1533

1. JUDGE, COURT OF COMMON PLEAS—ACCEPTED COMMISSION FROM UNITED STATES GOVERNMENT—OFFICER, ARMY OF UNITED STATES—IPSO FACTO FORFEITED AND VACATED OFFICE—ARTICLE IV, SECTION 14, CONSTITUTION OF OHIO.

2. WHERE SUCH JUDGE SERVED IN WORLD WAR II, ARMY OF UNITED STATES, COMMISSIONED OFFICER AND WAS DISCHARGED FROM MILITARY SERVICE—REASSUMED POSITION ON BENCH—NOT ENTITLED TO RECEIVE SALARY OF OFFICE FOR SERVICES PERFORMED AFTER DISCHARGE.

SYLLABUS:

1. By virtue of the principles established by the common law and in force in this state, and specifically by virtue of Section 14 of Article IV, of the Constitution of Ohio, a judge of the court of common pleas who accepted a commission from the United States Government as an officer in the army of the United States, *ipso facto* forfeited and vacated his said office as judge of the court of common pleas.

2. A judge of the court of common pleas who has received and accepted a commission as an officer in the army of the United States and has served thereunder during World War II, and been discharged from such military service and has returned and reassumed a position on the bench, is not entitled to receive the salary of the office for service so rendered after his discharge.

Columbus, Ohio, January 25, 1947

Hon. Joseph T. Ferguson, Auditor of State
Columbus, Ohio

Dear Sir:

I have before me your request for my opinion, reading as follows:

"On June 14, 1946, you rendered this office your informal opinion No. 84 in reference to legality of payment of salary to a common pleas judge who accepted a commission in the United States Army and entered on active duty.

Since requesting the above opinion, another similar case has been presented to this office, and we are attaching hereto facts and questions as submitted to us. It may be that the facts on which your informal opinion No. 84 was predicated are different than those submitted herewith. Your opinion relative to these facts and questions will be appreciated."

In Mechem on Public Offices and Officers, Section 419, it is said:

"In general it is contrary to the policy of the law that the same individual should undertake to perform inconsistent and incompatible duties. So also, as has been seen, it is frequently provided by constitutions and statutes that officers holding offices of one class or under one authority, shall not also hold an office of a different class or created by a different authority. Prohibitions of the first kind arise under the common law; those of the second are the creatures of express constitutional or statutory enactment."

The same author says at Section 420:

"It is a well settled rule of the common law that he who while occupying one office, *accepts another* incompatible with the first, *ipso facto absolutely vacates the first office and his title is thereby terminated without any other act or proceeding.*"

(Emphasis added.)

The same principle appears in the constitutions and statutes of many states. Speaking on this subject it is said by Mechem, at Section 427:

"From motives of public policy, it is frequently provided in the state constitutions and statutes that a person shall not at the same time hold an office of trust or profit under the state and under the Federal government; that persons holding judicial offices shall not at the same time hold other offices of trust or

> profit; that a person shall not at the same time hold two offices of trust or profit, and the like. These provisions cover substantially the same ground as the common law prohibition against holding incompatible offices; but they also, in many cases, go further than that and arbitrarily prohibit the holding of two offices which the common law might not declare incompatible."

The same principle is stated and discussed in 42 Am. Jur., page 940, where it is said:

> "At common law, and under constitutional and statutory prohibitions against the holding of incompatible offices, a person who accepts and qualifies for a second and incompatible office is generally held to vacate, or by implication resigns, the first office, so that no judicial proceedings are necessary to determine the title."

To each of the above statements the authors have cited a very large number of cases from the courts of the United States and practically all the states, so that it is safe to say that the principle is established by the overwhelming weight of authority that the acceptance of a second office which is incompatible with one already held, vacates the original office and amounts to an implied resignation or abandonment of the same. In an elaborate annotation found in 100 A. L. R., page 1162, the same principle is stated and the authorities reviewed.

It is thus stated by the commentator:

> "It is a well-settled rule of the common law that a person cannot at one and the same time rightfully hold two offices which are incompatible, and, thus, when he accepts appointment to the second office, which is incompatible, and qualifies, he vacates, or by implication resigns, the first office."

