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SOLDIERS' AND SAILORS' CIVIL RELIEF ACT

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The Soldiers' and Sailors' Civil Relief Act[1] according to widespread popular opinion, grants to a person in the military service an absolute right to forget all of his obligations when he enters the service, and to take care of them after his period of military service. The Act grants no such moratorium. As a general rule the specific relief to which a man in the service may be entitled is left to the discretion of the appropriate court. A serviceman is still under a duty to meet his obligations, but the Act provides:

> Sec. 700 (1) "A person may, at any time during his period of military service or within six months thereafter, apply to a court for relief in respect of any obligation or liability incurred by such person prior to his period of military service or in respect of any tax or assessment whether falling due prior to or during his period of military service. The Court, after appropriate notice and hearing, unless in its opinion the ability of the applicant to comply with the terms of such obligation or liability or to pay such tax or assessment has not been materially affected by reason of his military service, may grant the following relief:
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> (a) In the case of an obligation payable under its terms in installments under a contract for the purchase of real estate, or secured by a mortgage or other instrument in the nature of a mortgage upon real estate, a stay of the enforcement of such obligation during the applicant's period of military service and, from the date of termination of such period of military service or from the date of application if made after such service, for a period equal to the period of the remaining life of the installment contract or other instrument plus a period of time equal to the period of military service of the applicant, or any part of such combined period, subject to payment of the balance of principal and accumulated interest due and unpaid at the date of termination of the period of military service or from the date of application, as the case may be, in equal installments during such combined period at such rate of interest on the unpaid

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[1]The Soldiers' and Sailors' Civil Relief Act of 1940, Pub. Law 861, 76th Congress, and Pub. Law 732, 77th Congress, 54 Stat. 1178; 50 U.S.C.A., Secs. 501 *et seq.*

balance as is prescribed in such contract, or other instrument evidencing the obligation, for installments paid when due, and subject to such other terms as may be just.

(b) In the case of any other obligation, liability, tax, or assessment, a stay of the enforcement thereof during the applicant's period of military service and, from the date of termination of such period of military service or from the date of application if made after such service, for a period of time equal to the period of military service of the applicant or any part of such period, subject to payment of the balance of principal and accumulated interest due and unpaid at the date of termination of such period of military service or the date of application, as the case may be, in equal periodic installments during such extended period at such rate of interest as may be prescribed for such obligation, liability, tax, or assessment, if paid when due, and subject to such other terms as may be just."

In addition to the general relief provided for in the above quoted section, the Act deals with certain specific types of obligations such as mortgages,[2] bailment leases,[3] installment contracts,[4] rental payments,[5] and property taxes.[6] In regard to all such obligations the Act provides that a court may, if the serviceman's ability to comply with the obligation is affected by his service, stay the enforcement of the obligation or may make such other order or modification as justice and equity may require.

From the foregoing summary of the substantive relief granted by the Act, two factors stand out:

FIRST: any relief depends upon whether the debtor's ability to comply with his obligation is materially affected by his military service; and SECOND: the court can grant such relief as is equitable to preserve the interest of all parties. The only two cases in which the Act grants specific relief are: (1) Provision is made for the carrying of a serviceman's life insurance up to $10,000 by the government during his service, with repayment of premiums during five years following the service;[7] (2) The statute of limitations is automatically extended for and against a serviceman during his period of service.[8] Aside, however, from these two specific instances, the Act sets forth a policy but leaves it to the court to apply the policy and to supply the procedure for so doing.

