
IN THE SENATE OF THE UNITED STATES.

FEBRUARY 18, 1891.—Ordered to be printed.

MR. HAMPTON, from the Committee on Military Affairs, submitted the following

REPORT:

[To accompany H. R. 4187.]

The Committee on Military Affairs, to which was referred the bill (H. R. 4187) for the correction of the army record of Capt. William P. Hall, U. S. Army, submit the following:

In the House the following report was made on this bill:

The Committee on Military Affairs, to whom was referred the bill (H. R. 4187) for the correction of the army record of William P. Hall, U. S. Army, have had the same under consideration, and report it back with the recommendation that it do pass.

William P. Hall, now a captain in the Fifth Regiment of Cavalry, U. S. Army, graduated at West Point and was commissioned a second lieutenant of the Nineteenth Regiment of Infantry on June 15, 1868.

Without application on his part he was, in July, 1869, transferred to the Fifth Cavalry.

His commission in the cavalry bears date July, 1869, a year after his graduation, and gives him rank below lieutenants of the Fifth Cavalry who graduated in his class below him, and officers who graduated a year after Hall outranked him as second lieutenant.

No fault is alleged against Hall, and his superior officers bear testimony to his zeal and efficiency.

He did not ask to be changed from infantry to cavalry, and when assigned he could not honorably decline, for the regiment to which he was assigned was then engaged in active operations against the Indians. In fact, he did not know for months what would be the date of his commission in the cavalry, and not until long after he had gone to the expense of buying horses and otherwise equipping himself for the cavalry service.

In the opinion of your committee, Captain Hall carried into the cavalry service a rank equal to the commission held by him in the infantry, and that by the transfer he lost no rank.

The views expressed in the opinion of the Acting Judge-Advocate-General, a copy of which is hereto attached and made a part of this report, are concurred in by your committee:

WAR DEPARTMENT, JUDGE-ADVOCATE GENERAL'S OFFICE,
Washington, D. C., February 7, 1890.

Respectfully returned to the Secretary of War.

These papers relate to certain proposed legislation having for its object the correction of the Army record of Capt. William P. Hall, Fifth Cavalry, "so that his name shall be placed in the position upon the list of captains of cavalry, which he should occupy, and which he would occupy had he been given his proper rank in the Fifth Cavalry on July 14, 1869, according to the date of his commission of June 15, 1868."

Captain Hall's army record, as given by the Adjutant-General, is as follows:

"He graduated from the Military Academy, and was appointed second lieutenant in the Nineteenth Infantry, June 15, 1868, with rank of second lieutenant from that date, and was subsequently nominated to the Senate, confirmed, and commissioned accordingly. He became supernumerary, or unassigned, by the consolidation, on March 31, 1869, of the Nineteenth and Twenty-eighth Regiments of Infantry, under

the act of March 3, 1869, he being one of the junior lieutenants. He was transferred, or assigned, to the Fifth Cavalry, in which vacancies of second lieutenant existed, by General Orders, No. 59, Headquarters of the Army, July 14, 1869. He joined the Fifth Cavalry, in pursuance of the order transferring him thereto, and has served continuously with it to the present time.

"He was nominated to the Senate for this transfer to the Fifth Cavalry, with date of rank as second lieutenant in that regiment from July 14, 1869; was confirmed, agreeably to the nomination, December 22, 1869, and was newly commissioned accordingly January 10, 1870. He received this commission, which fixed his position and relative rank in the cavalry, and executed the required oath of office, February 8, 1870, without then making protest or objection. He was nominated to the Senate July 13, 1876, for promotion to first lieutenant in the Fifth Cavalry, to date July 1, 1876, and was duly confirmed and commissioned accordingly. He was promoted to be captain in the same regiment to date March 8, 1887, acknowledged and formally accepted this promotion by letter March 12, 1887, offering no protest against it, his nomination for the promotion was sent to the Senate when it met in December, 1887; was confirmed January 16, 1888, and commission issued, accordingly, February 1, 1888."