At page 1167 of this annotation, the principle underlying this general rule is thus stated:

> "The doctrine that the acceptance by the incumbent of one office of another incompatible office vacates the first seems to be based on the presumption of an election between the two as evidenced by the acceptance and incumbency of the second office."

The same reasoning is given and supported by 42 Am. Jur., page 941, followed by the following comment:

> "It is a certain and reliable rule, and one that is indispensable for the protection of the public. For the public has a right to know, in the case of attempted incompatible office holding, which

office is held and which surrendered, and it should not be left to chance or to the uncertain whim of the officeholder to determine."

The general rule above stated is subject to certain exceptions. One important exception, which I consider very significant as bearing on certain Ohio cases to which reference will be made, is thus stated in 42 Am. Jur., at page 942:

> "The rule above stated, that the acceptance of a second office vacates one already held, prevails where the law declares the two offices incompatible or inconsistent. The effect is quite different where it is expressly provided by law that a person holding one office shall be ineligible to another. Such a provision is held to incapacitate the incumbent of an office from accepting or holding a second office, and to render his election or appointment to the latter office void or voidable. The rule is applicable to members of a legislature who are forbidden during their term or for a designated period thereafter to acquire another specified office."

Referring now to the Constitution of Ohio, I find in Article IV, Section 14, the following language:

> "The judges of the supreme court, and of the court of common pleas, shall, at stated times, receive, for their services, such compensation as may be provided by law, which shall not be diminished, or increased, during their term of office; but they 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. * * *" (Emphasis added.)

In the light of the overwhelming weight of authority above referred to there can, in my opinion, be no possible doubt that the provision of the Constitution just quoted would operate to cause a judge of the common pleas court, who accepts another office of profit or trust under authority of the United States, to lose his position as judge. In the light of those authorities, he would be presumed to have elected to take the new office and to have impliedly, at least, resigned his position as judge. This conclusion must irresistibly follow unless the decisions of the Ohio courts are completely out of line with the almost universal rule. A superficial examination of these Ohio cases might lead to the conclusion that Ohio is somewhat out of line. However, the early Ohio case of State, ex rel. Moore v. Heddleston, 8 O. Dec. Rep., 77, decided by the district court, announced and applied the common law rule above referred to, to wit, that the incumbent of one office has vacated the same when he accepts and

assumes a second incompatible office. The case of State ex rel. v. Kearns, 47 O. S., 566, was one in which the members of a city council undertook to appoint one of their number as a member of the Decennial Board of Equalization. Also it appears that another member of the council was appointed by the mayor as one of the trustees of the public hospital of the city. These actions were taken in the face of the provisions of Section 1717 of the Revised Statutes then in force, which provided:

> "No member of council *shall be eligible to any other office* or to a position on any other board provided for in this title or created by law or ordinance of council. * * *"
>
> (Emphasis added.)

As to these appointments, the court held as shown by the fifth branch of the syllabus:

> "The appointment by a city council of a member thereof to an office which the statute makes a member of council ineligible to fill, and his acceptance thereof, does not work an abandonment of his office as councilman. The appointment to the second office is absolutely void."

Here, we find an application of that generally recognized exception to the general rule to which I have already referred, to wit, that where the constitution or the statute makes a public officer *ineligible* to fill another office, then his appointment to or attempt to accept such other office is a nullity. It is perfectly plain that the case of *State ex rel. v. Kearns,* supra, does not, therefore, contradict the general rule to which I have already referred, but falls within the exception.

Likewise, in the case of State ex rel. v. Craig, 69 O. S., 236, it was held:

> "Where the appointment to an office is *a nullity, for the reason that the appointee is by statute ineligible to such office,* a legal appointment to such office may be made, without first ousting such first appointee by proceedings in quo warranto."
>
> (Emphasis added.)

Here, again, was an attempt by the members of the city council to appoint themselves as members of the city board of health, and the court resting its decision squarely on the provisions of Section 1717 of the Revised Statutes held as above stated. The reason underlying this exception and these decisions is simple and plain. Since the statute or the constitu-

tion may distinctly provide that a person shall be ineligible to fill a given office, there could be no possible question of his being barred from the acceptance of an office which he is expressly prohibited from filling, and his appointment or election to and his attempted acceptance would of course be in vain and of no effect.

