

January 1940

Soldiers and Sailors Civil Relief Act, Its Provisions and Effect

L. A. Hellerstein

Follow this and additional works at: <https://digitalcommons.du.edu/dlr>

Recommended Citation

L. A. Hellerstein, Soldiers and Sailors Civil Relief Act, Its Provisions and Effect, 17 Dicta 245 (1940).

This Article is brought to you for free and open access by the Denver Law Review at Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

Soldiers and Sailors Civil Relief Act, Its Provisions and Effect

Soldiers and Sailors Civil Relief Act, Its Provisions and Effect

By L. A. HELLERSTEIN*

The Soldiers and Sailors Civil Relief Act was enacted during the World War. (March 8, 1918, Chap. 20, 40 Stat. 440) in order to protect the rights of citizens in military service. An early article commenting upon this act stated that it was intended to "free persons in military service of the United States from harassment and injury to their civil rights during the term of service and to enable them to devote their entire energy to the military needs of the nation. It covers such subjects as staying court proceedings, non-eviction for failure to pay rent, prohibiting foreclosure of mortgages, prohibiting the lapsing of insurance policies, etc. On the whole, the method of the act consists mainly in suspending proceedings and transactions during the soldier's or sailor's absence so that he may have an opportunity when he returns to be heard and take measures to protect his interest." †

Section 4 of the Joint Resolution of Congress under the National Guard Act (approved August 27, 1940) granted to persons called to active service in the National Guard, United States Army Reserves and Retired Personnel the benefits of certain provisions of the act.

Section 13 of the Selective Training and Service Act of 1940 (approved September 16, 1940) granted certain benefits of the Relief Act to persons selected for such training and service.

Except as to certain portions of the act declared inoperative, the Soldiers and Sailors Relief Act of 1918 is now in force and effect and supplements our statutes and rules of procedure.

It should be noted that some of the benefits of the original Relief Act are not granted to persons under either of the foregoing acts. Particularly, provisions of the act relating to protection against lapsing of insurance policies and against tax sales upon land have been omitted.

It should also be noted that the act does not release or discharge any person from his contractual or legal obligations. Its aim is principally to suspend actions and thereby protect one in military service. The act grants discretion to the court, in many instances, as to the extent relief shall be granted under the act or what terms or conditions should be imposed.

*Of the Denver Bar.

†Note: Articles in Illinois Law Review, February, 1918, Vol. 12, No. 7, by John H. Wigmore, Mansfield Ferry and Samuel Rosenbaum.

The benefits of the act accrue, not when a person is inducted in active service but from the date he is *ordered* to active duty. The period of military service ends 60 days after the termination of active service. Criminal penalties are provided for in event of violation of some provisions.

ANALYSIS OF THE ACT

General Provisions (Sec. 103): The act is intended to apply not only to persons in military service, but its benefit may also be granted to sureties, guarantors, endorsers and others subject to the obligation or the liability. The court is given wide discretion in these matters and generally may or may not grant relief, dependent upon the particular facts involved.

Defaults (Sec. 200): Plaintiffs are required in default cases, before entering judgment, to file an affidavit setting forth facts that the defendant is not in military service. If the plaintiff is unable to determine whether the defendant is in such service, and an affidavit is filed so showing, an order of court is required to have judgment entered. If a defendant is in military service, no judgment may be entered until the court shall have appointed an attorney to represent the defendant and protect his interest. The court may also require the filing of a bond to protect a defendant, if in military service, against loss or damage that he may suffer should the judgment be thereafter set aside in whole or in part. The court may also make such other and further orders or enter such judgment as may in its opinion be necessary to protect the rights of the defendant in the service.

Appointment of Attorney (Sec. 200 (3)): The act provides that in any action or proceeding to which a person in military service is a party and if such party does not personally appear or is not represented by an authorized attorney, the court may appoint an attorney to represent him. The court may also require a bond. An attorney appointed has no power to waive any rights of the person for whom he is appointed or bind him by his acts.

