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## The Williams Case

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## COMMENT

### THE WILLIAMS CASE

FREDERICK L. KANE†

On December 21st, 1942, the United States Supreme Court rendered an important decision relating to interstate recognition of divorce, and the application of the Full Faith and Credit Clause of the Constitution.<sup>1</sup> The Court was divided and there were four opinions, Mr. Justice Douglas writing the majority opinion, with a concurring opinion by Mr. Justice Frankfurter and both dissenting Justices, Jackson and Murphy, writing opinions. The noted case of *Haddock v. Haddock*, decided in the same Court in 1906, was expressly overruled.<sup>2</sup>

The *Williams* case came to the Supreme Court on *certiorari* from the Supreme Court of North Carolina, to review the conviction of two defendants for "bigamous cohabitation". O. B. Williams had been married in North Carolina in 1916, and lived there with his wife until 1940. Lillie Hendrix had been married in North Carolina in 1920 and lived there with her husband until 1940. In May 1940, Mr. Williams and Mrs. Hendrix left North Carolina, went to Las Vegas, Nevada, and in a few weeks started divorce actions against their respective spouses, who remained in North Carolina. The latter were never personally served with process in Nevada, and entered no appearance in the Nevada Court, although they had actual notice of the applications. In October 1940, having been granted divorces, Mr. Williams and Mrs. Hendrix married in Nevada, returned to North Carolina, and lived there as husband and wife until their indictment.

Quoting from the dissenting opinion of Mr. Justice Jackson, "North Carolina then had on its hands three marriages among four people in the form of two broken families, and one going concern. What problems were thereby created as to property or support and maintenance, we do not know. North Carolina, for good or ill, has a strict policy as to divorce. The situation is contrary to its laws, and it has attempted to vindicate its own law by convicting the parties of bigamy".<sup>3</sup>

In the criminal proceeding in North Carolina the defendants offered their divorce decrees in defense. The prosecuting officer contended that these decrees were not recognized as valid in North Carolina under the doctrine of the *Haddock* case. The defendants were convicted and the North Carolina Supreme Court affirmed the conviction. In the United States Supreme Court the case was treated on the assumption that the Nevada plaintiffs were domiciliaries of that State. The reasons assigned for this assumption were: (1) that the

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1. *Williams v. North Carolina*, 317 U. S. 287 (1942).

2. *Haddock v. Haddock*, 207 U. S. 562 (1906).

3. *Williams v. North Carolina*, 317 U. S. 287, 312 (1942).

prosecution did not make an issue of the Nevada domicile in the United States Supreme Court, and (2) that the verdict was a general one, so that the conviction would have to be reversed if either ground upon which it was supported was unconstitutional. The Court, therefore, according to the majority opinion could not "avoid meeting the *Haddock v. Haddock* issue" and apparently grasped the opportunity to overrule that case.

It is not within the scope of this comment to go into any elaborate discussion of the *Haddock* case or of the various developments or ramifications of its doctrine in the past thirty-seven years. It is too soon to even speculate on the effects of the *Williams* decision. The press comments immediately after the decision characterized it as "revolutionary", but in some instances revealed a misunderstanding of the limited scope of the *Haddock* doctrine, which we venture to state briefly as follows: The Full Faith and Credit Clause of the Federal Constitution did not compel one State to recognize the extra-territorial validity of a decree of absolute divorce granted in a sister State against a non-resident, on constructive service of process, where the sister State was not the last matrimonial domicile of the parties. This rule has been bitterly criticized, as anomalous, as based upon a fictitious distinction, as "appalling" in its practical results, and likely to result in a "bedlam of confusion".<sup>4</sup> On the other hand it has enabled some states, particularly New York, to prevent obvious injustice and to give expression to its strict divorce policy, in spite of the decrees of other states.<sup>5</sup>

To anyone who believes in a strict policy of divorce, under which divorce would be granted only for a grave offense or wrong committed by one spouse against the other, the real evil is the consensual divorce, whether granted in New York on a pretense of infidelity or in Reno for a relatively trivial cause and after a brief and simulated domicile of the plaintiff. Just what effect the *Haddock* rule had on such divorces seems to be doubtful. In the *Williams* case, Mr. Justice Douglas says: "Certainly if decrees of a state altering the marital status of its domiciliaries are not valid throughout the Union even though the requirements of procedural due process are wholly met, a rule would be fostered which could not help but bring 'considerable disaster to innocent persons' . . . or else encourage collusive divorces".<sup>6</sup> Mr. Justice Jackson, on the other hand, states that the effect of the *Williams* decision may be "to force all states to recognize mail order divorces as well as tourist divorces. Indeed, the difference is in the bother and expense—not in the principle of the thing".<sup>7</sup>

In spite of the relatively narrow scope of the *Haddock* doctrine, it unquestionably has had a wide influence on the development of divorce law. Possibly there might have been less confusion if the rule had never been enunciated,

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4. *Miller v. Miller*, 200 Iowa 1193, 206 N. W. 262 (1925).

5. *Dean v. Dean*, 241 N. Y. 240, 149 N. E. 844 (1925).

6. *Williams v. North Carolina*, 317 U. S. 287, 301 (1943).

7. *Id.* at 321.

but it has been the rule for almost forty years. A majority of the present Supreme Court is now of the opinion that the majority in 1906 was wrong, that the minority was right, and therefore the decision must be overruled. To make such an important pronouncement, on the record before the Court in the *Williams* case, seems regrettable, for reasons that can be no better expressed than in the following quotations from the dissenting opinion of Mr. Justice Jackson:

"We should, I think, require that divorce judgments asking our enforcement under the full faith and credit clause, unlike judgments arising out of commercial transactions and the like, must also be supported by good-faith domicile of one of the parties within the judgment state. . . ."<sup>8</sup>

\* \* \*

"The Court would seem, indeed, to pay lip service to this principle. I understand the holding to be that it is domicile in Nevada that gave power to proceed without personal service of process. That being the course of reasoning, I do not see how we avoid the issue concerning the existence of the domicile which the facts on the face of this record put to us. Certainly we cannot, as the Court would, by-pass the matter by saying that 'We must treat the present case for the purpose of the limited issue before us precisely the same as if petitioners had resided in Nevada for a term of years and had long ago acquired a permanent abode there.' I think we should treat it as if they had done just what they have done. . . ."<sup>9</sup>

\* \* \*

"In the application of the full faith and credit clause to the variety of circumstances that arise when families break up and separate domiciles are established, there are, I grant, many areas of great difficulty. But I cannot believe that we are justified in making a demoralizing decision in order to avoid making difficult ones. . . ."<sup>10</sup>

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"This Court may follow precedents, irrespective of their merits, as a matter of obedience to the rule of stare decisis. Consistency and stability may be so served. They are ends desirable in themselves, for only thereby can the law be predictable to those who must shape their conduct by it and to lower courts which must apply it. But we can break with established law, overrule precedents, and start a new cluster of leading cases to define what we mean, only as a matter of deliberate policy. We, therefore, search a judicial pronouncement that ushers in a new order of matrimonial confusion and irresponsibility for some hint of the countervailing public good that is believed to be served by the change."<sup>11</sup>

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8. *Id.* at 320.

9. *Id.* at 320-321.

10. *Id.* at 323.

11. *Id.* at 323-324.

In New York State in a brief three months' period we have a "new cluster" of cases in which the Courts have insisted on maintaining the divorce policy of the State, mainly by questioning the bona fides of the domicile in the divorce State.<sup>12</sup> We have also a bill that passed both houses of the State Legislature, but was vetoed by Governor Dewey on April 16, 1943, authorizing injunctions against pending or threatened divorce actions in other States unless the defendant has been served personally with process within the other State or has appeared generally.<sup>13</sup> Recent comments on the *Williams* decision run all the way from unqualified condemnation, in an article in the leading Bar Association journal of the country,<sup>14</sup> to the very optimistic approval of a writer who believes that the Court has at last brought "certainty to a bewildering problem".<sup>15</sup>

We cannot forget that among the majority of the Court in the *Williams* case are wise and experienced Judges; nor are we unmindful of the temptation to trail along with a vigorous dissent in any case, and sometimes to question the rightness of a decision in justification of a personal impulse. We might be able to present strong argument for a suspended sentence for the newlyweds in North Carolina, but we doubt whether North Carolina should be made powerless in the maintenance of its divorce policy under the circumstances. We believe that if the Court could not avoid meeting the *Haddock v. Haddock* issue, it should not, in a leading case, have avoided meeting the *bonafide* domicile issue, and we fail to see how any ultimate good can come from the *Williams* decision.

### THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT AMENDMENTS OF 1942

The morale of the armed forces is bound to play a leading part in winning the war. The mind of a man really intent upon fighting must not be preoccupied with mortgages, leases or law suits. Congress recognized this in passing the Soldiers' and Sailors' Civil Relief Act of 1940,<sup>1</sup> which was to a large extent a re-enactment of an act passed in 1918.<sup>2</sup> However, ambiguities in the 1940 Act and the inadequacy of its coverage called for its revision, and in 1942 an

12. *Selkowitz v. Selkowitz*, 40 N. Y. S. (2d) 9 (Sup. Ct. 1943); *Jiraneck v. Jiraneck*, 39 N. Y. S. (2d) 523 (Sup. Ct. 1943); *McCarthy v. McCarthy*, 109 N. Y. L. J. (Sup. Ct. Feb. 3, 1943) p. 477, col. 3; *Estate of Bingham*, 39 N. Y. S. (2d) 756 (2d Dep't 1943); *Reese v. Reese*, 109 N. Y. L. J. (Sup. Ct. Mar. 13, 1943) p. 999, col. 4.

13. Bill vetoed, N. Y. World Telegram, April 16, 1943, p. 6.

14. Burns, *Two Nevada Divorces Get Full Faith and Credit* (1943) 29 A. B. A. J. 125.

15. (1943) 17 TEMPLE L. Q. 197.

1. 54 STAT. 1178 (1940), 50 U. S. C. A. App. §§ 501-585 (Supp. 1942).

2. 40 STAT. 440 (1918), 50 U. S. C. A. App. §§ 101-164 (Supp. 1942). For the differences between the 1918 and the 1940 Acts, see (1941) 130 A. L. R. 774.

amendatory act was passed.<sup>3</sup> Some of the more important amendments will be considered herein.

The Soldiers' and Sailors' Civil Relief Acts have in general been liberally construed in favor of the person in military service.<sup>4</sup> With a few exceptions their provisions are merely permissive<sup>5</sup> and relief will be refused where the ability to comply with the obligations or to conduct the defense is not materially affected by the defendant's military service. The discretion of the trial court is wide and, in the absence of abuse, will not be interfered with.<sup>6</sup> The provisions apply to any court of competent jurisdiction, whether or not a court of record,<sup>7</sup> and shall be in effect until May 15, 1945, or six months after the proclamation of a treaty of peace should the country still be at war on such date.<sup>8</sup>

The avowed purpose of the amendatory act, as set forth in its preamble, is

" . . . to extend the relief and benefits provided therein to certain persons, to include certain additional proceedings and transactions therein, to provide further relief for persons in military service, to change certain insurance provisions thereof, and for other purposes."<sup>9</sup>

It will be endeavored in the following comment to point out generally how

3. Pub. L. No. 732, 77th Cong. 2d Sess. (Oct. 6, 1942), 56 STAT. 769, 50 U. S. C. A. App. §§ 501-585 (Supp. 1943).

In the footnotes to this comment the Soldiers' and Sailors' Civil Relief Act of 1940 as amended by Pub. L. No. 732, will be cited as S AND S (1942), and in the form prior to the amendatory act as S AND S (1940). Where no change was made in the pertinent provision the citation will be S AND S.

4. *In re Cool's Estate*, 19 N. J. Misc. 236, 18 Atl. (2d) 714 (1941); *In re Bashor*, 132 P. (2d) 1027 (Wash. 1943); *Clark v. Mechanics Nat'l Bank*, 282 Fed. 589 (C. C. A. 8th, 1922); *Dietz v. Treupel*, 184 App. Div. 448, 170 N. Y. Supp. 108 (1918); *Steinfeld v. Mass. Bonding & Ins. Co.*, 80 N. H. 39, 112 Atl. 800 (1921); *Kuehn v. Neugebauer*, 216 S. W. 259 (Texas Civ. App. 1919); *but see Ebert v. Poston*, 266 U. S. 548 (1925) confining the 1918 Act to a literal interpretation on the theory that it was so clear and comprehensive as to leave little room for conjecture. *Cf. Tulley v. Super. Ct. in and for Alameda County*, 45 Cal. App. (2d) 24, 113 P. (2d) 477 (1941).

5. The sole exceptions are the provisions for the tolling of periods of limitation (*infra* page 159, for the guarantying of life insurance premiums (*infra* page 167), for the termination of leases (*infra* page 163), and for the rate of interest on obligations during the period of military service (*infra* page 166). The two last provisions, however, will be defeated upon a showing by the obligor that the serviceman's ability to comply with the obligation is not materially affected by his military service.

6. *Davies and Davies v. Patterson*, 137 Ark. 184, 208 S. W. 592 (1919); *Fennel v. Frisch's Adm'r.*, 192 Ky. 535, 234 S. W. 198 (1921); *Gilluly v. Hawkins*, 108 Wash. 79, 192 Pac. 958 (1919); *Kuehn v. Neugebauer*, 216 S. W. 259 (Tex. Civ. App. 1919); *Shaffer v. Shaffer*, 42 N. E. (2d) 176 (Ohio App. 1942).

7. *Riordan v. Zube*, 50 Cal. App. 22, 195 Pac. 65 (1921); S AND S § 101(4), 50 U. S. C. A. App. § 511(4).

8. S AND S § 604, 50 U. S. C. A. App. § 584. The Act is co-terminous with the Selective Training & Service Act, 54 STAT. 897 (1940), 50 U. S. C. A. App. 316.

9. Pub. L. No. 732, 77th Cong. 2d Sess., 56 STAT. 769.

these purposes are achieved; more specifically, how certain problems have been met, to what extent the scope and policy of the 1940 Act have been modified.

## I

“ . . . to extend the relief and benefits . . . to certain persons . . . ”

While the benefits of the 1940 Act were extended primarily to all persons in actual military service,<sup>10</sup> it was also provided that a stay might be granted in favor of “. . . sureties, guarantors, endorsers and others subject to the obligation or liability, the performance or enforcement of which is stayed, postponed or suspended.”<sup>11</sup> Persons in the armed forces of our allies were given the benefits of those sections dealing with taxes and public lands.<sup>12</sup> Dependents of persons in military service were allowed relief in tax,<sup>13</sup> and eviction and distress proceedings.<sup>14</sup> No relief whatsoever was extended to creditors against losses they might incur due to the suspension of their remedies.

The amendatory act makes some important additions to this coverage. The primary right to the benefits of the Act is extended to all selectees and enlisted reservists from the time they are ordered to report,<sup>15</sup> and to all persons serving with the armed forces of our allies.<sup>16</sup> Dependents are accorded relief on their own obligations in certain cases,<sup>17</sup> and landlords are granted relief against mortgages, conditional sales contracts and taxes.<sup>18</sup> The provisions concerning guarantors, sureties and endorsers have been clarified so as to expressly include accommodation makers and bail bond issuers.<sup>19</sup>

The inclusion of selectees and reservists was a result of the decision in *Continental Jewelry Co. v. Minsky*<sup>20</sup> holding that a person accepted for service but not yet called could not obtain relief. Such a ruling appeared harsh, especially where the failure to comply with the obligation was due to the realization by such a person that in a very short time his income would be materially decreased, and that he must presently apportion his resources to take care of his dependents and most equitably to meet the claims of his creditors. This deficiency

10. Certain persons were denied the benefits of the 1918 Act: a deserter, *Op. J. A. G.* 1041, Oct. 9, 1919; the captain of a ship engaged in transporting munitions and soldiers, *Greenwood v. Puget Mill Co.*, 111 Wash. 464, 191 Pac. 393 (1920); a defendant whose soldier co-defendant was granted a stay, *White v. Kimerer*, 83 Okla. 9, 200 Pac. 430 (1921).

11. S AND S (1940) § 103, 50 U. S. C. A. App. § 513.

12. S AND S § 512, 50 U. S. C. A. App. § 572.

13. S AND S § 501, 50 U. S. C. A. App. § 561.

14. S AND S § 300, 50 U. S. C. A. App. § 530.

15. S AND S (1942) § 106, 50 U. S. C. A. App. § 516 (Supp. 1943).

16. S AND S (1942) § 104, 50 U. S. C. A. App. § 514 (Supp. 1943).

17. S AND S (1942) § 306, 50 U. S. C. A. App. § 536 (Supp. 1943).

18. S AND S (1942) § 300(2), 50 U. S. C. A. App. § 530(2) (Supp. 1943).

19. S AND S (1942) § 103, 50 U. S. C. A. App. § 513 (Supp. 1943).

20. 119 Me. 475, 111 Atl. 801 (1920).

having been pointed out Congress acted to remedy it, but in doing so it excluded from the benefits extended to such persons the "further relief"<sup>21</sup> added by the amendatory act. The reason for this is not clear and it would seem to be due to an error of draftsmanship rather than to any consideration of policy.<sup>22</sup> Certainly the time between the receipt of an order to report and actual induction would seem most opportune to apply to the court for a rewriting of his obligations. Upon induction he would then be much better able to concentrate on the military needs of the country. However as the new provisions granting "further relief" appear to have been primarily intended to assist the homecoming soldier in meeting his accrued obligations, it may possibly have been thought that their purpose would not be effectuated by extending their application to persons who are merely "on call".