The Act does seem to relieve a serviceman from the payment of income taxes[9] and to give him the right to terminate any lease in which he is the lessee for proper-

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[2]The Acts, Sec. 302.
[3]*Ibid.*, Sec. 301.
[4]*Ibid.*, Sec. 301.
[5]*Ibid.*, Secs. 300 and 305. *See* Jonda Realty Corp. v. Marabotto, 34 N.Y. Supp. (2d) 301 (1942), where the court granted stay of eviction for three months and forbade eviction if current rent was kept up, leaving the three months in abeyance.
[6]*Ibid.*, Sec. 500.
[7]*Ibid.*, Sec. 305.
[8]*Ibid.*, Sec. 205.
[9]*Ibid.*, Sec. 513.

ty used by him or his dependents either as residential property or for business, professional, or agricultural uses.[10] Despite the broad language of the Act in conferring these rights, in both instances the broad language is followed by provisions that limit the rights to cases where the serviceman's ability to comply with the obligations is affected by his service. These cases, therefore, likewise come within those cases that are left up to the courts to decide on equitable principles.

The Act provides in many instances that certain things can only be done by leave of court and that certain relief can be granted by the court. The Act defines the term "Court" as, "any Court of competent jurisdiction, whether or not a Court of Record."[11] There are certain cases in this state which fall exclusively within the jurisdiction of Justices of the Peace. It would seem to follow logically that power to grant relief in such cases is vested in the Justices' Courts. If this is correct the very important question arises as to whether a Justice of the Peace could be applied to in other types of cases which may come within its jurisdiction. For example, a Justice of the Peace has jurisdiction to evict tenants for non-payment of rent and at the expiration of leases. The Civil Relief Act provides that no eviction or distraint will lie against a serviceman or his dependents without leave of Court. It would seem logical that application to a Justice of the Peace for leave to evict should be sufficient compliance with the Act, and since distraint is ordinarily done without supervision of any Court, it is possible that an application to a Justice of the Peace might be sufficient compliance in such a case. If such is the meaning of the Civil Relief Act, it is extremely unfortunate, for such a wide power should not be vested in the minor judiciary.

Aside from the question of jurisdiction, the question as to what specific relief shall be granted is made a matter of judicial discretion. The trend of decisions is the only guide the practitioner or serviceman has as to what facts may lead a court to grant relief and on what terms. The decisions to date have shown a very fair attitude on the part of the Courts. The decisions have shown that the Courts will not permit a serviceman to dodge obligations, which he can and should meet, merely because he is in the service. Such a case is *Pope v. U. S. Fidelity and Guaranty Company* decided by the Court of Appeals of Georgia.[12] In that case the defendant had embezzled funds in his hands as guardian of his niece and judgment for the amount embezzled had been recovered against him by the bonding company. He sought an indefinite stay of execution on the grounds of his military service. The Court found that he was receiving a salary of between six and seven thousand dollars a year as a Lieutenant Colonel in the Army and refused to grant him any relief stating:[13]

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[10] *Ibid.*, Sec. 304. *See* Ostrowski v. Barczynski, 45 D. & C. 451 (Erie Co. 1943), where a lessee was permitted to terminate lease on his premises on order to report for induction.

[11] *Ibid.* Sec. 101 (4).

[12] 20 S.E. (2d) 618 (1942).

[13] At p. 621.

> "So it will be seen that a person in the military service is not entitled to a stay of execution against him as a matter of law under the Act, where in the opinion of the Court passing on the matter, the ability of the person to comply with the judgment is not materially affected by reason of his military service."

The courts have likewise shown that they will not permit a man to retain property which will depreciate or become worn out, nor which is producing income, without making some effort to meet his obligation.[14] From these decisions it is apparent that most courts will protect creditors from unjust loss at the hands of unscrupulous servicemen as readily as they will protect servicemen from an unjust sacrifice. This attitude is shown by the following statement from the case of *Hunt v. Jacobson*:[15]

> "The Act is not applicable to every situation without limitation merely because a party is in the military service: it is not to be employed as a vehicle of oppression or abuse; its invocation is not to be permitted for any needless or unwarranted purpose; it is to be administered as an instrument to accomplish substantial justice."