Vacating Judgment (Sec. 200 (4)): The act provides that if a judgment is rendered against the person in military service during the period of such service, or within 30 days thereafter, and such person was prejudiced by reason of his military service in making his defense, such judgment may, upon application within 90 days after the termination of military service, be reopened and the defendant permitted to defend, provided he has a meritorious or legal defense to the action or some part of it.

Stay of Action (Sec. 201): At any stage in an action or proceeding a court may in its discretion stay an action or proceeding against the person in military service during the period of his service, or within 60

days thereafter, unless in the opinion of the court the ability to prosecute or defend the action is not materially affected by reason of his military service.

Penalties (Sec. 202): A court may relieve a fine or penalty incurred under the terms of a contract for non-performance where the ability of the person to pay or perform was materially impaired by reason of his military service.

Attachments and Garnishments (Sec. 203): The court may, in its discretion, stay executions or orders, vacate or stay any garnishment or attachment before or after judgment in an action against a person in military service before or during the period of such service or within 60 days thereafter.

Length of Stay (Sec. 204): Stays ordered by the court generally, and except as otherwise provided, may be for the period of military service and three months thereafter, and subject to such terms as may be just. That is, the court may fix installment payments or terms to be complied with upon granting the stay. The court may also grant leave to proceed against co-defendants who are not parties to the action.

Statute of Limitations (Sec. 205): The period of military service is excluded in computation of such statutes.

Rent (Sec. 300 (1)): No eviction can be made during the period of military service in respect to any premises occupied chiefly for dwelling purpose by the wife, children or other dependents of such person, where the rent does not exceed \$50.00 per month, *except upon leave of court granted therefor, or such an order granted in an action.* The court may, in its discretion, stay the proceeding for not longer than three months or make such other orders as may be just, provided that the payment of rent is materially affected by reason of such person being in the military service.

The Secretary of War or the Secretary of the Navy may order an allotment of the pay of a person in military service in a reasonable proportion to discharge rent.

Installment Contracts (Sec. 301 (1)): The section covering this subject is as follows:

“That no person who has received, or whose assignor has received, under a contract for the purchase of real or personal property, or of lease or bailment with a view to purchase of such property, a deposit or installment of the purchase price from a person or from the assignor of a person who, after the date of payment of such deposit or installment, has entered military service, shall exercise any right or option under such contract to rescind or terminate the contract or resume possession of the property for nonpayment

of any installment falling due during the period of such military service, except by action in a court of competent jurisdiction."

The purport of the above section is to require a court proceeding to terminate or rescind an installment contract or to resume possession of the property sold. This section applies and extends to both the original vendor or his assignee provided a deposit or installment has been paid. Further, if the instrument used be a lease or bailment contract where the goal is a purchase the act applies. Other conditions appear to be required to bring the act in effect:

- (1) A deposit or installment upon the purchase must have been paid.
- (2) The person entered military service after the deposit or installment was paid.
- (3) The non-payment occurred concerning an installment falling due during the period of military service.

It would appear from this section that if no deposit or installment was paid prior to the person entering military service or if the non-payment of an installment occurred prior to the period of military service, the provisions of this section are inapplicable. There seems to be no reference in this section to acts of default other than non-payment of installments.

A criminal penalty is provided for failure to observe the mandates of this section. Upon a hearing of such action, the court may order the repayment of prior installments or deposits, or any part thereof, as a condition of terminating the contract and resuming possession of the property, or it may stay proceedings if the defendant is unable to comply with the terms of the contract due to his military service; or it may make such other disposition of the case as may be equitable to conserve the interests of all the parties.

The parties may agree to terminate or cancel the contract pursuant to mutual agreement if such agreement is in writing and subsequent to the making of the contract and during the period of military service. (Added by the Selective Service and Training Act of 1940.)