The question is whether Captain Hall's claim is one which should be recognized by the proposed legislation. It is evident that he has no legal claim now. Whatever his rights may have been when he was transferred to the Fifth Cavalry, his subsequent acceptance of commissions in that regiment with the rank which those commissions gave was a waiver of any such claim. It could only be on equitable grounds that he could now be considered entitled to relief; and this equity, if it exists, must be based on a wrong done him at the time of his transfer to the Fifth Cavalry. He became "unassigned" by virtue of the consolidation of the Nineteenth and Twenty-eighth Regiments of Infantry, under the act of March 3, 1869. That act provided:

"That there shall be no new commissions, no promotions, and no enlistments in any infantry regiment until the total number of infantry regiments is reduced to twenty-five; and the Secretary of War is hereby directed to consolidate the infantry regiments as rapidly as the requirements of the public service and the reduction of the number of officers will permit."

Having become unassigned by virtue of a consolidation of infantry regiments under this act, Captain Hall was assigned to the Fifth Cavalry, July 14, 1869, from which date his commission as second lieutenant in the Fifth Cavalry was made to give him rank. It seems to have been understood that the existing Army Regulations (of 1863) precluded his being assigned to the Fifth Cavalry with the rank which he already held. The paragraphs of the regulations which were regarded as having this effect were the following:

EXCHANGE OR TRANSFER OF OFFICERS.

"30. The transfer of officers from one regiment or corps to another will be made only by the War Department on the mutual application of the parties desiring the exchange.

"31. An officer shall not be transferred from one regiment or corps to another with prejudice to the rank of any officer of the regiment or corps to which he is transferred.

"32. Transfers will seldom be granted—never except for cogent reasons."

Paragraphs 30 and 31 are to be found in the regulations of 1835, 1841, 1847, 1857, and 1861, and clearly related only to "exchanges" or voluntary transfers, which Captain Hall's assignment to the Fifth Cavalry was not. So that it appears to have been an error to regard these paragraphs of the regulations as prescribing the rule to govern in the case of his assignment. But, in an opinion, dated March 22, 1889, the Attorney-General (XVI Opin., 291), held as follows:

"It will be observed that the law in question affected infantry regiments and the officers therein only. In order to provide for officers who were rendered superfluous in the infantry, it was deemed just to transfer them to the other arms of the service. But it is obvious that this could not legally be done in any way that would affect the rank of officers in those arms of the service which were not in any way touched by the legislation referred to. This rendered it impossible to transfer to the cavalry or artillery any but second lieutenants or officers who would consent to accept the position of second lieutenant, for the obvious reason that first lieutenants and captains, being entitled to their rank, would necessarily displace officers in those arms of the service. This was of course provided for, and no officers were in fact transferred except of the grade of second lieutenant. When thus transferred it would have been equally unjust to an officer in the cavalry of the grade of second lieutenant to place above him an officer of the infantry whose commission was of an earlier date, for the same reason that has been heretofore suggested—that the cavalry was in no way affected by the legislation; and the desire which was naturally felt in the War De-

partment to provide for as many infantry officers as possible could not be allowed to interfere with the rights of the officers in the other arms of the service."

It appears to me, however, that an important consideration is here omitted. If the assignments of officers which followed the act of March 3, 1869, were legal, they were the necessary consequence of that act, and became legally operative by virtue of it, so that the act by reason of its necessary results did affect the regiments into which the transfers from the waiting-order or unassigned list were made. The rights which the officers in these regiments had were subject to legislative modification, which might be either express or necessarily incident to legislation. If the assignments were in accordance with law, the officers of the regiments to which the assignments were made could not be said to be prejudiced in their legal rights by the assignment to such regiments of other officers with their existing rank, provided that the assignment was the legal consequence of legislation, and the retention by the assigned officers of their existing rank was law. And the law, it seems to me, is to be found, not in the paragraphs of the regulations above quoted, but in the appointment and commission which fixes the date of rank.

When Second Lieutenant Hall was appointed, confirmed, and commissioned as a second lieutenant in the Fifth Cavalry, with rank to date from July 14, 1869, that fixed the date of his rank thereafter; but he might have been appointed to rank from June 15, 1868, and if it was through error that this was not done there would seem to be equitable ground for relief. He had before his assignment to the Fifth Cavalry a certain rank in relation to officers of his grade in the Army, and therefore to officers of his grade in the Fifth Cavalry. He stood above some of these in this relative rank. When he was assigned to that regiment as a legal result of the act of Congress consolidating the infantry regiments he, in the absence of any law or rule having the force of law which made it necessary that he should be given rank as of the date of his assignment, would seem to have been entitled to carry with him into the Fifth Cavalry the rank which he already held in relation to the officers of that regiment, and this should have been recognized at the time of his appointment in the Fifth Cavalry.