Under the 1940 Act there was a difference of judicial opinion as to whether accommodation makers on negotiable paper could obtain relief where the principal had entered military service.<sup>23</sup> The amendments have dispelled this conflict by making the Act specifically applicable to "accommodation makers and others, whether primarily or secondarily" liable.<sup>24</sup> This amendment was required by reason of an apparently erroneous interpretation of the 1940 Act. In *In re Itzkowitz*,<sup>25</sup> it had been decided that the court had no power to stay an action against the accommodation maker, the court being of the opinion that he was not a surety or guarantor, since he was primarily liable on the instrument, and construing the section in question<sup>26</sup> as only benefitting those secondarily liable. It was also held that the words "and others", as used in the pertinent section, did not include an accommodation maker, since by the *ejusdem generis* rule of construction they only referred to persons secondarily liable. The opposite conclusion was reached in *Modern Industrial Bank v. Zaentz*<sup>27</sup> on the ground that an accommodation maker stands in the position of a surety regardless of how he is denominated in the instrument, and that in any event he would come within the phrase "and others". The latter decision seems to have been the more correct. A surety or a guarantor is one who becomes liable to pay another's

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21. S AND S (1942) § 700, 50 U. S. C. A. App. § 590 (Supp. 1943).

22. The Section, S AND S (1942) § 106, 50 U. S. C. A. App. § 516 (Supp. 1943), provides that selectees not actually inducted and reservists "shall be entitled to the relief and benefits accorded . . . under articles I, II and III . . .", this including all relief except as to insurance (article IV), taxes and public lands (article V), and "further relief" (article VII). There may be some reason for the exclusion of the provisions governing insurance and taxes and public lands, but the failure to include article VII ("Further Relief") in the enumeration of the section would seem to be due to an oversight.

23. See (1942) 16 ST. JOHN'S L. REV. 276.

24. S AND S (1942) § 108, 50 U. S. C. A. App. § 518 (Supp. 1943).

25. 177 Misc. 269, 30 N. Y. S. (2d) 336 (Sup. Ct. 1941).

26. S AND S § 103, 50 U. S. C. A. App. § 513.

27. 177 Misc. 132, 29 N. Y. S. (2d) 969 (Munic. Ct. 1941).



debt or perform another's duty, irrespective of the form of his undertaking.<sup>28</sup> While some American decisions make a distinction between a surety and a guarantor based on the form of their promise, holding an unconditional promise to be that of a guarantor, the essential note in both relationships is that the debt is, as between them and the principal, the principal's.<sup>29</sup> Since an accommodation maker is one who promises to pay another's debt he is clearly a surety.<sup>30</sup> Surely Congress never meant the grant of relief to depend upon the fact whether the accommodation party placed his signature on the face or on the back of the instrument. The evident purpose was to accord the benefits of the Act to those who became liable upon the instrument solely to assist the person now in military service. Whether the instrument is negotiable or not should be immaterial.<sup>31</sup> While under the Negotiable Instruments Law a maker is primarily liable and an endorser secondarily liable,<sup>32</sup> this distinction would only seem to be of importance in applying the provisions of that Law<sup>33</sup> and Congress never intended the separate provisions of the Negotiable Instruments Law to effect the relief granted in the Act. The court in the *Itzkowitz* case relied upon the heading of the pertinent section of the Act which in the United States Code Annotated reads "Protection of persons secondarily liable".<sup>34</sup> However, the Act as passed by Congress did not contain any section headings;<sup>35</sup> even if the heading had been used, it would not follow that Congress intended the word "secondarily" to carry the technical meaning it has in the Negotiable Instruments Law.

However, the amendatory act fails to remedy an apparent defect in the provisions immediately under consideration. The court in *Modern Industrial Bank v. Zaentz*<sup>36</sup> refused to grant a stay to the accommodation party since no stay had been granted in favor of the person in military service,<sup>37</sup> the court relying upon

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28. See ARANT, SURETYSHIP (1st ed. 1931) § 5; RESTATEMENT, SECURITY (1941) § 82; *Imperial Bank v. London Docks Co.*, [1877] 5 Ch. Div. 195, 200.

29. See 4 WILLISTON, CONTRACTS (Rev. ed. 1936) § 1211.

30. *Southern Nat'l Life Realty Corp. v. People's Bank*, 178 Ky. 80, 198 S. W. 543 (1917).

31. *But see Akron Auto Finance Co. v. Stonebraker*, 66 Ohio App. 507, 35 N. E. (2d) 585 (1941).

32. UNIFORM NEGOTIABLE INSTRUMENTS LAW § 192; N. Y. NEGOTIABLE INSTRUMENTS LAW § 3.

33. *Cellers v. Meachem*, 49 Ore. 186, 89 Pac. 426 (1907); *National Citizens Bank v. Toplitz*, 81 App. Div. 593, 81 N. Y. Supp. 422 (1903); *cf. Southern Nat'l Life Realty Corp. v. People's Bank*, 178 Ky. 80, 198 S. W. 543 (1917); *Manufacturers Trust Co. v. Steinhart*, 265 N. Y. 145, 191 N. E. 867 (1934).

34. 50 U. S. C. A. App. § 513 (Supp. 1942).

35. 54 STAT. 1178 (1940).

36. 177 Misc. 132, 29 N. Y. S. (2d) 969 (1941).

37. Research has not disclosed any other case in which a stay was refused for failure to meet this prerequisite. On the contrary stays were granted in *Akron Auto Finance Co. v. Stonebraker*, 66 Ohio App. 507, 35 N. E. (2d) 585 (1941), *Ilderton v. Charlestown*

the language of the instant section,<sup>38</sup> which states that ". . . such stay . . . may . . . likewise be granted to sureties, . . . and others subject to the obligation or liability, the performance or enforcement of which is stayed, postponed, or suspended".<sup>39</sup> Another section of the Act, dealing with stays generally, permits the granting of a stay of "any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant. . .".<sup>40</sup> The court held that since the person in military service, although named in the action, had not been served, he was not a party defendant<sup>41</sup> and therefore, as the action could not be stayed as to him, it could not be stayed as to his surety. Although such a construction seems to be justified by the language of the Act, it may not represent the apparent desire of Congress to grant a stay to the surety, where the court is of the opinion that the surety is entitled to such relief. It is true that under the Act the court in its discretion may grant a stay on its own motion and shall do so on application to it by the person in military service or some person on his behalf,<sup>42</sup> but even assuming the validity of an application by the surety on the serviceman's behalf, this power of the court presupposes that the person in military service is a party to the action, and, under the *Zaentz* decision, that he is served with a summons, as well as named in the action.<sup>43</sup>

Prior to the amendatory act it had been indicated that the surety on a bail

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Cons'd Ry and Lighting Co., 113 S. C. 91, 101 S. E. 282 (1919), *Dietz v. Treupel*, 184 App. Div. 448, 170 N. Y. Supp. 108 (1918).

38. S AND S (1940) § 103, 50 U. S. C. A. App. § 513.

39. It is interesting to note that while this section on first impression would seem to apply only to contract liabilities, it has been held to apply in non-contractual cases. *Griswold v. Cady*, 27 N. Y. S. (2d) 302 (Sup. Ct. 1941) (in favor of car owner in negligence action); *but see State ex rel. Frank v. Bunge*, 133 P. (2d) 515, 516 (Wash. 1943). *Royster v. Lederle*, 128 F. (2d) 197 (C. C. A. 6th, 1942) (in favor of liability insurer); *contra: Swiderski v. Moodenbaugh*, 44 F. Supp. 687 (D. C., Oregon, 1942), *rehearing* 45 F. Supp. 790 (D. C., Oregon 1942). See also *Ilderton v. Charlestown Cons'd Ry*, 113 S. C. 91, 101 S. E. 282 (1919).

40. S AND S § 201, 50 U. S. C. A. App. § 521.

41. *But see In re Cool's Estate*, 19 N. J. Misc. 236, 18 A. (2d) 714 (1941) holding that persons interested in the decedent's estate are defendants within § 200 governing defaults of appearance by defendants although only served constructively by public notice of "to whom it may concern" type.

42. S AND S § 201, 50 U. S. C. A. App. § 521.

43. *Landis, Soldiers' and Sailors' Civil Relief Act* (1943) 47 DICKINSON L. REV. 129, 134 submits that the right of an indorser or co-maker should be conditioned upon the effect of the military service upon the indorser's or co-maker's ability to pay. While the contention is interesting it does not seem to be subscribed to by the courts. Cases cited *supra* in notes 25, 27, 37 and 39; *but see Refrigeration and Air Cond'g Inst. v. Bohn*, 36 N. Y. S. (2d) 69 (App. Term 1st Dep't 1942) (recovery permitted against guarantor of infant soldier's contract) and *Jamaica Sav. Bk. v. Bryan*, 175 Misc. 978, 25 N. Y. S. (2d) 17 (Sup. Ct. 1941) (dictum that wife of serviceman who acted as his surety is only entitled to a stay if she is not financially able to perform).

bond was not entitled to relief under the Act, it being pointed out that the Act had reference solely to civil proceedings and not to criminal ones.<sup>44</sup> By common law principles the surety would be released where the principal was drafted,<sup>45</sup> but not where he enlisted.<sup>46</sup> To alleviate this hardship on the bail bond issuer it is now provided that such obligation will not be enforced during the period of military service, provided that the inability of the surety to enforce the appearance of the principal is due to the latter's military service. Furthermore, the court may, in its discretion, discharge the surety from his obligation.<sup>47</sup>

By a new section added by the amendments, the benefits of the Act are extended to United States citizens serving in the armed forces of our allies.<sup>48</sup> Prior to the amendatory act such persons were only entitled to relief in connection with public lands and taxes;<sup>49</sup> for this relief they had to be honorably discharged from their foreign service and resume their United States citizenship, or else die in service.<sup>50</sup> Under the amended Act relief is given in all cases save where there is a dishonorable discharge or it appears that the person does not intend to resume his citizenship.<sup>51</sup>

## II

“. . . to include certain additional proceedings and transactions . . .”