In that case the court refused to stay the foreclosure of a mortgage where a serviceman was part owner of a second mortgage. In a similar case the court refused to stay a foreclosure against a serviceman, where it appeared as a fact that the property was unproductive and so heavily incumbered that the defendant had no equity.[16] In another case the court refused to stay foreclosure of a chattel mortgage on a marine engine, provided that no personal judgment would be taken against the owner who was in service. The court there pointed out that a stay of proceedings would permit the plaintiff's security to depreciate and possibly miss a good market.[17]

The power of the courts to protect all parties is very aptly illustrated by two New York cases. The first was an action by a finance company to repossess an automobile owned by a soldier and worth more than the amount due on it. There the court ascertained the market value of the car, and permitted the finance company to repossess it on payment to the defendant of the difference between the value of the car and the amount due.[18] The second case was an action to foreclose an F.H.A. mortgage on the home of a serviceman, occupied by his wife and four small children. There the court analyzed the defendant's income before and after his induction, found that his ability to make the payments was materially affected, but not entirely wiped out. The court therefore stayed the foreclosure on condition that the defendant make monthly payments sufficient to cover interest and

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[14]Brooklyn Trust Co. v. Papa, 33 N.Y. Supp. (2d) 57 (1941); Associates Discount Corp. v. Armstrong, 33 N.Y. Supp. (2d) 36 (1942); Cortland Savings Bank v. Ivory, 27 N.Y. Supp. (2d) 313 (1941).

[15]33 N.Y. Supp. (2d) 661, 664 (1942).

[16]Jenkintown Bank and Trust Company v. Greenspan, 44 D. & C. 507 (C.P. Montgomery County).

[17]The Sylph, 42 Fed. Supp. (2d) 354 (E.D.N.Y.).

[18]Associates Discount Corp. v. Armstrong, *supra.* n. 14.

taxes, thereby postponing for the duration payments on principal, insurance, and service charges.[19] A similar result was reached by the Court of Common Pleas of Philadelphia in the case of *Davis v. Brown*.[20] In that case the defendant, who was in the army, owned a business and apartment property in which he conducted a business and his family occupied an apartment. The court stayed foreclosure on the mortgage upon condition that the mortgagee be permitted to manage the property, collect all rents and the defendant deliver possession of the storeroom and apartment which he was occupying. In the course of the decision, Judge Crumlish made the following observation:

> "In a final word, we wish to add that we are not blind to the equities of the plaintiff in this case. Nor has our decision been reached without difficulty. It is important on the one hand that the Soldiers' and Sailors' Civil Relief Act should not be treated as a blanket moratorium on all litigation against service men. To thus enforce the act might prove a boomerang [see Smith, 'Soldiers' and Sailors' Civil Relief Act' in Practice, 3 Mass. L.Q. 229 (1918)] in that all credit for men in service and for their dependents would be destroyed. And on the other hand, these are times when some sacrifices must be made, and it is the duty of our economic society to persons called into the service that they be made to feel that their homes and businesses upon which they are dependent are afforded some protection during the war. In the light of these conflicting factors we shall examine in detail the facts of each individual case coming before us. The equities must be carefully weighed, and the act administered as an instrument to accomplish substantial justice."

From the above it will be seen that the substantive relief granted by the Act to servicemen is a matter of equity. While this fact will enable the Act to operate with a minimum of strain on our economic system, it makes it exceedingly difficult for either servicemen, their creditors, or the legal advisors of either, to forecast exactly what effect induction into the armed forces may have on an inductee's civil obligations.

Among the most difficult of questions arising under this Act, and those on which the decisions are sometimes irreconcilable, are those involving the rights of persons other than servicemen.

The Act provides as follows:

> Sec. 103 (1) "Whenever pursuant to any of the provisions of this Act the enforcement of any obligation or liability, the prosecution of any suit or proceeding, the entry or enforcement of any order, writ, judgment, or decree, or the performance of any other act, may be stayed, postponed, or suspended, such stay, postponement, or suspension may, in the discretion of the Court, likewise be granted to sureties, guarantors, endorsers, accommodation makers, and others, whether primarily or secondarily subject to the obligation or liability, the performance or enforcement of which is stayed, postponed, or suspended."