Mortgages, Trust Deeds and Securities (Sec. 302 (2)): The provisions of the Relief Act, Sec. 301 (1); relating to installment contracts for purchase of real or personal property, do not apply to mortgages, trust deeds or securities. A Texas court so held in the case of *Bashman v. Evans*, 216 S. W. 446. This distinction is of importance, since no language appears in the sections relating to mortgages, trust deeds and securities to prevent repossession without a court action. A further distinction appears since the sections of the Relief Act relating to mortgages, trust deeds and securities only apply to such instruments originating *prior* to the dates of the approval of the National Guard Act and Selective

Service and Training Act (August 27 and September 16, 1940, respectively), while as to installment contracts of purchase the date of origin of the instruments is of no materiality, as long as a deposit or installment was paid before the person entered military service.

There may be some inconsistency in the foregoing distinctions made and the wisdom of Congress in differentiating between such types of instruments.

Sec. 302 (1) of the Relief Act is as follows:

“That the provisions of this section shall apply only to obligations originating prior to the date of approval of this Act and secured by mortgage, trust deed, or other security in the nature of a mortgage upon real or personal property owned by a person in military service at the commencement of the period of the military service and still so owned by him.”

Under the Relief Act then as to mortgages, trust deeds and securities, before the Act may be applicable the said instruments (1) must have originated prior to the effective date of the revival of the said act and further, (2) the real or personal property must still be owned by a person in military service at the commencement of the military service and (3) still be so owned by him. Unless the foregoing conditions exist the sections of the act relating to mortgages, trust deeds and securities do not apply.

In the event the foregoing conditions do exist, the act provides (Sec. 302 (2)) that if an action be commenced a court may stay such action or make such other disposition of the case as may be equitable to conserve the interests of all parties, unless the court is of the opinion that the ability of the defendant to comply is not affected by reason of his military service.

A further important provision of the act relating to mortgages, trust deeds and securities is as follows:

“Sec. 302 (3). No sale under a power of sale or under a judgment entered upon warrant of attorney to confess judgment contained in any such obligation shall be valid if made during the period of military service or within three months thereafter, unless upon an order of sale previously granted by the court and a return thereto made and approved by the court.”

As has been stated as to mortgages, etc., the act is silent as to retaking or resuming possession of the property. It concerns itself primarily with the *method of foreclosure* requiring a sale through an action and an order of court. Chattel property may be repossessed without violating the Relief Act, but such possession would be of little value unless the court would permit a sale of the security. If, however, a replevin suit

or a possessory suit is filed the court may stay the proceedings, in its discretion, as an ordinary action.

Transfers of Interest (Sec. 600): In order to protect against evasion of the Relief Act, it provides that any interest or contract transferred or acquired since the date of the approval of the act to avoid or delay its provisions may nevertheless be subject to orders of court in any proceeding.

Decisions of Courts: Some of the early authorities have adjudicated portions of the act now in effect. For example, the effect of failure to file an affidavit that a defendant is not in military service when default and judgment are taken, was passed on in the cases of *Howie Mining Co. vs. McGary*, 256 Fed. 38, and *Harrell vs. Shealy*, 100 S. E. 800, 24 Ga. App. 389. The court held that a default judgment against a defendant cannot be vacated for failure to file such affidavit unless the record shows that the defendant was, as a matter of fact, in military service. To the same effect is the case of *Alzugaray vs. Onzurez*, 187 Pac. 549, 25 N. M. 662, and the case of *Wells vs. McArthur*, 188 Pac. 322, 77 Okla. 279. The holding of these cases seems to be that a defendant who is not in the military service cannot take advantage of the failure of plaintiff to file such affidavit.

Concerning the foreclosure of real estate mortgages, in the case of *Taylor vs. McGregor State Bank*, 174 N. W. 893, 144 Minn. 249, the court held that where a foreclosure and sale had been had by advertisement as authorized by the Minnesota statutes, which was fully completed prior to the commencement of the mortgagor's military service, the redemption period which had not expired was not extended by the act by such person being in such service.