The sole mandatory provision of the 1940 Act was that tolling any period limited by law for the bringing of any action by or against a person in military service where the cause of action accrued prior to or during the period of military service. It was provided that “The period of military service shall not be

44. *Briggs v. Commonwealth*, 185 Ky. 340, 214 S. W. 975 (1919).

45. *Robertson v. Patterson*, 7 East. 405, 103 Eng. Repr. R. 157 (1806); *Briggs v. Commonwealth*, 185 Ky. 340, 214 S. W. 975 (1919).

46. *Lamphire v. State*, 73 N. H. 463, 62 Atl. 786 (1906); *State use of Elder v. Rearey*, 13 Md. 230 (1858); *Harrington v. Dennie*, 13 Mass. 92 (1816). Cf. *People v. Cushney*, 44 Barb. 118 (N. Y. 1865) and *Briggs v. Commonwealth*, 185 Ky. 340, 214 S. W. 975 (1919), holding enlistment good defense where principal is prevented by his service from appearing.

47. S AND S (1942) § 103(3), 50 U. S. C. A. App. § 513(3) (Supp. 1943). In *Ex parte Moore*, 12 So. (2d) 77 (Ala. 1943) it was held that for relief of the bail, the serviceman must be prevented from appearing by his military service. It is submitted that this is erroneous as even though the principal refuses to accept a furlough to attend the trial, the bails are nevertheless “prevented from enforcing the appearance of their principal” as they have no power to arrest a person in the armed forces. See N. Y. CODE OF CRIMINAL PROCEDURE § 593.

48. S AND S (1942) § 104, 50 U. S. C. A. App. § 514 (Supp. 1943).

49. S AND S (1940) § 512, 50 U. S. C. A. App. § 572. See, however: *State ex rel. Buck v. McCabe*, 140 Ohio St. 535, 45 N. E. (2d) 763 (1942) holding that on common law principles, the court could, in its discretion, stay an action against a person who had enlisted in the Canadian Army.

50. S AND S (1940) § 512, 50 U. S. C. A. App. § 572.

51. S AND S (1942) § 104, 50 U. S. C. A. App. § 514 (Supp. 1943).

included . . ." in the computation of such period of limitation.<sup>52</sup> While this provision has been liberally construed in favor of the person in military service,<sup>53</sup> in *Ebert v. Poston*<sup>54</sup> the United States Supreme Court decided that the period in which to redeem realty sold at foreclosure proceedings was not tolled, as the right to redeem is a personal privilege and not a period of time limited by law for the bringing of an action.<sup>55</sup> The incongruity of this result with the general policy of the Act did not escape the attention of Congress, and it is now provided that no part of the period of military service occurring after the effective date of the amendatory act (October 6, 1942) shall be included in computing any period limited by law for the redemption of real property sold or forfeited to enforce any obligation, tax or assessment.<sup>56</sup> The evident reason for only excluding that part of the period of redemption subsequent to the enactment of the amendments was to prevent a change of title to property, based on a complete running of the period of redemption before that date, as such a measure would most likely be unconstitutional as constituting a taking of property without due process of law.<sup>57</sup> However, no apparent objection on constitutional grounds would have been present if the amendments had provided that the period of redemption would be extended by the entire period of military

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52. S AND S (1940) § 205, 50 U. S. C. A. App. § 525.

53. *Steinfeld v. Mass. Bonding and Ins. Co.*, 80 N. H. 39, 112 Atl. 800 (1921) (parties themselves limited the time for bringing action); *Kuehn v. Neugebauer*, 216 S. W. 259 (Tex. Civ. App. 1919) (time limited for taking out of mandate to lower court exceeded); *Perkins v. Manning*, 122 P. (2d) 857 (Ariz. 1942) (claim to collect back salary as public official not submitted within due time). Cf. *Halle v. Cavanaugh*, 79 N. H. 418, 111 Atl. 76 (1920) (time limited for bringing a representative action is not tolled), and *Easterling v. Murphy*, 11 S. W. (2d) 329 (Tex. Civ. App. 1928) (successors in interest of servicemen may deduct period of service from time limited for bringing ejectment action).

A literal interpretation of the language quoted in the text and of that added by the 1942 amendment relating to the time in which to redeem foreclosed realty ("nor shall any part of such period"), might lead to the conclusion that when a right accrues during the period of military service the whole of such period is to be deducted from the period of limitation. (See Taintor and Butts, *Soldiers' and Sailors' Civil Relief Act of 1940* (1941) 13 Miss. L. J. 467, 488). At least two courts have used language which, although unnecessary to the decision, lends support to this view. *Kossel v. First Nat'l Bank*, 55 N. D. 445, 214 N. W. 249 (1927); *Green v. Bankers' Life Ins. Co.*, 112 Kans. 50, 209 Pac. 670 (1922). However, it would seem Congress never could have intended such an effect; full justice would only seem to require that that part of the service elapsing after the right accrues be excluded from the time limited.

54. 266 U. S. 548 (1925).

55. See *Bell v. Buffinton*, 244 Mass. 294, 137 N. E. 287 (1923) to the same effect where foreclosure by entry and possession was concerned, and also *Wood v. Vogel*, 204 Ala. 692, 87 So. 174 (1920).

56. S AND S (1942) § 205, 50 U. S. C. A. App. § 525 (Supp. 1943).

57. *Campbell v. Holt*, 115 U. S. 620, 623 (1885); *Stewart v. Keyes*, 295 U. S. 403, 417 (1935); see Note (1922) 16 A. L. R. 1346 *et seq.*

service so long as the period of redemption had not expired on the effective date of the amendments; this would not have entailed the divesting of any title obtained by a termination of the period of redemption and would have had the added advantage that the treatment of the right of redemption of all persons in military service would be the same.

A further important change in those provisions for the tolling of periods of limitation was suggested by a ruling of the Bureau of Internal Revenue that the provisions in the 1940 Act had no application to claims for tax refunds and credits.<sup>58</sup> It is now provided that "The period of military service shall not be included in computing any period . . . limited by any law, *regulation or order* for the bringing of any action or *proceeding in any court, board, bureau, commission, department, or other agency of government*. . ."<sup>59</sup> However, it is interesting to note that by a more recent amendment to the Act<sup>60</sup> it is provided that this section shall have no application to proceedings before the Bureau of Internal Revenue. Possibly, Congress determined that the above provision was too inelastic as applied to internal revenue matters and decided to vest in the Bureau the power to regulate the tolling of periods of limitation in this field.

The most important changes made by the amendments relate to the rent,<sup>61</sup> conditional sale<sup>62</sup> and mortgage provisions<sup>63</sup> of the 1940 Act. Under that Act no relief was afforded as to mortgages or instalment contracts entered into after the date of its enactment (October 17, 1940).<sup>64</sup> The reason for this was the fear that credit to persons of military age would be frozen if they would be able to obtain stays once they entered service.<sup>65</sup> It is probable that such fear was exaggerated.<sup>66</sup> In any event the extension of the application of the Act to mortgages and instalment contracts entered into at any time up to induction into military service was one of the prime reasons for the amendments.<sup>67</sup> Persons who prior to Pearl Harbor had no idea that they would be selected for service,

58. I. R. 1289, C. B. June 1922, p. 311. *Hearings before Committee on Military Affairs on H. R. 7029*, 77th Cong., 2d Sess. (1942) at 13, 28.

59. S AND S (1942) § 205, 50 U. S. C. A. App. 525 (Supp. 1943) (italicized matter added by amendatory act).

60. S AND S (1942) § 207, 50 U. S. C. A. App. § 527 (Supp. 1943), added by REVENUE ACT OF 1942, 56 STAT. 964, 26 U. S. C. A. § 507 (1942).

61. S AND S (1940) § 300, 50 U. S. C. A. App. § 530.

62. S AND S (1940) § 301, 50 U. S. C. A. App. § 531.

63. S AND S (1940) § 302, 50 U. S. C. A. App. § 532. S AND S (1940) § 303, 50 U. S. C. A. App. § 553, dealing with repossession of motor vehicles has been replaced by new § 303 (*infra* page 168).