At a later date, by act approved July 15, 1870 (sec. 12, 16 Stats., 318) this principle was expressly recognized, but it seems to me clear that it already existed and should have been the rule of action applied to transfers necessitated by the act of Congress referred to. And it appears that Generals Sherman, Ord, Pope, and Canby, the latter being regarded as a particularly good authority with regard to the underlying principles of our military system, took this view. The proposed legislation is believed to be an equitable recognition of the principle, in accordance with which Lieutenant Hall's rank ought to have been regulated.

Very respectfully,

G. NORMAN LIEBER,
Acting Judge-Advocate-General.

We concur in the views of the law in this case so clearly expressed by the Judge-Advocate-General, and of equities in behalf of Captain Hall to have the rank now that he would have had had the requirements of the law of Congress of July 15, 1870, section 12, been applied to him in his transfer, providing that "officers so assigned shall take rank from the date of their original entry into the service."

The act of March 3, 1869, only provided—

That there shall be no new commissions, no promotions, and no enlistments in any infantry regiment until the total number of infantry regiments is reduced to twenty-five; and the Secretary of War is hereby directed to consolidate the infantry regiments as rapidly as the requirements of the public service and the reduction of the officers will permit.

No provision was made for transfers or musters out of any of the infantry officers, and Congress necessarily reserved the right and power to prescribe the terms and conditions upon which the supernumerary officers caused by the consolidation should be disposed of, by transfers, musters out, etc. In the very next Congress the Congress considered the question of the disposition of supernumerary officers, and by the twelfth section of the act of July 15, 1870, enacted the law as follows, to wit:

SEC. 12. *And be it further enacted*, That the President is hereby authorized to transfer officers from the regiments of cavalry, artillery, and infantry to the list of supernumeraries, and all vacancies now existing, or which may occur prior to the first day

of January next, in the cavalry, artillery, or infantry, by reason of such transfer or from other causes, shall be filled in due proportion by the supernumerary officers, having reference to rank, seniority, and fitness, as provided in existing law regulating promotions in the Army. And if any supernumerary officers shall remain after the first day of January next they shall be honorably mustered out of the service with one year's pay and allowances: *Provided*, That vacancies now existing in the grade of second lieutenants, or which may occur prior to said date, may be filled by the assignment of supernumerary first lieutenants or officers of higher grades, who, when so assigned, shall rank as second lieutenants, *providing* [provided] such officer shall prefer to be so assigned instead of being mustered out under the provisions of this section, and officers so assigned shall take rank from the date of their original entry into the service: *And provided further*, That no chaplain be appointed to posts or regiments until those on waiting orders are assigned.

Thus Congress expressly provided for the supernumerary officers by transfers, assignments, or musters out with one year's pay and allowances, and that *officers so assigned shall take rank from the date of their original entry into the service.*

This was an express declaration of Congress that there should be no loss of rank. Captain Hall was transferred by General Orders No. 59, of July 14, 1869, and the question is, what was the legal effect of that order upon the rank of this and other officers so transferred, and upon this question the following opinions have been given by Generals Sherman, Ord, Pope, and Canby:

1. On General Orders No 59, the same as above stated, the following indorsement appears, made in a similar case by General W. T. Sherman, then the General of the Army, the officer who issued General Orders No. 59:

[Indorsement on General Orders No. 59, War Department, A. G. O., Washington, July 14, 1869.]

Second Lieut. A. W. GREELY,
Fifth Cavalry:

In my opinion the officers transferred by this order carried into their new arm of service a rank equal to the commission held in the former arm, with the same date. In other words, without loss of rank.