In a decision of the United States Supreme Court, in the case of *Ebert vs. Poston*, decided January 12, 1925, 45 Law Ed. 188, Mr. Justice Brandeis delivered the opinion of the court and also held that the period of redemption under foreclosures by advertisement was not extended for a period of military service under the Soldiers and Sailors Relief Act. The court stated that a decree of foreclosure may be stayed if the suit was commenced after the passage of the act and during the period of military service. It is only sales made after the passage of the act and during military service that are invalidated if made without leave of court. The statutory right to redeem from a sale by advertisement is not a right of action. It is a primary right as distinguished from a remedy.

In the case of *Lima Oil Co. vs. Pritchard*, 92 Okla. 113, 218 Pac. 863, the court held that property may not be transferred to one in military service to delay parties to a contract or proceeding in enforcing their rights.

In the case of *Riordan vs. Zeebe*, 50 Calif., App. 22, 195 P. 65, the court held that justice of the peace courts come within the act.

The act has been held to apply to equitable interests as well as legal interests of a person in military service, and even though unknown to one foreclosing a real estate mortgage, the equitable interest was protected. *Hoffman vs. Bank*, 121 N. E. 15. This ruling seems to be a harsh one.

In the case of *Davison vs. Lynch*, 171 N. Y. S. 46, the court held that an attorney appointed to protect the interest of a person in military service was not to be allowed any compensation and should regard such service as a patriotic duty.

In the case of *Kendall vs. Balster*, 131 N. E. 319, 239 Mass. 152; the court held that mortgages executed at a date subsequent to the approval of the act are not affected by it.

Other cases have been decided by the courts of various jurisdictions. However, there are many propositions under the act that are still undetermined and require clarification. Probate and real estate actions are examples of these. At the present time it appears likely the act will be a factor to be considered and coped with for many years to come. The act places the court in the position of being a chancellor in equity, a conciliator and the guardian and protector of persons in military service.

Every lawyer, to conscientiously serve his client, should give careful attention to it, not only as to the language employed and its interpretation, but, in addition, such consideration should be given as to place proper emphasis upon the patriotic motives which impelled its revival and its broad purpose to conserve and preserve the rights of persons in service of our country.

MEMBERSHIP COMMITTEE

The following have been appointed to constitute the Membership Committee of the Denver Bar Association:

Vernon V. Ketring, Chairman	
Charles W. Sheldon, Jr.	Philip Hornbein, Jr.
Frank J. Trelease, Jr.	Clarence W. Button
William K. Ris	Charles H. Haines, Jr.
Fred B. Dudley	A. A. Brooks.

"ALMOST"

Trial Lawyer, almost invincible before a jury; has large corporate practice; would undertake to assist in the trial of important litigation anywhere in the United States; has refused steady employment as trial lawyer offered him by one of the largest law firms in America. References. Address reply Box 521, care of West Publishing Co., St. Paul, Minn.

The Denver Bar Association

PROUDLY PRESENTS

A Meeting of the

BAR OF
CRIPPLE
CREEK

Featuring:

HENRY McALLISTER, Esqr of Cripple Creek in an address
describing his experiences at the bar

AND

HORACE HAWKINS, Esqr of the Capitol City
AS Toastmaster

with MUSICAL SELECTIONS by a Quartette of Talented
Voices, direct from Eastern Triumphs

Prof. Irving Hale, Director

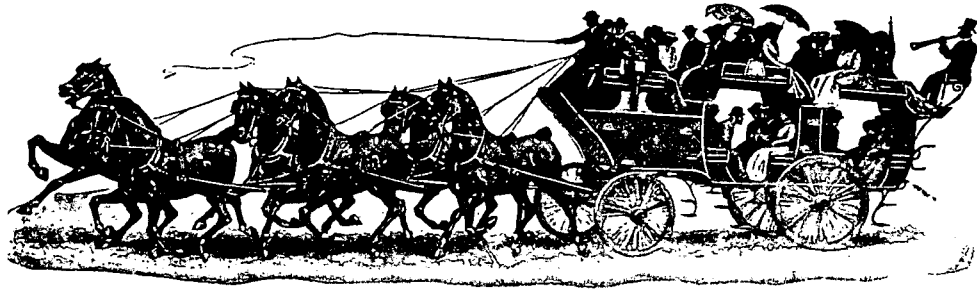
NEW COSMOPOLITAN HOUSE DENVER

18th at BROAD WAY STREETS

MONDAY
EVE

OCT. 21 1940
7½ P.M.