The case of State ex rel. Leland v. Mason, 61 O. S., 513, appears to be to place the Supreme Court of Ohio squarely in accord with the general trend of decisions on the question which we are considering. In that case the relator was duly elected at the November election in 1897, as a member of the House of Representatives of Ohio, and duly qualified and entered upon the duties of that office. Shortly thereafter, he was appointed associate justice for the United States District Court in the territory of New Mexico, accepted such appointment and duly qualified as such justice. The action was for a writ of mandamus to compel the speaker of the House to sign a certificate for his salary as a member of the House of Representatives. The syllabus of the case reads as follows:

> "A member of the general assembly, who has accepted an appointment to a federal judgeship, thereby, by force of Section 4 of Article 2 of the Constitution, *becomes ineligible* to a seat in the general assembly and *ceases to be a member of that body,* and is not entitled to payment of salary thereafter."
>
> (Emphasis added.)

The constitutional provision, Section 4 of Article II, reads as follows:

> "No person holding office under the authority of the United States, or any lucrative office under the authority of this state, shall be eligible to, or have a seat in, the General Assembly; but this provision shall not extend to township officers, justices of the peace, notaries public, or officers of the militia."

The court, in refusing the writ of mandamus, did not discuss the constitutional question at length, but concluded its opinion as follows:

> "It is the duty of the court to give force to this mandate of the constitution, and though the general assembly does not act, the court cannot evade that duty. It must refuse its aid to one who assumes to hold office in violation of the constitution. No one doubts that the federal judgeship is an office. The relator, when he accepted that office and became a federal judge, was no longer eligible to a seat in the general assembly, and is not entitled to payment of the salary claimed."

Another case which might upon hasty reading appear to put Ohio out of accord with the rest of the nation is State ex rel. v. Gillen, 112 O. S., 534, where it was held:

> "A mayor of a municipality who is elected to membership in the General Assembly, and qualifies and discharges the duties of such office, but nevertheless continues to serve as mayor and to discharge the duties of that office does not by virtue of Section 4 of Article II of the Constitution forfeit the office of mayor. The ineligibility relates to membership in the General Assembly."

Gillen, who was the mayor, was elected to the General Assembly, and it was claimed in a quo warranto action that by accepting that office he forfeited the mayorality. The case, it will be noted, turned on Section 4 of Article II of the Constitution, which I have quoted in connection with the case of State ex rel. Leland v. Mason, supra. If one will observe carefully the last sentence in the above syllabus, it will appear very clearly that it, as well as the decision in the Leland case, was based on the proposition that the constitutional provision relates only to the *ineligibility of a member of the General Assembly* to take another office, and the court in the course of its opinion said:

> "We are not called upon in this case to decide the question of Gillen's title to the office of state senator. We are only called upon by the demurrer to the answer, which searches the record, and challenges the sufficiency of the petition, to determine Gillen's title to the office of mayor of Wellston, * * *"

This case like the Leland case only illustrates the exception which I have noted to the general rule, and in no degree leads to any doubt that the courts of this state are in accord with the great volume of authority.

In the course of the opinion the Leland case is referred to, and its syllabus quoted with approval.

Section 14 of Article IV which I have quoted, and which declares that the judges of the court of common pleas shall not hold any other office of profit or trust under the authority of this state or of the United States, does not undertake by word or inference to make such judge ineligible to an office under the authority of the United States. Obviously, it would be presumptious and vain for the General Assembly to attempt to define the qualifications of any person to an office of the United States or to declare anyone ineligible to such office. Certainly, that would be a

matter solely within the jurisdiction of Congress. Consequently, in so far as this constitutional provision relates to the acceptance of an office under the United States government, its only possible effect is to declare an absolute incompatibility between the office of an Ohio judge and a federal office, with the result that where a judge receives and accepts an election or appointment to a federal office, he has definitely abandoned or by implication has resigned from his judgeship.

I have discussed the Gillen case and the two earlier cases involving Section 1717 of the Revised Statutes, because they are mentioned by the commentator in the A. L. R. annotation above referred to as possibly indicating that the courts of Ohio were not in full accord with the generally accepted rule. It is my opinion that they do not in any wise indicate an intention on the part of our courts to question or depart from that rule.