W. T. SHERMAN,
General.

2. General E. O. C. Ord, then brigadier-general, gave an opinion on March 19, 1873, in a similar case showing that, in his judgment, "officers are entitled to rank after transfers, according to the dates of their commissions." His statement is as follows:

OMAHA, NEBR., *March 19, 1873.*

Lieut. A. W. Greely, having asked my opinion of his right to rank after transfer according to date of commission, I can state that I am of the opinion that when a transfer is not sought by the officer, but is made by order of the President to dispose of surplus officers who have performed their full duty, such officers are entitled to rank after transfer according to dates of their commissions; and that the thirty-first and thirty-second articles of the general regulations, when taken together, show that the thirty-first article refers to transfers applied for by the parties transferred.

E. O. C. ORD,
Brigadier-General.

3. General John Pope, then brevet major-general, gave an opinion, on August 2, 1873, in the same case, sustaining the opinions and judgment expressed above:

HEADQUARTERS DEPARTMENT OF THE MISSOURI,
Fort Leavenworth, Kans., August 2, 1873.

To _____.

SIR: I am just in receipt of your letter of the 30th ultimo, and in compliance with your request I take pleasure in giving you my own opinion of the point presented.

Every commissioned officer of the Army takes rank according to the date of his commission. That date is fixed by the nomination of the President and its confirmation by the Senate.

There are only four ways known to me by which the rank thus fixed can be changed:
(1) By express provision of law.

(2) By sentence of court-martial—of doubtful legality, though it has been done and maintained.

(3) Through deprivation of all rank by the act of the President.

(4) By the voluntary act of the officer himself, seeking transfer to another, regiment or corps, which case is provided for in the thirty-first paragraph of Army Regulations.

In no other manner known to me can an officer be deprived of the rank fixed by the date of his commission.

When two regiments are consolidated by an Executive order, it is, doubtless, the right of the President to select the officers for the consolidated regiment and assign them places on the roster: *Provided*, First, that officers so assigned be not deprived of their lawful rank; or, second, that if so reduced in rank the act be sanctioned by the Senate and accepted by the officer. The rank of an officer, being a joint act of the President and Senate, can not be changed, either to his advantage or disadvantage, without the sanction of the same joint authority.

It seems to me clear, therefore, that when two regiments are consolidated the officers assigned to the new organization take rank in it according to the date of their commissions, unless the Senate concurs in, and the officer accepts, a different arrangement.

It seems that by the provisions of the law directing the reduction of the number of regiments in the Army, the surplus officers, after the reduction was made, were to retain their commissions and to be assigned to regiments as vacancies occurred. The order so assigning them, which covers your case, transfers you from the unassigned list to one of the regiments. Not a transfer from one regiment to another, which is covered, when voluntarily made, by the thirty-first paragraph of the Army Regulations. By the law in question you in no sense lost any of the rights and privileges of your rank any more than a Naval officer does when placed on waiting orders.

It is impossible for me to understand upon what ground it is maintained that, when you are assigned from waiting orders to the Fifth Cavalry, you thereby parted with any of the rights you had at the time the assignment was made.

No one, I imagine, would deny that if whilst on waiting-order list you had been detailed on court-martial or any other military service you would have ranked all officers of the Fifth Cavalry, then your juniors by commission, and now it is maintained that you lose such right of rank simply by being assigned by order to that regiment is difficult to see.

I think it is safe to say that the order assigning you to the Fifth Cavalry in no sense impaired any of the rights of rank you had when the order was made, and that by law you are entitled to such place on the roster of the regiment as the date of your commission gives you in any other position or on any other duty. * * *

The thirty-first and thirty-second paragraphs of the Army Regulations relates, it seems clear, to transfers made on the application of the parties concerned.

Should the Government, as in your case, find it for the interest of the service, having supernumerary officers in one arm, to transfer such officers to another arm of the service, or to another regiment in the same arm, it is doubtless competent to do so, but not competent to change the rank of the officers so transferred without their own consent.

I think this position clear, and, as it covers your case, it should seem to be conclusive.

Very respectfully, your obedient servant,

JNO. POPE,
Brevet Major-General, U. S. A.

4. General Ed. R. S. Canby, after full examination of the question, gave an opinion, on September 27, 1872, which is most thorough in detail, and proves conclusively the statements made in the preamble to this bill, and sustains, beyond question, Captain Hall's claim:

HEADQUARTERS DEPARTMENT OF THE COLUMBIA,
Portland, Oregon, September 27, 1872.