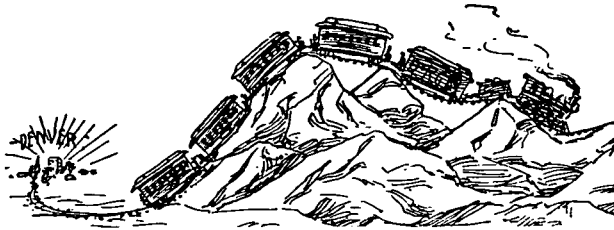
Tickets at \$1.50 may be obtained from James A. Woods,
Esqr, Secretary of the Association, 930 First National Bank
Building, Denver, Colorado.



HACKNEYS AND LIVERIES

for hire to the Visiting Counsellors at
THE DENVER OMNIBUS AND CAB CO.
 18th at Pearl Avenues, Denver, Colorado

Rates from 35c an hour. The finest horses in the territory.



The Colorado Midland Railway

Announces Palace Car Service

from the Southern Portion of the State to the Capitol City
 for the Members of the Bar who will visit Denver
 for the meeting of the Cripple Creek Bar

RATES ON APPLICATION FROM THE STATION AGENTS

The New Cosmopolitan House

CHOICE CUISINE 18th at Upper Broad, Denver TURKISH BATHS

the most modern Hostelry in the
 Capitol City offers choice accomoda-
 tions for the gentlemen of the Bar
 visiting the Cripple Creek
 Association meeting

Rooms with running water from 75c

Suites with private bath from \$4.00

FIRE ROPES AT EACH WINDOW



COLORADO BAR ASSOCIATION SECTION

619 Midland Savings Building

Denver, Colo.

COLORADO BAR ASSOCIATION

OFFICERS

President.....WILLIAM E. HUTTON
President-Elect.....W. W. PLATT
Senior Vice-President.....OSMER E. SMITH
Vice-Presidents.....

{	HARRY S. PETERSEN
	BEN E. SWEET
	JUDGE JOHN R. CLARK

Secretary.....WM. HEDGES ROBINSON, JR.
Treasurer.....EDWARD C. KING

BOARD OF GOVERNORS

Frank Moorhead	Wilbur F. Denious	Charles M. Holmes	J. Edgar Chenoweth
S. Arthur Henry	Lowell White	Charles E. Blaine	Albert Todd
James A. Woods	John Carruthers	Marion F. Miller	George W. Lane
Dudley W. Strickland	W. W. Gaunt	Benj. F. Koperlik	H. Lawrence Hinkley
A. K. Barnes	Geo. H. Wilkes	Wm. Atha Mason	Clay R. Apple
	Fred W. Stover	Geo. M. Corlett	

Editor of Section.....Wm. Hedges Robinson, Jr., Denver

CORRESPONDENTS

John C. Banks, Grand Junction	Wilkie Ham, Lamar
Judge J. Edgar Chenoweth, Trinidad	Harlan Howlett, Boulder
Charles Corlett, Monte Vista	John W. O'Hagan, Greeley
George S. Cosand, La Junta	Jesse E. Pound, Alamosa
C. H. Darrow, Glenwood Springs	Charles Ribar, Pueblo
George F. Dodge, Jr., Montrose	Dale E. Shannon, Fort Collins
James B. Garrison, Dolores	Charles J. Simon, Colorado Springs
George C. Twombly, Fort Morgan	

Address all communications and information for publication to 619 Midland Savings Building, Denver, Colorado.

CALENDAR

January, 1941..... Annual Meeting Colorado Association of District Attorneys