One other Ohio case needs comment. That is the case of State ex rel. Bricker v. Gessner, 129 O. S., 290, the syllabus of which is as follows:

> "1. Membership on a county charter commission, created under Section 4, Article I of the Constitution of Ohio, constitutes the holding of a public office or trust.
>
> 2. A judge of the court of common pleas is precluded from becoming a member of a county charter commission by Section 14, Article IV of the Constitution of Ohio, providing that no such judge shall hold any other office of profit or trust under the authority of the state of Ohio or the United States."

In that case, a judge of the common pleas court was elected as a member of the commission to frame a county charter. An action in quo warranto was brought by the Attorney General, seeking to oust him from his membership on the charter commission. A careful reading of the entire opinion shows that no question appears to have been raised as to the effect on the judgeship of accepting the other office, the sole question discussed being whether the membership on the charter commission was in the eyes of the law a public office. I believe it is a fair assumption that if the question we are here considering, had been presented, the court, having respect for the great weight of authority, and its own previous utterances, would have decided that the judge, by accepting another office, had in effect surrendered and vacated his judicial office.

If it be claimed that a commission as officer in the United States Army does not constitute the holder an officer, it appears to me that that

claim will be speedily dissipated upon an examination of the authorities. I find cases holding that the mere fact that a public officer enlisted in the *national guard of his state in times of peace* and held a commission as officer in said guard, did not constitute him an officer within the meaning of constitutional or statutory prohibition against holding more than one office. However, these authorities in the main agree that where such public officer is called into the military service of the United States and there given a commission in the army, he does, by accepting the same, obtain another and an incompatible office. 42 Am. Jur., page 939. Citing among others, Fekete v. E. St. Louis, 315 Ill., page 58. In the citation from 42 Am. Jur., just given, it is said:

> "* * * constitutional or statutory provisions prohibiting a person holding an office of honor or profit under the federal government from holding at the same time an office of honor or profit under the authority of the state disqualify a military officer of the United States from holding such a state office. Under such a provision, an officer of the national guard may hold a state office before he is actually called into the military service of the nation, but not thereafter, except where he continues to serve under his original commission and without taking any additional oath."

In Fekete v. E. St. Louis, supra, it was held:

> "1. A city attorney accepting a commission in the United States Army vacates his office, where the Constitution provides that no person holding any office of honor or profit under the government of the United States shall hold any office of honor or profit under the authority of the state.
>
> 2. An officer of the United States is one who holds office by virtue of appointment by the President or by heads of departments authorized to make appointments."

In this case which seems to be a leading case, the court pointed out that the officer, so long as he was merely a captain in the Illinois National Guard, was not within the prohibition contained in the constitution, but that when he was called into the service of the United States during a war and was given a commission, he became an officer of the United States and by reason of the constitutional prohibition, vacated his office as city attorney. The court cited with approval the case of Lowe v. State, 83 Tex. Crim. Rep., 134, in which case a judge was an officer in the national guard of his state and was later taken, as an officer, into the

United States military service, and under a constitutional provision practically identical with that in Illinois and that in Ohio, it was held that when he accepted the position of officer in the military service of the United States and was placed on the payroll as such, he vacated his office as judge. The court cited to like effect Kerr v. Jones, 19 Ind., 351, and State ex rel. McMillan v. Sadler, 25 Nev., 132. The opinion of the court concluded with the following very convincing statement:

> "The question we have to determine is one of law, unaffected by sentiment. It seems not open to question that the office of captain in the United States Army is an office of honor or profit. If it is, plaintiff by his appointment to and acceptance of that office was thereby rendered ineligible to hold the office of city attorney, an office of honor or profit under the authority of this state. *His acceptance of the former office was a constructive resignation or abandonment of the latter.*" (Emphasis added.)

