

1943

## SOLDIERS AND SAILORS-CIVIL RELIEF ACT OF 1940-APPLICATION TO DECEDENTS' ESTATES, SECURED OBLIGATIONS, INSTALLMENT CONTRACTS, INSURANCE, TAXES, AND ASSESSMENTS

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### Recommended Citation

L. M. S., *SOLDIERS AND SAILORS-CIVIL RELIEF ACT OF 1940-APPLICATION TO DECEDENTS' ESTATES, SECURED OBLIGATIONS, INSTALLMENT CONTRACTS, INSURANCE, TAXES, AND ASSESSMENTS*, 42 MICH. L. REV. 480 (1943).

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## COMMENTS

SOLDIERS AND SAILORS—CIVIL RELIEF ACT OF 1940—APPLICATION TO DECEDENTS' ESTATES, SECURED OBLIGATIONS, INSTALLMENT CONTRACTS, INSURANCE, TAXES, AND ASSESSMENTS—On October 17, 1940, the Soldiers' and Sailors' Civil Relief Act<sup>1</sup> became effective. Its purpose, as stated in the first section, is as follows:

“In order to provide for, strengthen, and expedite the national defense under the emergent conditions which are threatening the peace and security of the United States and to enable the United States the more successfully to fulfill the requirements of the national defense, provision is hereby made to suspend enforcement of civil liabilities, in certain cases, of persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the nation, and to this end the following provisions are made for the temporary

<sup>1</sup> 54 Stat. L. 1178 (1940); 50 U. S. C. A. App. §§ 501-585.

suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the period herein specified over which this Act remains in force.”

This statute follows closely the text of the Soldiers' and Sailors' Civil Relief Act of March 8, 1918.<sup>2</sup> The act of 1918 was prepared in the office of the Judge Advocate General at Washington, and is said to have been drawn by the late John H. Wigmore.<sup>3</sup> In an article in the *Illinois Law Review*<sup>4</sup> by Mansfield Ferry, of the New York Bar, Samuel Rosenbaum, then draftsman to the American Judicature Society, and John H. Wigmore, the authors state that they assisted in preparing the draft which came from the office of the Judge Advocate General.

The 1940 act consists of six articles entitled as follows: General Provisions; General Relief; Rent, Installment Contracts, Mortgages; Insurance; Taxes and Public Lands; Administrative Remedies. The general relief provided includes a temporary stay of proceedings in which the person in military service is a party; the appointment of an attorney to represent such person; the vacation of judgments or decrees; the extension of periods of limitation by the period of military service.

The 1940 act was modified, and in general its scope was extended, by an amendment effective October 6, 1942.<sup>5</sup> The class of persons within the protection of the act was enlarged. Without attempting a complete statement of the effect of this enactment, the following summary may be made. Four new sections were added to article I. Section 205 of article II, as to the period of limitations, was extended to include proceedings before administrative tribunals and was made applicable to the period of redemption for real estate sold under mortgages and other obligations. Doubtless, this last modification was a result of the decision of the Supreme Court of the United States in the case of *Ebert v. Poston*,<sup>6</sup> to the effect that the corresponding section of the 1918 act was inapplicable to such a period of redemption. A new section, namely 207, specifically excluded from the operation of 205 “any period of limitation prescribed by or under the internal revenue laws of the United States.” Section 206, limiting the rate of interest on interest bearing obligations of service men was also added to article II. Article III was amended by the addition of several new sections, including a section extending the benefit of the article to dependents

<sup>2</sup> 40 Stat. L. 440 (1918); 50 U. S. C. A. App. §§ 101-165.

<sup>3</sup> Bendetson, “A Discussion of the Soldiers' and Sailors' Civil Relief Act of 1940,” 2 WASH. & LEE L. REV. 1 (1940).

<sup>4</sup> Ferry, Rosenbaum and Wigmore, “The Soldiers' and Sailors' Civil Rights Bill,” 12 ILL. L. REV. 449 (1918).

<sup>5</sup> 56 Stat. L. 769 (1942); 50 U. S. C. A. App. §§ ———.

<sup>6</sup> 266 U. S. 548, 45 S. Ct. 188 (1925).

of a person in military service. Article IV on insurance was repealed and an entire new article was substituted. At the end of the act a new article, entitled "Further Relief," was added.

The discussions which follow, written by different authors, do not cover the entire act, but only the parts indicated by the various headings.—*Ed.*

### *Decedents' Estates*

At the outset, the question may be raised whether the Soldiers' and Sailors' Civil Relief Act<sup>7</sup> now in force has any direct application to the administration of decedents' estates. As will more fully appear in the discussion which follows, several of its sections are believed to be applicable. Yet among the special matters dealt with in the statute, such as mortgages, leases, installment contracts, life insurance and public lands, decedents' estates are not singled out for separate treatment. Moreover, the following statement which appeared in an article written by three men who participated in drafting the Civil Relief Act of 1918, from which the present act was directly derived, is not without significance:<sup>8</sup>

"A number of subjects were considered for inclusion in this bill, but were rejected for various reasons. In the cases of partnership and bankruptcy it was at first thought desirable to prohibit proceedings adverse to the soldier or sailor looking to dissolution or bankruptcy; it was, however, decided to be unwise to make any absolute prohibitions on legal proceedings. The discretion granted in the act to stay proceedings was considered sufficiently broad to cover all special cases.