64. S AND S (1940) §§ 301(1), 302(1), 50 U. S. C. A. App. §§ 531(1), 532(1).

65. See remarks of Senator Gurney, Cong. Rec. p. 19, 364, Sept. 30, 1940.

66. Bendetson, *A Discussion of the Soldiers' and Sailors' Civil Relief Act of 1940* (1940) 2 WASH & LEE L. REV. 1.

67. *Report of Committee on Military Affairs on Amendments Oct. 6, 1942*, House Report No. 2198, 77th Cong., 2d Sess. (1942).

or who had already been discharged or placed in the Enlisted Reserve Corps suddenly found themselves subject to military service, and the obligations which they had incurred since October 17, 1940, were without the protection of the Act.

The 1940 Act provided that no person who had received a deposit or instalment prior to October 17, 1940 under a conditional sale contract, or under a bailment or lease containing an option to purchase, entered into prior to this enactment could rescind or terminate such contract or resume possession of the property for nonpayment of any instalment falling due during the period of military service, except pursuant to court action.<sup>68</sup> Thus where the following four conditions were present, the conditional vendor could not rescind the contract or resume possession: (1) The contract or lease was entered into prior to October 17th, 1940, the effective date of the Act; (2) A deposit or instalment of the purchase price had been paid prior to October 17, 1940; (3) Repossession was sought because of the non-payment of an instalment; and (4) Such non-payment occurred during the period of military service. The amendatory act does away with all of these conditions save the second. Repossession now may be sought for the breach of *any* of the terms of the contract, whether the breach occurred prior to or during the period of military service, provided a deposit or instalment was paid prior to military service. To prevent any attempt to circumvent the Act by disguising payments made under an instalment purchase as rent under a lease or bailment, the Act was further amended to prevent rescission or repossession where there had been paid ". . . a deposit or instalment under the contract, lease or bailment . . ."<sup>69</sup>

The scope of the mortgage provisions of the 1940 Act<sup>70</sup> has been similarly extended. It had been provided that a sale under a power of sale or a warrant to confess judgment contained in an obligation secured by mortgage, trust deed, or other security in the nature of a mortgage, could be had without court approval, and that all proceedings to enforce such obligations might be stayed.<sup>71</sup> Four conditions governed the applicability of these provisions: (1) The obligation must have originated prior to October 17, 1940; (2) The property covered by the obligation must have been owned<sup>72</sup> by the person in military service

68. S AND S (1940) § 301(1), 50 U. S. C. A. App. § 531(1).

69. S AND S (1942) § 301(1), 50 U. S. C. A. App. § 531(1) (Supp. 1943). See remarks of Major Partlow in *Hearings, supra* note 58, at 11.

The proviso in S AND S (1940) § 301(1), 50 U. S. C. A. App. § 531(1), permitting rescission, modification or termination of such contracts by mutual agreement has been transferred to article II providing for "General Relief". See *infra* page 169.

70. S AND S (1940) § 302, 50 U. S. C. A. § 532.

71. *Ibid.* In *Stability Bldg. and Loan Ass'n v. Liebowitz*, 132 N. J. Eq. 477, 28 A. (2d) 653 (1943) it was held no foreclosure is valid unless made pursuant to a court order granted previous to commencement of military service. It is submitted that this is patently erroneous, and that the court order may be obtained at any time prior to the actual foreclosure sale.

72. An equitable interest is apparently sufficient, even though not sufficient to take the case out of the statute of frauds. See *Twitchell v. H. O. L. C.* 122 P. (2d), 210 (Ariz. 1942);

prior to his entrance therein; (3) It must still have been so owned by him at the time of the proceeding or attempted foreclosure; and (4) The foreclosure must be sought "under a power of sale or under a judgment entered upon warrant of attorney to confess judgment". By the 1942 amendments the date mentioned in the first condition was changed to the commencement of military service.<sup>73</sup> The fourth condition was amended for the purpose of including within the Act foreclosures by entry and possession.<sup>74</sup> While it has been suggested that where a state permits foreclosure by summary process, a person in military service need only apply to the court for a stay, or for such other relief as may be deemed equitable by the court,<sup>75</sup> in a New Jersey case<sup>76</sup> where the mortgagee upon default exercised his right to demand possession, and being refused brought an action in ejectment, it was held that the suit was merely for the possession of the property and not to enforce an obligation arising from the mortgage and that, therefore, no relief could be had. While the soundness of this decision is questionable, the matter has been laid at rest by the amendments. It is now provided that no ". . . sale, foreclosure, or *seizure* of property . . ." may be had, save upon an order previously granted by the court.<sup>77</sup> As a corollary it would surely appear that the defense of military service could successfully be interposed in an action for ejectment brought by the mortgagee to enforce his right of possession.

Whereas the 1940 Act was limited to the suspension of remedies, certain provisions of the amendatory act operate to afford relief upon the obligations themselves.<sup>78</sup> Thus, the provision of probably the greatest general interest in the amendatory act is that permitting the termination of leases by lessees called into military service.<sup>79</sup> It is now provided that a person entering military service may terminate his lease by written notice delivered to the lessor at any time following the date of his entrance into military service, such notice to take effect 30 days after the next rent day.<sup>80</sup> The provision applies to all

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Hoffman v. Charlestown Five Cents Savings Bank, 231 Mass. 324, 121 N. E. 15 (1918); Morse v. Stober, 233 Mass. 223, 123 N. E. 780 (1919); John Hancock Mut. Life Ins. Co. v. Lester, 234 Mass. 559, 125 N. E. 594 (1920).

73. S AND S (1942) § 302(1), 50 U. S. C. A. App. § 532(1) (Supp. 1943).

74. S AND S (1942) § 302(3), 50 U. S. C. A. App. § 532(3) (Supp. 1943). For cases holding that such foreclosures were not within the 1940 Act *see*: Bell v. Buffinton, 244 Mass. 294, 137 N. E. 287 (1923); Ebert v. Poston, 266 U. S. 548 (1925). Any such foreclosures made prior to the amendments are not affected thereby. S AND S (1942) § 302(3), 50 U. S. C. A. App. § 532(3) (Supp. 1943).

75. Bendetson, *supra* note 66, at 32. One real obstacle to the granting of such a stay under the 1940 Act is that neither it nor the amendatory act provides for a stay upon application, where the petitioner is not a party to a pending action.

76. Union Labor Life Ins. Co. v. Wendeborn, 19 N. J. Misc. 496, 21 A. (2d) 317 (1941).

77. S AND S (1942) § 302(3), 50 U. S. C. A. App. § 532(3) (Supp. 1943). (Italics added.)

78. *Hearings, supra* note 58, at 8.

79. S AND S (1942) § 304, 50 U. S. C. A. App. § 534 (Supp. 1943).

80. S AND S (1942) § 304(2), 50 U. S. C. A. App. § 534(2) (Supp. 1943).

leases on premises occupied prior to the entrance into service for dwelling, professional, business, agricultural, or similar purposes.<sup>81</sup> However, this right of termination is not absolute, it being provided that upon application of the lessor such right may be restricted or modified as equity may, in the circumstances, require.<sup>82</sup> In the original form sponsored by the War Department it was proposed to confer an absolute right of termination, on the theory that the person in military service was no longer able to enjoy the use of the property rented.<sup>83</sup> During the hearing on the bill it was objected that making such right of termination absolute ran counter to the underlying policy of the Act of giving relief only where inability to meet the obligation is substantially due to the obligor's presence in the armed forces. It was thought that such right of termination should not be extended to a case where there was no material reduction in the financial ability to pay the rent.<sup>84</sup>

The sole provision in the 1940 Act as to leases was that no eviction or distress should be had during the period of military service in respect to dwellings occupied by dependents, the rent for which did not exceed \$80 a month, save upon leave of court.<sup>85</sup> On application for such leave the court was empowered to ". . . stay the proceedings for not longer than three months . . . or it may make

81. S AND S (1942) § 304(1), 50 U. S. C. A. App. § 534(1) (Supp. 1943).

82. S AND S (1942) § 304(2), 50 U. S. C. A. App. § 534(2) (Supp. 1943). Skilton, *The Soldiers' and Sailors' Civil Relief Act of 1940 and the Amendments of 1942* (1942) 91 U. OF PA. L. REV. 177, 186 suggests that this proviso is so broad as to make the right virtually meaningless and throw the whole question back again on the common law principles of impossibility of performance. This, it is submitted, is not entirely so. Under the Act the court may consider equitable principles and not merely the legal doctrine of impossibility of performance or frustration of purpose, under which the ability of the obligor to pay is unimportant. See *infra* note 83.

83. *Hearings, supra* note 58, at 25. Under this theory of frustration of purpose two New York courts have held that drafting into the armed forces terminates the obligation to pay rent. *Jefferson Estates, Inc., v. Wilson*, 35 N. Y. S. (2d) 582 (Munic. Ct. 1942), noted in (1942) 91 U. OF PA. L. REV. 267; *State Realty Co. v. Greenfield*, 110 Misc. 270, 181 N. Y. Supp. 511 (Munic. Ct. 1920). *Cf.* (1942) 11 FORDHAM L. REV. 317. However, it would seem that this relief would not be available to a person who voluntarily enlisted, or where the lease was made after the enactment of the Selective Training and Service Act, 55 STAT. 885 (1940), 50 U. S. C. A. App. §§ 301-318. Thus in the *Jefferson Estates* case the court emphasized that defendant entered into the lease before the war could reasonably have been anticipated, and that non-performance was due to a governmental act, *i.e.* drafting. The same facts were present in the *State Realty* case. The vast expansion of the common law right introduced by this amendment to the 1940 Act is therefore evident.