I do not consider that any different conclusion was reached or even suggested by the case of State ex rel. v. White, 143 O. S., 175, in which the court held that a prosecuting attorney did not lose his position or right to his salary because he was in the active military service of the United States. That case turned upon the express provision of the statute which provided that county officers should not be subject to removal although absent from their county by reason of being in the military service of the United States. Furthermore, it does not appear that the officer in question had been given a commission but rather that he had voluntarily enlisted in the United States Army. On the other hand, I consider the case of State ex rel. Cooper v. Roth, 140 O. S., 377, as committing our Supreme Court to the proposition that military service in the United States Army during the late war was public employment, and that the acceptance of a commission in that service constituted one an officer of the United States. The court had before it the question of a member of a municipal council who was inducted into the armed service during the war, and the provisions of Section 4207, General Code, which provides that a member of council "shall not hold any other public office or employment except that of notary public or member of the state militia". The officer in question claimed that because he was a member of the state militia and thereby subject to call to the defense of the nation, his induction did not constitute an incompatible employment. The court disposed of that contention summarily, saying:

> "This brings under consideration the other claim of the relator, to the effect that induction into the armed forces of the United States under the National Selective Service Act does not place him in public office or public employment. That one in military service does not hold a public office, *unless he is a commissioned officer,* may be considered settled. State, ex rel. Attorney General v. Jennings, 57 Ohio St., 415, 49 N. E., 404; 5 Corpus Juris, 309, Section 50." (Emphasis added.)

The court held, however, that mere induction into the military service of the United States constituted a public employment and the plain inference is that the only thing that kept him from becoming a federal officer was the absence of the commission.

One case in which a court has taken a position contrary to the general current of authority on the matter of military service is State, ex rel. v. Grayston, decided by the Supreme Court of Missouri and reported in 163 S. W., 2nd, 335, where it was held that a circuit judge who had been an officer in the state militia and had been called into the federal service did not thereby obtain an office inconsistent with his state office within the provisions of the constitution which prohibited the holding of an office under both the state and federal governments. A portion of the syllabus in that case which possibly throws light on the holding, reads as follows:

> "At the time of the adoption of the constitutional provision prohibiting the holding of an office of profit under both the state and federal governments a militiaman was considered a 'state trooper' even when called for national duty, which meaning has not changed."

The court in its opinion distinguished between service in the regular army and what it called emergency service in time of war. The court admitted that its opinion in this respect was not in accord with opinions of many other courts and pointed to the Fekete case as typical of the contrary view. I do not consider that this Missouri case is anything other than an exception to the general rule which, as I have already pointed out, seems to be recognized by our own Supreme Court.

The question which you have submitted has several times been presented to my predecessors. In an opinion found in 1917 Opinions of the Attorney General, page 640, the then Attorney General was called upon to answer the question of a common pleas judge who was about to enlist in the officers reserve corps and go into training with a view to receiving

a commission. The specific question which he propounded was: "If I finish my training course at Indianapolis and am accepted, would it be necessary for me to resign as judge, in the event I take a commission in the army?" The syllabus of the opinion reads as follows:

> "1. Under the provisions of Section 12, Article IV of the Constitution requiring the judges of the Court of Common Pleas 'to reside in the county while in office', the word 'reside' means an actual, personal residence and not merely a legal, constructive residence. Hence, a person holding said office could not enlist in the army of the United States and still retain the office of common pleas judge.
>
> 2. The provisions of Section 14, Article IV of the Constitution, requiring that judges of the Court of Common Pleas 'shall not hold any other office of profit or trust, under the authority of this state, or the United States,' apply to office in the army of the United States, as well as to office in the civil service. Hence, a person holding said office could not accept a commission in the army of the United States and still retain the office of common pleas judge."

It will be noted that the first branch of the above quoted syllabus introduces another disqualification to retain the office of judge, growing out of the provisions of Section 12 of Article IV of the Constitution, which reads:

> "The judges of the courts of common pleas shall, while in office, reside in the county for which they are elected; and their term of office shall be for six years."

The opinion points out the well recognized difference between a legal residence and an actual personal residence, and cites a number of cases wherein the courts have held that constitutional provisions similar to this require the judge to maintain his *actual residence* in his district as distinguished from a legal or constructive residence. Thus, it was held in the case of People v. Owens, 29 Colo., 535, that such a provision of the Constitution did require a district judge to maintain his actual residence in his district as distinguished from a legal or constructive residence or domicile. The court in its opinion said:

> "The word 'reside' may, and sometimes does, have different meanings in the same or different articles or sections of a constitution or statute, but the direction here, that a district judge shall reside within his district, manifestly was not intended for his convenience, but for the benefit of the people, whose servant he is.