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[19] Cortland Savings Bank v. Ivory, *supra*. n. 14.
[20] D. & C. Advance Reports, Dec. 14, 1942, p. 76a.

It can be seen that there is absolutely nothing to guide the courts in the exercise of their discretion. Reported decisions to date unfortunately fail to establish any principles on which to base a judgment as to whether in any particular case a stay might be granted to persons liable along with servicemen. It is intimated by the Court of Appeals of Ohio[21] that relief should be granted to one who was an accommodation maker for a soldier. Unfortunately the decision was before the amendment of 1942 and was concerned chiefly with problem as to whether a co-maker was within the meaning of the phrase "sureties or others." Having decided that he was such a party the lower court was affirmed, but the equities of the case were not mentioned in the decision. The Appellate Division of New York, on the other hand, permitted recovery against the guarantor of a serviceman's note.[22] In *Continental Can Co. v. Mittlemen,*[23] Judge Leach in the Court of Common Pleas of Lackawanna, refused to grant a stay of proceedings against one of two guarantors of a contract of a corporation where the other guarantor was in the service and had been the operator of the company. This case unfortunately concerned the right of the defendant to have the question of liability adjudicated, and did not touch on his right to have a stay of execution. With the authorities so few, it is seen that there is no definite answer to the question as to when an indorser for a soldier will be granted relief because of the soldier's service. Since the right of a soldier to relief depends upon his ability to comply with the obligation, it is submitted that the right of an indorser or co-maker should likewise be conditioned upon the effect of the military service upon the party's ability to pay. Thus where a note is given by a man and his wife, and the husband is inducted into military service, the wife should be granted relief, if her ability to pay is affected by her husband's military service. If, however, the note of a soldier is indorsed by one in no way dependent upon his earnings, it is submitted, relief should not be granted. The indorser knows that the maker may not be able to pay for any number of reasons, one of which may be military service, and that service should not relieve the indorser.

It is to be noted in this connection that the courts have liberally construed the Act to protect the rights of servicemen, even though such men may not be nominal parties to actions. Thus the Supreme Court of Arizona[24] refused to permit the foreclosure of an H.O.L.C. mortgage against the mother of a serviceman, upon application of the serviceman who claimed that his mother had agreed to convey the property to the son in return for his keeping up the property, a thing which he could not do because of his service. The court followed Massachusetts' decisions under the World War I Act, which extended similar relief even though such an agreement might be unenforcible under the Statute of Frauds.[25]

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[21]Akron Auto Finance Co. v. Stonebroker, 66 Oh. App. 507, 35 N.E. (2d) 585 (1941).
[22]Refrigeration and Air Conditioning Institute v. Bohn, 36 N.Y. Supp. (2d) 69 (1942).
[23]D. & C. Advance Reports, July 13, 1942, p. 18a.
[24]Twitchell v. Home Owners Loan Corp., 122 Pac. (2d) 210 (Ariz. 1942).
[25]Hoffman v. Charlestown Bank, 121 N.E. 15; Morse v. Stober, 123 N.E. 780; 9 A.L.R. 78.

On the other hand, the courts have refused to stay foreclosure proceedings where it has been found that a serviceman defendant was merely a "straw man"[26] or where title had been put in his name for the specific purpose of taking advantage of the Act.[27]

Among the persons to seek relief under this Act have been, very naturally, insurance companies in negligence actions where the defendant is in military service. The weight of authority is to the effect that an action to recover damages in automobile cases brought against a serviceman, must be stayed for the duration, even though it is defended by a liability insurance company.[28] In the case of *Royster v. Lederle*,[29] the matter was considered thoroughly by the U. S. Circuit Court of Appeals for the 6th Circuit, but their reasoning is difficult to follow. The court states:

> "Unless it be made to appear that the rights of the person in the service will be prejudiced by a proceeding against him, the Act is inapplicable."