84. *Hearings, supra* note 58 at 26.

85. S AND S § 300(1), 50 U. S. C. A. App. § 530(1). A person without dependents was given no relief on leases under the 1940 Act except where his landlord sued for the rent and he was able to show that his military service had materially affected his capacity to pay. In such case he was entitled to a stay of execution. S AND S § 203, 50 U. S. C. A. App. § 523.



such other order as may be just."<sup>86</sup> The interesting question remains, since this provision is still in the Act,<sup>87</sup> whether the quoted language gives the court the power to grant a stay for more than three months. In *Gilluly v. Hawkins*,<sup>88</sup> the Washington court held this was permissible; the California court, in *Riordan v. Zube*,<sup>89</sup> came to the opposite conclusion. This divergence of judicial opinion came in for rather extended discussion during the hearing on the proposed amendments,<sup>90</sup> but unfortunately the language of the Act was not clarified. However, the amendments add a provision giving the court power to relieve the landlord from mortgage, conditional sale and tax claims against himself where an eviction or distress order has been refused him.<sup>91</sup> The comment has been made that this new provision might show an intent to grant stays of eviction for periods of more than three months.<sup>92</sup> The more natural conclusion, and the one that seems to fit in better with the tenor of the committee discussion, is that Congress shied away from committing itself and left the problem with the courts.

One great criticism of the 1940 Act was that it did not provide any relief for dependents of persons called into military service.<sup>93</sup> Some harsh decisions resulted from this omission. Thus in *Great Barrington Savings Bank v. Brown*<sup>94</sup> it was held that a stay of foreclosure could not be granted where the defendant was not a person in military service, even though she was a widow entirely dependent for her support upon her soldier sons who had provided the money for the previous mortgage payments. The amended Act provides that dependents who have themselves made mortgages, conditional sales contracts, or leases or have assigned life insurance policies as collateral will be entitled to the same relief, upon application to the court, as granted to persons in service, if their ability to meet the terms of the obligation has been materially impaired by reason of the service of the person upon whom they are dependent.<sup>95</sup>

86. S AND S § 300(2), 50 U. S. C. A. App. § 530(2).

87. S AND S (1942) § 300, 50 U. S. C. A. App. § 530 (Supp. 1943).

88. 108 Wash. 79, 182 Pac. 958 (1919). See also *Jonda Realty Corp. v. Marabotta*, 34 N. Y. S. (2d) 301 (Munic. Ct. 1942) where it was held that payment of rent for the month following the termination of the three months' stay defeats the landlord's right to recovery of the premises.

89. 50 Cal. App. 22, 195 Pac. 65 (1921).

90. *Hearings, supra* note 58, at 15.

91. S AND S (1942) § 300(2), 50 U. S. C. A. App. § 530(2) (Supp. 1943).

92. *Skilton, supra* note 82 at 184. That this is so might follow from the words of Major Partlow (*Hearings, supra* note 58, at 14) to the effect that while a stay for an excessive period would work a severe hardship on the landlord, the new provision allows him to seek relief from the court for the period of time he is not getting his rent.

93. Of course some monetary relief is granted by the SERVICEMEN'S DEPENDENTS ALLOWANCE ACT OF 1942, 56 STAT. 381, 37 U. S. C. A. §§ 201-220 (1942), providing for allowances to dependents of persons in military service to assist them in meeting their living expenses.

94. 239 Mass. 546, 132 N. E. 398 (1921).

95. S AND S (1942) § 306, 50 U. S. C. A. App. § 536 (Supp. 1943).

It has been suggested that there is this minor conflict between this provision and the provision providing for the termination of leases:<sup>96</sup> the latter section, which by its terms only applies to those in military service, permits cancellation by notice,<sup>97</sup> whereas the provision under consideration requires the dependent to apply to the court for relief.<sup>98</sup> Since the provision as to automatic termination by notice does not include dependents, must the dependent before giving notice of cancellation apply to the court? Or is it intended that the court order replace the notice?

### III

“. . . to provide further relief for persons in military service . . .”

A major deficiency which appears to have been inherent in the 1940 Act was the fact that the relief afforded by the Act would not become available to the person in military service until his obligee took some steps to enforce the obligation. Thus in *Application of Roossin*<sup>99</sup> the court refused to act where the petitioner in military service sought suspension of payment on certain notes before suit was instituted. It is easy to see that the mere existence of an obligation, the enforcement of which may be sought while he is abroad or otherwise unable to apply for relief, may be the source of anxiety for the thoughtful obligor. Congress has apparently recognized this in enacting article VII entitled “Further Relief”. In general this enactment permits the person in military service to initiate proceedings for the revision of his obligations and the court is empowered to extend the obligation upon payment of certain instalments. The “further relief” provided for by this article may also be applied for during a period of six months after the discharge of the person from military service.<sup>100</sup> This meets a major criticism of the 1940 Act, under which

96. Fribourg, *When Dependent Signs Lease*, 110 N. Y. SUN, Nov. 20, 1942, p. 43, col. 1. Mr. Fribourg also points out that while in New York City the Municipal Court would seem the tribunal best suited to handle landlord and tenant problems, it could not consider a petition to cancel a lease made by a dependent since it has not equitable jurisdiction. It is true that the Act does not change the jurisdiction of any state court. S AND S § 101, 104; *Riordan v. Zub*, 50 Cal. App. 22, 195 Pac. (1921). See Landis, *supra* note 43 at 131, arguing that the wide power given the courts by the Act should not be vested in the minor judiciary.

97. S AND S (1942) § 304(2), 50 U. S. C. A. App. § 534(2) (Supp. 1943).

98. S AND S (1942) § 306, 50 U. S. C. A. App. § 536 (Supp. 1943).

99. 30 N. Y. S. (2d) 9 (1941), *aff'd* 262 App. Div. 1038, 30 N. Y. S. (2d) 1013 (2d Dep't 1941).

100. It is to be noted that although the maximum period for a stay is three months after discharge, S AND S § 204, 50 U. S. C. A. App. § 524, yet since the soldier can petition for “further relief” within six months after discharge, the effective period has been increased to six months after discharge. Skilton, *supra* note 82, at 192, n. 53 attributes this discrepancy to an error in draftsmanship. Thus if the creditor brings his action prior to six months after the debtor's discharge from service, the latter can always ask for a rewriting of the obligation. If the creditor hopes to avoid this, he will have to bring his action subsequent to this six months period.

a relatively short period of time was allowed to the person after discharge from military service in which to make good on the obligations which had been stayed, for example, one year in which to pay insurance premiums,<sup>101</sup> six months on taxes and assessments,<sup>102</sup> and three months in which to repay all other obligations the enforcement of which had been stayed.<sup>103</sup> While such periods of time might possibly have sufficed when only a one-year period of selective training was contemplated they afforded little relief when the term of service was extended "for the duration". The fact that the soldier might have looked forward, upon his victorious homecoming, to a frantic struggle to pay off, within such a short period of time, obligations accruing over a long period of service, could in no sense be considered helpful to his morale or conducive to his maximum efforts to successfully terminate the war as rapidly as possible. Accordingly, it is now provided that obligations incurred before service may be paid off after discharge from service in instalments over a period equal to the full period of service, plus the remaining life of the obligation.<sup>104</sup>

## IV

*"... to change certain insurance provisions ..."*

The insurance provisions of the 1940 Act have been practically rewritten.<sup>105</sup> Under the amended Act the government, upon application,<sup>106</sup> will guarantee<sup>107</sup> until two years after service<sup>108</sup> payment of premiums on up to ten thousand dollars face value of life insurance,<sup>109</sup> provided that the policy is on a premium paying basis,<sup>110</sup> that a premium was paid prior to October 6, 1942 or thirty days before entrance into service, and that the policy does not contain a war risk clause.<sup>111</sup> The former requirements that not more than one year's premiums could be due and owing<sup>112</sup> and that there could not be an outstanding policy loan for 50% or more of the cash surrender value<sup>113</sup> have been re-

101. S AND S (1940) § 405, 50 U. S. C. A. App. §545.

102. S AND S § 500(3), 50 U. S. C. A. App. § 560(3).

103. S AND S § 204, 50 U. S. C. A. App. § 524. The only one of these time limits to have been changed is that governing insurance. Two years are now permitted to repay premiums. S AND S (1942) § 403, 50 U. S. C. A. App. § 543 (Supp. 1943).

104. S AND S (1942) § 700, 50 U. S. C. A. App. § 590 (Supp. 1943).

105. S AND S (1940) art. IV, 50 U. S. C. A. App. §§ 540-548. Note should also be taken of the NATIONAL SERVICE LIFE INSURANCE ACT OF 1940, 54 STAT. 1008, 38 U. S. C. A. § 801-818, providing life insurance for persons in military service at very low rates.