> Doubtless one, if not the only, object of the section was to compel the officer to maintain his residence where litigants might expeditiously and with as little expense as possible, have access to him for the transaction of official business. Bearing this in mind, it is quite clear that 'residence' here means an actual, as distinguished from a legal or constructive residence, or its equivalent, domicile; * * *"

The court went on to indicate that this interpretation should not be carried to an unreasonable extent so as to cause a judge to lose his office, simply because he was temporarily absent from his district or casually or occasionally absent therefrom for short periods.

This holding of the Attorney General on the question of residence, as well as the case cited, fit into the proposition to which I have already called attention, to wit, that the circumstances which may result in an officer losing his position by accepting an incompatible position arise not only when specifically covered by statutory or constitutional prohibition but also arise out of the well settled rule of the common law which under the authorities heretofore cited leads to precisely the same result. In other words, the statutes and constitutional provisions existing in many states are only declaratory of the recognized principle of the common law.

In a further opinion found in 1919 Opinions of the Attorney General, page 1354, it was held:

> "The acceptance by a common pleas judge in Ohio of a commission as officer of the National Guard results in the vacation of his judicial office."

In the opinion at page 1355, it was said:

> "It seems clear that an individual can not serve as common pleas judge and at the same time hold a commission in the National Guard.
>
> The next question is, what is the effect of such judge's accepting such commission? The American rule is well stated in Throop's Public Officers, at Section 31:
>
> > 'In many of the states of the Union, it is expressly forbidden by the Constitution or by statute, that one person should hold two public offices under the state government, and that an officer under the state government should hold office under the United States government. * * * It is, however, the acceptance of, not the election or appointment to,

an incompatible office, which vacates the first office; and that result follows from such acceptance, without any legal proceedings to oust the party from his first office.'

Authorities sustaining this view are collected in the foot note to Attorney-General v. Marston (N. H.), 13 L. R. A. 670. See also Howard v. Harrington, 114 Me. 443; L. R. A. 1917a, p. 211, 225 (annotation).

A similar conclusion was reached in State ex rel. v. Mason, 61 O. S. 513. A different constitutional provision was there considered but the holding was that the acceptance of a federal judgeship by a state representative prevented his receiving further compensation as such."

Again in 1933 Opinions of the Attorney General, page 262, it was held that while a reserve officer when not on active duty, does not hold an office "under the authority of the United States" within the meaning of Section 14 of Articles IV of the Constitution, yet when he is called to active duty he does fall within the prohibition of that section.

In the statement of facts which accompanied your communication, it is stated that the judges in question were ordered into the active military service of the United States where they acted and served as officers with the army of the United States continuously until about the time of the surrender of the enemy armies; that upon being relieved from active duty they returned to their homes and resumed their offices as common pleas judges, and that they have ever since performed the functions and duties of such judges, and the question is raised whether they are entitled to be paid for such performance. If they are so entitled, it is upon the theory that they are de facto officers, notwithstanding the facts that they vacated their judicial offices, to accept offices under the United States.

On principle, it is difficult to conceive how one who as a matter of law has completely vacated or resigned his office, can at a later time, without reelection or reappointment, but solely on his own initiative, reassume that office and claim the right to compensation as a de facto officer. It must be admitted, however, that there is not unanimity of decision on this question. See cases cited in 100 A. L. R., page 1187.

In the case of Pruitt v. Glen Rose School District (Tex.), 84 S. W., 2d, 1004, it was held:

"1. If a person holding an office is elected or appointed to another, and the two offices cannot be legally held by the same

person, and he accepts and qualifies as to the second, such acceptance and qualification operate ipso facto as a resignation of the former office.

2. One who, by reason of a constitutional inhibition of the holding of two offices by the same person at the same time, vacates one office by accepting and qualifying as to another, does not continue to hold the first office as a defacto incumbent, so as to render sureties on his bond liable for a subsequent default, in virtue of a constitutional provision that all officers shall continue to perform the duties of their offices until their successors shall be duly qualified."