Since in that case the plaintiff agreed to limit recovery to the amount of insurance, how were the defendant's rights prejudiced or his ability to defend affected? It is the insurance company which must pay and likewise must defend. It is a matter of indifference to the defendant who wins or loses. The court further points out that the insurance policy is avoided if the defendant does not cooperate. Certainly no court would hold that his inability to cooperate due to military service would be such a failure as would work a forfeiture. The court further reasoned that no person should be compelled to go to trial in his absence or in the absence of his chief witness unless he has been guilty of negligence, and that the insurance company had not been negligent in not getting his deposition. Why should not the insurance company take its own insured's deposition as it would have to take the deposition of any other witness in the case, and why should not they be chargeable with the effects of their failure, if they do not do it? In closing the court states:

> "A protection must be applied in such a way as to affect the rights of the claimants to no greater extent than is necessary to effectuate the purposes of the Act."

It is submitted that the purposes of the Act do not require such a stay, as the action in no way touches or affects the civil rights of the defendant.

It is common knowledge that a defendant in a negligence action, when he is insured, has nothing to do with the case, except to come to court and testify as a witness. He does not choose the attorney who is to defend the action or have any

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[26]Charles Tolmas, Inc. v. Streiffer, 199 La. 25, 5 So. (2d) 372 (1941).
[27]Flushing Bank v. Hollewell, 35 N.Y. Supp. (2d) 521 (1942).
[28]Royster v. Lederle, 128 Fed. Supp. (2d) 197 (C.C.A. 6th, 1942); Bowsman v. Peterson, 45 Fed. Supp. (2d) 741 (D.C. Nev. 1942); Craven v. Vought, 43 D. & C. 482 (Montgomery County 1941).
[29]*Supra*, n. 28.

say in the way in which the defense is to be conducted. He does no negotiating for a settlement, he does not have to go out and round up his witnesses. All these things are done for him by the insurance adjuster. Insurance companies always carefully reduce their insured's version of the accident to writing as soon after the accident as possible. Once that is done, how then does his military service affect the insurance company's ability to defend the action? To say that the insured is the defendant, and the insurance company is not, is to ignore the facts of the case.

The writer submits that the decision in *Swiderski v. Moodenbaugh,*[80] in which a stay of proceedings was denied is a far sounder decision than the three previously referred to. It is interesting to note that the *Swiderski* case was decided before *Royster v. Lederle*, and then re-examined without change in the light of the *Royster* decision. In the *Swiderski* case, the court made the following observations:

> "The Court has discretion under the statute. Congress has declared the public policy relating to persons in the military service. No absolute bar has been erected to such proceedings. The necessity is thus imposed to act with sound judgment. Two perils here present themselves. The Court must prevent injury to a soldier who is devoting himself to the service of his country, and the Court must prevent the use of this shield for the protection of others not so devoted. The Act expressly allows an action to proceed against other defendants, although a soldier is also sued. It is true that the insurer is not technically a party to the suit, but the judgment, if any, will be paid by it. If it were sued directly it would have no defense based on the fact that a witness is in the service."

On rehearing, the court stated:

> "This is a capitalization of the patriotism of another to the detriment of one alleged to have been seriously injured which the Court should not permit at the instance of an insurer for hire."

As this article was about to go to press, a decision was reported from the Court of Common Pleas of Montgomery County[81] which is in accord with the decision in the *Swiderski* case. This decision would seem to overrule the earlier decision in *Craven v. Vought* decided by the same court, and hence the authority in Pennsylvania would seem to adopt the view that an insurance company in a negligence case is not entitled to take advantage of the fact that its insured is in the military service.

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[80] 44 Fed. Supp. (2d) 687; rehearing, 45 Fed. Supp. 791 (D.C. Oregon 1942).
[81] 46 D. & C. 84 (1942).