Promotion and transfers are necessary incidents of the power to appoint, and are regulated in the Army, not by legislative direction, but by rules that were in existence when our present Government was organized or subsequently established by Executive prescription. All legislation upon this subject has recognized the right of the Executive to establish these rules, and has forborne to limit his constitutional discretion, except in prescribing qualification, class, or service in the appointments to be made.

They provide that transfers shall not be granted "except for cogent reasons;" they shall only be made on the mutual application of the parties, "and that an officer shall not be transferred with prejudice to the rank of any officer of the regiment or corps to which he is transferred." These rules have never been held to deny the right of the President to make other transfers whenever the circumstances of the service rendered it wise or expedient to make them, and practically both classes of transfers have been made repeatedly, "regard being paid to rank," when the transfers were made in the interest of the service.

The instances most analogous to the present case were in the reduction of the Army under the laws of March 3, 1815, and March 2, 1821. In both cases transfers were made without consulting the officers concerned, and without loss of rank. In the first the regulations in relation to transfers were partially suspended.

It is conceived, however, that officers who accept in good faith the transfers made by his (the President's) direction, prior to the passage of the law of July 15, 1870, in the belief that their rank would not be prejudiced thereby, may, in equity, ask to be relieved from their present anomalous position and restored to their original rank.

The transfer grew out of the provision of the second section of the act of Congress making appropriations for the support of the Army, etc., approved March 3, 1869: "That there shall be no new commissions, no promotions, and no enlistments in any infantry regiment until the total number of infantry regiments is reduced to twenty-five, and the Secretary of War is hereby directed to consolidate the infantry regiments as rapidly as the interest of the public service and the reduction of the number of officers will permit." Although this section directed the consolidation and consequent reduction of the number of infantry regiments, the qualifying conditions gave it a more extended application, and authorized (if indeed any authority was necessary) the transfer of supernumerary officers, regard being had to fitness of the infantry arm to fill vacancies existing in the other arms of the service or that might occur during the period embraced in the reduction prescribed by law. The provisions of General Orders No. 19, of March 18, 1869, from the headquarters of the Army, which required commanders of departments where regiments of artillery and cavalry are serving "to report the names of all absent officers, and to recommend to Army headquarters any of the infantry officers left out by consolidation competent to fill the places of the officers of artillery and cavalry so absent, with a view to their permanent transfer or assignment," appeared to indicate very clearly the intention of the President, not only to fill vacancies that might occur in these arms by assignment of supernumerary officers, but to create vacancies by the transfer to the list of unassigned of the same class of officers that were left by the consolidation of the infantry regiments. General Orders No. 59, of July 14, 1869, transferred, by direction of the President, a number of infantry officers awaiting assignment to fill vacancies in the artillery and cavalry. These transfers, made without application by or consultation with * * * the officers transferred, and without qualification or condition, confirmed the impression that the transfers were made by the President in the exercise of a constitutional right, in entire accord with the usage of the service in analogous cases, and not in conflict with any law.

General Orders Nos. 19 and 59, of 1869, appeared to be conclusive that the President had determined to exercise this power, so far at least as the artillery, cavalry, and infantry arms of the service were concerned, and when the order of transfer in this case (59) was received, * * * he was advised by me that his transfer was an order that he was not at liberty to decline, and that all questions of rank growing out of the consolidation would, no doubt, be properly adjusted and settled when the reduction was completed.

ED. R. S. CANBY,
Brigadier-General, Commanding Department.

A true copy.

H. R. ANDERSON,
Second Lieutenant, Fourth Artillery.

In these eminent authorities we concur, and under them Captain Hall should have rank as provided for in this bill. The legal effect of this bill is to place Captain Hall in rank in the Fifth Cavalry from his present position on the Army Register to the position and rank of Captain, above Capt. W. C. Forbush, J. A. Angus and E. D. Thomas

The effect upon the lineal list of captains of cavalry, giving Captain Hall his rank as captain on April 2, 1879, and carrying out the provisions of this bill with reference to other officers—would be to place Captain Hall just below Capt. George A. Drew, and Capt. W. C. Forbush just below Capt. S. P. Hamilton, and Capt. J. A. Angus just below Capt. G. S. Anderson, and Capt. E. D. Thomas, just below Capt. Alexander Rogers.