106. S AND S (1942) § 401, 402, 50 U. S. C. A. App. §§ 541, 542 (Supp. 1943).

107. S AND S (1942) § 406, 50 U. S. C. A. App. § 546 (Supp. 1943).

108. S AND S (1942) § 403, 50 U. S. C. A. App. § 543 (Supp. 1943).

109. S AND S (1942) § 401, 50 U. S. C. A. App. § 541 (Supp. 1943).

110. S AND S (1942) § 400, 50 U. S. C. A. App. § 540 (Supp. 1943).

111. S AND S (1942) § 400, 50 U. S. C. A. App. § 540 (Supp. 1943).

112. S AND S (1940) § 402, 50 U. S. C. A. App. § 542.

113. S AND S (1940) § 402, 50 U. S. C. A. App. § 542.

moved. However, premiums paid by the Government become a personal claim against the insured to the extent that they exceed the cash surrender value, if any, of the policy.<sup>114</sup>

## V

“. . . and for other purposes.”

Mention should be made of other provisions of the amendatory act. Persons in military service are now protected against the forfeiture of a life insurance policy on their own life which has been assigned as collateral prior to entry into military service for one year after discharge from service, provided that no premiums are due.<sup>115</sup> Before the assignee exercises any right by virtue of the assignment he must obtain court approval.<sup>116</sup> This provision was added because of the widespread custom of lending on life insurance policies, which could then be cashed in without court action to the detriment of the dependent beneficiaries.<sup>117</sup>

The foreclosure or enforcement of storage liens on household goods or personal effects of a person in military service is now forbidden until three months after discharge from service, unless court approval has been obtained.<sup>118</sup> This provision was inserted to make certain that these liens could not be foreclosed in states permitting summary foreclosure of storage liens in which it might be held that storage liens were not included in the mortgage provisions of the Act.<sup>119</sup> It is to be noted that for relief under this provision it is immaterial when the goods are warehoused, while for relief under the mortgage provisions,<sup>120</sup> the obligation must be incurred prior to entrance into military service. There appears to be a sound basis for this distinction, since in most instances the household effects of a person inducted into service will only be stored after his induction.

An amendment designed principally for the relief of the creditor as well as for the benefit of the person in military service provides that in an action brought to foreclose a mortgage upon or resume possession of personal property, or to rescind or terminate a contract for the purchase thereof, the court may appoint three appraisers and order, as a condition for the relief requested, the repayment to the debtor of an equitable amount.<sup>121</sup> The cases of *Associates*

114. S AND S (1942) § 406, 50 U. S. C. A. App. § 546.

115. S AND S (1942) § 305(1), 50 U. S. C. A. App. § 535(1) (Supp. 1943).

116. *Ibid.*

117. *Hearings, supra* note 58, at 23.

118. S AND S (1942) § 305(2), 50 U. S. C. A. App. § 535(2) (Supp. 1943).

119. *Hearings, supra* note 58, at 23.

120. S AND S (1942) § 302(1), 50 U. S. C. A. App. § 532(1) (Supp. 1943). “The provisions of this section shall apply only to obligations secured by mortgage, trust deed, or other security in the nature of a mortgage . . . which obligations originated prior to . . . [the] period of military service.”

121. S AND S (1942) § 303, 50 U. S. C. A. App. § 533 (Supp. 1943).

*Discount Corporation v. Armstrong*,<sup>122</sup> in which the courts required as a condition to repossession of an automobile the payment of the difference between the present value and the balance due on the conditional sales contract, and of *Cortland Savings Bank v. Ivory*,<sup>123</sup> where a stay of foreclosure of a real estate mortgage was conditioned on the payment of monthly amounts sufficient to cover interest and taxes, indicate that the courts had this power under the 1940 Act. The express approval of this method of preserving the equities of debtor and creditor found in the new provision will, however, undoubtedly serve as a guide to the courts in the exercise of their equitable jurisdiction. The evident reason for not including realty in this new section is that realty has a relatively stable value as compared with the comparatively rapid deterioration of chattels.<sup>124</sup>

Another new section<sup>125</sup> limits the rate of interest on all obligations<sup>126</sup> incurred by a person in military service to six per centum per annum during the period of military service occurring after the effective date of the amendatory act, unless the obligee can show that the ability of the obligor to pay a higher rate of interest has not been materially affected by his military service.<sup>127</sup> The reason for this new provision lies in the desire to protect huge accumulations of interest on small loans, which in some states carry 3½% interest per month.<sup>128</sup>

Under the amendatory act a person after entrance into military service may waive, in writing, the benefits of the Act relating to the modification of any contract or to the repossession, retention, foreclosure, sale, forfeiture, or taking possession of property serving as collateral or purchased or received under any contract.<sup>129</sup> It should be noted that the purpose of this new protection was not

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122. 33 N. Y. S. (2d) 36 (City Ct. Rochester 1942).

123. 27 N. Y. S. (2d) 313 (Sup. Ct., Queens Co. 1941).

124. Thus in *Associates Discount Corp. v. Armstrong*, 33 N. Y. S. (2d) 36 (1942), the court emphasized that the car was incurring increasing storage expenses and was depreciating in value. See also *The Sylph*, 42 F. Supp. 354 (E. D. N. Y. 1941) where, in refusing to stay a foreclosure of a chattel mortgage, provided it was not attempted to hold defendant personally, the court stressed that a stay would permit depreciation and risk a low market in the future, and *Brooklyn Trust Co. v. Papas*, 33 N. Y. S. (2d) 57 (Sup. Ct. 1941) where it was said that a serviceman will not be allowed to keep property which will become worn out.

125. S AND S (1942) § 206, 50 U. S. C. A. App. § 526 (Supp. 1943).

126. It had been contemplated to limit the interest rate only on obligations the enforcement of which was stayed. All obligations were finally included so as to catch those cases where no action would be brought by the creditor until the termination of military service. See *Hearings, supra* note 58, at 13.

127. The original proposal limited interest to 6% without regard to ability to pay. See *Hearings, supra* note 58, at 13.

128. *Hearings, supra* note 58, at 13.

129. S AND S (1942) § 107, 50 U. S. C. A. App. § 517 (Supp. 1943). See *supra* note 69.

to cut down on the common law right to adjust obligations but rather to induce the parties to settle their differences between themselves, notwithstanding the penalty provisions of the Act.<sup>130</sup> However, it would appear that a waiver not conforming to the requirements set forth above would be held invalid. By a similar provision it is now provided that a "surety, guarantor, endorser, accommodation maker, or other person" liable upon an obligation may waive the benefit of a stay by an instrument executed separately from the obligation.<sup>131</sup>

The tax provisions of the 1940 Act have been amended so that compensation for military service shall not be taxable as income from services rendered within a state to which the serviceman has been taken solely due to his military service.<sup>132</sup> Furthermore the general tax provisions have been extended to personal property taxes in addition to taxes on realty occupied for dwelling, professional, business or agricultural purposes.<sup>133</sup>

### FOOTNOTE TO AN INVESTIGATION

FRANCIS H. HORAN†

There are three pages in "Administrative Adjudication in the State of New York"<sup>1</sup> (pp. 2-5), devoted to methods of study employed, which could have been greatly expanded. These notes attempt such an expansion and may be regarded as a footnote to Commissioner Robert M. Benjamin's report.<sup>2</sup>

On March 3, 1939, Mr. Benjamin was appointed a Moreland Act Commissioner "to study, examine and investigate the exercise of quasi-judicial functions by any board, commission or department of the State". Governor Lehman made no suggestion as to his own views of the problem beyond those publicly expressed in his annual message to the Legislature in January 1939. Methods were left to the Commissioner. The Governor did make one considerate suggestion: Because allegedly scandalous situations usually give rise to the appointment of a Moreland Act Commissioner, and because this in contrast was to be an objective study of methods and not a search for unfaithfulness nor a weigh-

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130. *Hearings, supra* note 58, at 18.

131. S AND S (1942) § 103(4), 50 U. S. C. A. App. § 513(4) (Supp. 1943).

132. S AND S (1942) § 514, 50 U. S. C. A. App. § 574 (Supp. 1943). Note should be taken of S AND S (1942) § 513, 50 U. S. C. A. App. § 573 (Supp. 1943) providing for deferment of the collection of income tax until six months after discharge, where disability to pay has been brought about by military service.

133. S AND S (1942) § 500(1), 50 U. S. C. A. App. § 560(1) (Supp. 1943).

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† Counsel to the Benjamin Commission.

1. Report to Governor Herbert H. Lehman by Robert M. Benjamin, as Commissioner under Section 8 of the Executive Law, March, 1942.

2. There may be help here for those in other states who may later face the same problem. But for the war there would now be several similar investigations going on.

ing of substantive results, the Governor suggested that Mr. Benjamin not style himself in our general work as "Moreland Commissioner". Accordingly the colorless title "Commissioner under Section 8 of the Executive Law" was used. This little exercise in semantics probably kept the newspapers from playing up a sober study into a five-alarm investigation. Actually the newspapers at no time took much interest in what we were doing. They gave some prominence to the initiation of the study but when the report was made they gave it very little attention. This was in contrast to the continuously interested attitude of the legal press, the State Bar Association publications, etc.

