determined by some public act of political departments of the government. War may be commenced by a formal declaration of war by one or both parties, and at one time a formal declaration of war to the enemy was considered necessary to legalize hostility between the nations, but a solemn declaration of war or previous notice to the enemy is no longer neces-

sary. War may exist without declaration on either side; a declaration by one country only is a mere challenge to be accepted or refused at the pleasure of the other. It is, however, essential that some form of public act, proceeding directly from the competent source, shall announce to the people at home their new relations and duties growing out of the state of war, and shall equally apprise neutral nations of the fact, to enable them to conform their conduct to the rights belonging to the new state of things. Such an official act operates from its date to legalize all hostile acts, in like manner as a treaty of peace operates from its date to annul them."

The use in Section 5909.09, Revised Code, of the simple term "war" in itself affords no aid in the determination of whether the General Assembly had in mind a "public war" or a "lawful war," both as described above.

It is to be borne in mind, however, that we are here concerned with welfare legislation which is to be liberally construed. It is to be noted also that the benefits therein afforded are to extend to the children of "deceased, permanently disabled, or indigent" members of the armed forces of the United States. It is a matter of common knowledge that great numbers of such members were killed or permanently disabled in actual combat at Pearl Harbor on December 7, 1941, in the "public war" which existed for a short period prior to the solemn declaration of war which followed on December 8, 1941. It is scarcely to be supposed the intent of the General Assembly to deny the children of such members the benefit of this legislation simply because death or disability resulted from combat in a "public war" as distinguished from a "lawful war," and I am impelled to the view, therefore, that the term "war" as here used is intended to refer to the existence of a state of actual combat designated in the discussion of "public war" above set out. Thus it follows, as to the statute here involved, that World War II began on December 7, 1941.

As to the Korean conflict there never has been any formal declaration of war by the Congress, as provided in the constitution, which would constitute such "conflict" a "lawful war" of the sort described in the material quoted above. I note, however, in the President's Executive Order No. 10195, promulgated December 20, 1950, that Korea was designated as a combat area for the purposes of the Internal Revenue Code, such order including this language:

"The date of the commencing of combatant activities in such area is hereby designated as June 27, 1950."

This date, June 27, 1950, appears thus to be the date on which, by the President's order, the armed forces of the United States were committed to hostilities in the Korean area, and I thus conclude that such date marks the beginning of a state of "public war" which has since been known popularly as the "Korean War".

As to the ending of these wars, in Opinion No. 3869, Opinions of the Attorney General for 1948, page 492, the syllabus is as follows:

"The offices and positions of employes in the classified civil service who enter the armed services of the United States are protected under Section 486-16a, General Code, until the war against the Axis Powers has been terminated by Presidential Proclamation or by joint resolution of Congress."

In that opinion the writer, after citing numerous judicial decisions on the subject, and after quoting at lengths from the opinion in *Samuels v. United Seaman's Service, Inc.*, 68 F. Supp. 461, said that:

"In the above decisions it was held that a war could not be terminated except by Presidential Proclamation or Joint Resolution of Congress. Since neither such proclamation nor such resolution has to date been issued or adopted, it would follow that the war with the Axis Powers referred to in Section 486-16a is not terminated and consequently the provisions of said section are applicable to the persons in question."

It would appear that since that date Congress has acted to end the war with Germany by joint resolution dated October 19, 1951. See Public Law 181, 82nd Congress; 65 Stat., 451.

The war with Japan appears to have been terminated on April 28, 1952, the effective date of the Treaty of Peace with the Imperial Japanese Government which was signed on September 9, 1951. See Volume III, Part 3, Department of State, United States Treaties and other International Agreements, page 3169.

At these dates, however, the Korean conflict appears still to have been in existence, and I know of no formal action to terminate the state of "public war" between the United States and the North Korean forces begun, as above indicated, on June 27, 1950.

It is true that a truce, ending actual combat operations in the Korean area, has since been effected, but this truce appears to have been regarded by all belligerents concerned as a mere armistice designed to agree upon

the terms of peace, i.e., the permanent cessation of hostilities. It is a matter of common knowledge that substantial elements of our armed forces are still stationed in Korea, facing the enemy from opposite sides of a zone within which "negotiations" for a permanent peace are still being conducted. I regard this state of affairs as amounting to "the exercise of force by bodies politic against each other and under the authority of their respective governments with a purpose of coercion, and as that state in which a nation prosecutes its rights or its claims by force of arms." See 56 American Jurisprudence, 133, Section 2. From this I conclude that, within the meaning of Section 5909.09, Revised Code, the Korean "war" has not yet been terminated. Moreover, because there was an overlapping as to the end of World War II as to Germany and Japan and the beginning of the Korean conflict, there has been a continuous state of war since December 7, 1941, to this date within the meaning of this section.

In specific answer to your questions, therefore, it is my opinion that:

1. The expression "during any war," as used in Section 5909.09, Revised Code, relative to the admission of children into the Ohio Soldiers' and Sailors' Orphans Home, refers to the existence not only of a formally declared or so-called "lawful war," but includes every contention by force between the United States and another nation under authority of their respective governments in a so-called "public war."

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6. Within the meaning of Section 5909.09, Revised Code, a state of “public war” still exists between the United States and the government of North Korea.

Respectfully,

C. WILLIAM O’NEILL

Attorney General