In 43 Amer. Jur., page 237, it is said:

"By the decided weight of authority, a de facto officer cannot maintain an action to recover the salary, fees, or other emoluments attached to the office, even though he has performed the duties thereof. Some authorities hold that the fact that there is no de jure claimant of the office does not alter the rule. But, in a number of states such fact has been held to entitle a de facto officer acting in good faith to enforce payment by the public of compensation to which an incumbent of the office is entitled."

It would be impracticable in this opinion to analyze the very numerous cases touching this question. I am impressed by the logic of the case of Hulbert v. Craig, 207 N. Y. S., 710. In that case it appears that the plaintiff, the duly elected President of the Board of Aldermen of the City of New York, sought by mandamus to compel payment of his salary. It appeared that he had while holding the office accepted an appointment as a member of the state park commission. The city charter provided:

"Any city official who shall during his term accept any other civil office under the United States or the state shall be deemed to have vacated any office held by him under the city government."

It was held:

"President of board of aldermen, whose office was vacated under Greater New York charter Section 1549 by accepting office under state was not entitled to salary as de facto officer of city although he continued to perform duties of office, and although there was no other claimant."

Speaking of plaintiff's claim to compensation as a de facto officer, the court cited a number of decisions so holding, and then said:

"The overwhelming weight of authority in other jurisdictions is against it."

The court cited in support of this statement a very long line of cases and quoting from People v. Tieman, 30 Barb., 193, said:

"The salary and fees are incident to the title and not to the usurpation and colorable possession of the office. When an individual claims by action the office or the incidents of the office, he can only recover upon proof of title. Possession under color of right may well serve as a shield for defense, but cannot as against the public, be converted into a weapon of attack to secure the fruits of the usurpation and the incidents of the office."

Concluding the opinion, the court said:

"Since on undisputed facts this petitioner vacated his office as a matter of law, and is not a de jure incumbent, he cannot claim the aid of the court to obtain its emoluments. While the public will be protected with respect to the acts performed by him under color of title, he can secure nothing from his mere de facto tenure."

To the same effect, Mechem on Public Offices, Section 331; Throop on Public Officers, Section 517.

I do not find that the Supreme Court of Ohio has passed on this question. I do find four Nisi Prius cases, three holding in accord with the general rule above stated, and one apparently deviating from it slightly. In Brown v. Milford, 6 O. N. P., 317, it was held that a policeman who was regularly appointed but failed to file the required bond might recover his salary. No discussion of principles or citation of authority appears. The cases holding with the general rule, in well considered opinions are State ex rel. v. Newark, 6 O. N. P., page 523; Ermston v. Cincinnati, 7 O. N. P., 635; Lutner v. Cleveland, 15 O. N. P. (N. S.) 517.

So far as I have examined the cases holding that the actions of an officer under circumstances such as are here presented are to be considered as having any effect by reason of a de facto status, these holdings are merely that he becomes a de facto officer so far as third persons and the public are concerned, and even if it be conceded that he acts in that capacity and that for the sake of the protection of the rights of the public his acts are to be recorded validity, it does not follow that he may take advantage of that situation and insist upon and require the payment of his salary.

I do not consider it necessary for the purpose of answering your questions, to express a positive opinion on the question whether the judges in question, upon resuming the bench were or were not officers *de facto,* or whether their acts as such, were valid as to the public. It is sufficient to hold as I do, upon the overwhelming weight of authority that they are not entitled to compensation for service so rendered.

Accordingly, and in specific answer to the questions you have submitted, it is my opinion:

1. By virtue of the principles established by the common law and in force in this state, and specifically by virtue of Section 14 of Article IV, of the Constitution of Ohio, a judge of the court of common pleas who accepted a commission from the United States Government as an officer in the army of the United States *ipso facto* forfeited and vacated his said office as judge of the Court of Common Pleas.

2. A judge of the Court of Common Pleas who has received and accepted a commission as an officer in the army of the United States and has served thereunder during World War II, and been discharged from such military service and has returned and reassumed a position on the bench, is not entitled to receive the salary of the office for service so rendered after his discharge.

Respectfully,

HUGH S. JENKINS,
Attorney General.