When we began, no study of quasi-judicial procedures of the scope contemplated had taken place in the English-speaking world. Almost contemporaneously (February 24, 1939) the Attorney General's Committee on Administrative Procedure had been constituted. The Report of the Lord Chancellor's Committee on Ministers' Powers<sup>3</sup> had been based only upon oral testimony by civil servants and others and upon long memoranda filed by the departments. Mr. Benjamin proposed to go into the agencies, down to the lowest operating levels, to see what in fact occurred at all stages of quasi-judicial determination. The investigatory problem was new. No method having been invented by others, he had to contrive his own.

Mr. Benjamin was told by the Governor that he would like to have the report in December 1939. One of the first things Mr. Benjamin decided was that this deadline could not be met, and his opinion was confirmed by eminent persons consulted.<sup>4</sup> Being so advised, the Governor extended the deadline to December 1940. It was actually three years after his appointment that Mr. Benjamin submitted his report.

The shortness of the study as first contemplated did not enable us to make attractive offers of employment as associate counsel. Because they would have to deal with high-ranking officials we concluded that the staff should be of mature years. We interviewed more than sixty applicants and from them selected a first-class staff of seven men, all lawyers in their low thirties. Primary responsibility for two or three departments was allocated to each associate. For convenience the office of the Commission was set up at 15 William Street, New York City.

The new Commissioner wrote to the head of each of the twenty-odd state agencies a letter inviting them to prepare and forward a description of all the quasi-judicial procedures conducted by the agency concerned. A definition of "quasi-judicial" was purposely not supplied. The administrators were told that no limiting definition was attempted in the letter because it was felt that the broadest possible description of their decision-making, great and trivial, would enable us to select what might fall within the scope of our study. The

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3. Cmd. 4060 (1932).

4. Mr. Justice Frankfurter said that he would not be bothered reading the report if it were prepared in ten months.

agency head was requested to appoint someone from the agency to be liaison officer between it and the Commission. In response the administrators sent reports of varying completeness. One large agency did not fulfil the request because it believed that such a report could not, as a practical matter, be satisfactorily prepared.

The Commissioner and his counsel soon paid a visit to the head of each agency to become acquainted and to explain what our policies and methods were to be. In these interviews we discovered the greatest willingness to cooperate. We met very little of the stuffy "arbitrariness" so often condemned by critics of the administrative process. In only one instance was any resistance encountered, this because the head of the agency apparently felt that we could obtain all the information needed by asking him alone. I will return to this later.

Meanwhile each member of the staff read the more significant legal literature in the field, and examined the statutes as to the agencies assigned to him, and departmental rules, regulations, annual and other reports. One member of the staff was assigned the primary task of studying questions of law relating to the scope and procedure of judicial review and the constitutional and legal requirements governing administrative procedure. The Commissioner himself undertook to prepare a check list for us by the staff which would serve to test the procedures upon which we were to work. The preparation of this check list proved to be a hard job; it ultimately ran to about sixty typewritten pages. This check list has never been published.

Having secured the interest and cooperation of the agencies, we next sought to become acquainted with those holding all points of view about the administrative process. The Commissioner and his counsel set out on travels around the state to meet those, predominantly lawyers, who had facts or opinion to tell us, particularly facts. In discussion centering around the proposed constitutional amendment in 1938 broadening judicial review of administrative decisions to include findings of fact,<sup>5</sup> there had been strong language used. Yet when we foregathered with those regarded as strong partisans we discovered great reasonableness, patience and willingness to assist us to reach reasoned conclusions. One well known critic of "bureaucracy" told us he didn't know why he had talked so much because he didn't think he really knew much about administrative law. Many of the judges, experienced in judicial review of administrative decisions, gave invaluable help and counsel. So too did many famous experts in the fields of political science and administrative law. Our task invited their interest and they gave freely of their learning. Commissioner Benjamin was invited to speak to a good many bar association and other groups, and almost always took the opportunity to do so. Stays of sufficient length

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5. The proposed amendment was defeated at the polls on the recommendation of the candidates of both major political parties. The general interest in the problem, however, induced Governor Lehman to start the Benjamin investigation.



were made in most localities so that it may confidently be said that, outside of New York City, we came in contact with almost every lawyer seriously interested in the problem. Many of them became as zealous for the success of the job as we were ourselves. Within New York City, where we were doing our work, we found the same interest and help easy to develop by other methods. There was never a hint of political partisanship on the part of any of the many who consulted with us. The loyal political opposition gave Governor Lehman's appointees as warm a welcome and as great a degree of trust and co-operation as they could have members of their own political faith.

A large and valuable correspondence was developed, reaching all over the state and into every field. At every opportunity we solicited correspondence. We sought to learn not only what procedures were regarded as improvable, but also those that were giving satisfaction.

The bar association committees on administrative law gave much help, particularly the committee of the New York State Bar Association. In their communities committee members were our guides, sponsors and friends.

These peregrinations had the wholesome effect, I am sure, of convincing everyone that we were after the facts and were not out either to badger the administrators or to whitewash them. When the report appeared it got a truly generous reception,<sup>6</sup> no doubt in part due to the general feeling among the informed throughout the state that they had had a part in its preparation.

Soon after we began work Mr. Charles S. Ascher, Executive Secretary of the Committee on Public Administration of the Social Science Research Council, arranged a two-day meeting in Washington for the Attorney General's Committee on Administrative Procedure, and to this Commissioner Benjamin and his counsel were invited. The Attorney General's committee and others present included most of the "authorities" on administrative law. Hour after hour for two hot Washington days about fifteen of us sat in a circle in a large room in the Hay-Adams House under the stimulating chairmanship of Mr. John Dickinson, author of "Administrative Justice and the Supremacy of Law in the United States" (1927), the foundation book for any study of American administrative law. It so happened that by the time these meetings had occurred we had done a little bit of work in New York State and the members of the Attorney General's Committee were intensely curious about our methods because they hadn't begun and they had methods to contrive, too.

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6. The following is a partial list of discussions of the Benjamin Report that have appeared in legal periodicals: Carr, *Administrative Adjudication in America* (1942) 58 L. Q. REV. 487; Fraser, *The Benjamin Report on Administrative Adjudication* (1942) 28 CORN. L. Q. 23; Hart, *The Benjamin Report on Administrative Adjudication* (1943) 21 TEX. L. REV. 277; Montague, *Commissioner Benjamin's Report on Administrative Adjudication in New York* (1943) 41 MICH. L. REV. 576; Jaffe, *Administrative Procedure Re-examined: The Benjamin Report* (1943) 56 HARV. L. REV. 704. Book reviews of the Report have also appeared: Parratt, *The Benjamin Report* (1942) 2 PUB. ADMIN. REV. 348; Fuchs, *Administrative Adjudication in New York* (1942) 42 COL. L. REV. 1376.

After having been schooled in what to look for, the associate counsel began in the late spring of 1939 to spend long periods in the agencies themselves, questioning everybody great and small, officials, lawyers and citizens. They (and the Commissioner) attended many hundreds of hearings of all kinds and in every part of the state to see for themselves what actually went on in the routine of adjudication. No such thorough study of the hearing stage had been made before. They read many files both on spot-check and in checking particular cases. Their gleanings, from interviews, hearings, and file-reading, were recorded in extensive, often colorful, notes prepared in typewritten quadruplicate. These were reviewed by the Commissioner and his counsel, and suggestions for emphasis, further study, etc. could accordingly be intelligently made. Frequently a report would lead to interviews on specific subjects between the Commissioner and the particular official concerned. Staff members constantly exchanged information with each other.

There was one agency head who was skeptical that much good in respect of his bailiwick could be accomplished as a result of our study. He was the person that suggested that if there was *anything* to be asked we should ask him. We had explained that our work had convinced us that no one in a big agency could possibly know all about its methods, but to educate him our associate counsel began to make appointments with him and to ask question after question of detail which naturally he could not know. Patiently the associate counsel wore down the administrator and he finally acquiesced in the employment of our established method in his agency. The drop-by-drop method was regarded as more useful than employment of all the statutory weapons of a Moreland Commissioner.

It was early decided to write and publish a description of the procedures of each agency. When the time came to write these descriptions, which ran to about 2000 pages, the routine reports of associate counsel, described above, formed a solid basis for definitive reports. Due mostly to the effects of the war, the writing of a few individual agency reports had to be abandoned.

One of the most talked-about branches of administrative law is "regulations". The administrators invited us to participate in their processes for making regulations, and some important sets of regulations promulgated by the agencies in 1940 and 1941 were prepared after consultation with Commissioner Benjamin. This we regarded as fortunate because the great bulk of improvement in administrative law must come within the agencies themselves and cannot be effected by peremptory statutes.

We saw improvement going on in many agencies even as we worked with them. In many instances, when they learned our view as to how a particular process could be bettered the change was immediately made. The wish of the administrators was to better anything that could be bettered; there was no disposition to defend present methods merely because they were familiar.

It is generally agreed that public hearings in connection with investigations have limited usefulness; but they induce a belief that everyone has had a