"The subjects of probate proceedings and trusts were likewise omitted. Those bodies of law can hardly be dealt with for soldiers and sailors without interfering with the adjustment of rights of all decedents' estates whatsoever."

Judicial decisions give us little aid. Only one reported case has been found which squarely decides upon the applicability of the act to proceedings in the administration of decedents' estates, and that is a decision of the Orphans' Court of Warren County, New Jersey.<sup>9</sup> On the other hand, the language of the act is very broad, and the courts have frequently said that it should be given a liberal construction.<sup>10</sup> The one

<sup>7</sup> 54 Stat. L. 1178 (1940) as amended by 56 Stat. L. 769 (1942).

<sup>8</sup> Ferry, Rosenbaum, and Wigmore, "The Soldiers' and Sailors' Civil Rights Bill," 12 ILL. L. REV. 449 at 470 (1918).

<sup>9</sup> In re Cool's Estate, 19 N. J. Misc. 236, 18 A. (2d) 714 (1941).

<sup>10</sup> Boone v. Lightner, — U. S., — 63 S. Ct. 1223 at 1231 (1943); Royster v. Lederle, (C. C. A. 6th 1942) 128 F. (2d) 197 at 200; Helberg v. Warner, 319 Ill. App. 117, 48 N. E. (2d) 972 at 975 (1943); Laperouse v. Eagle Indemnity Co., 202

decision referred to does decide that the act is applicable; and likewise a few of the discussions of the act in legal periodicals express views indicative of its applicability to probate proceedings.<sup>11</sup> Of necessity, therefore, the conclusions suggested herein must be regarded as tentative. One cannot speak with finality as to the extent and character of the application of the act to probate proceedings until the Supreme Court of the United States has given its interpretation.

It is obvious that the significant sections of the act with respect to its application to probate proceedings are contained in article II on "General Relief." In this connection, one should consider the various remedies provided: namely, the provision for the representation of a soldier defendant before a default judgment is taken; the provision for an attorney in any action or proceeding; the provision for setting aside a judgment; the provision for a stay of proceedings; the provision for a stay or vacation of executions, attachments and garnishments; and the provision for the extension of periods of limitation. The question of the applicability of the act may arise on the probate or contest of a will; on the filing of a claim against the estate; on a judicial sale; on the settlement of an account; or on proceedings for distribution. It may arise when the soldier is an heir or devisee; when he is a creditor of the estate; when he is the executor or administrator; and, at least in the case of absentee statutes, when the soldier is presumed to be the decedent.

Taking up the significant provisions of article II, one by one, it should be observed that section 200, subsection (1), relative to taking a default, provides that "In any action or proceeding commenced in any court, if there shall be a default of any appearance by the defendant, the plaintiff, before entering judgment shall file in the court an affidavit setting forth facts showing that the defendant is not in military service." It may be argued that the decision of a probate court is not a judgment, or that there are no defendants in a probate proceeding since the action

La. 686, 12 So. (2d) 680 at 682 (1943); *In re Bashor*, — Wash. —, 132 P. (2d) 1027 at 1028 (1943). But compare the following statement of Brandeis, J., speaking for the court with respect to the Soldiers' and Sailors' Civil Relief Act of 1918: "There is a further contention that the broad purpose of the Act declared in § 100, demands that it be liberally construed to include the situation presented by this case . . . The judicial function to be exercised in construing a statute is limited to ascertaining the intention of the legislature therein expressed. A *casus omissus* does not justify judicial legislation. Compare *United States v. Weitzel*, 246 U. S. 533, 543. This Act is so carefully drawn as to leave little room for conjecture." *Ebert v. Poston*, 266 U. S. 548 at 553, 45 S. Ct. 188 (1925).

<sup>11</sup> Reed, "Soldiers' and Sailors' Civil Relief Act of 1940," 28 IOWA L. REV. 14 at 29 (1942); Cogswell, "Application of the Soldiers' and Sailors' Civil Relief Act to Probate Proceedings," 8 D. C. BAR ASSN. J. 398 (1941); Anderson, "The Soldiers' and Sailors' Civil Relief Act," 6 UNIV. DETROIT L. J. 163 at 170 (1943).

is strictly *ex parte*. It would seem, however, that courts are likely to interpret the term "defendant" very liberally so that it will mean practically any party to an action or proceeding other than the persons who initiated it. Thus, in a proceeding for the adoption of the infant daughter of a soldier, which originated in the District Court of the District of Columbia, the Court of Appeals determined that section 201 of the act was applicable, and observed:<sup>12</sup> "The intention of Congress and the purpose of the statute require a liberal interpretation of the word *defendant*."

*In re Cool's Estate*,<sup>13</sup> the single decision determining the applicability of the act to probate proceedings, involved a petition by an executor to present his account for confirmation and settlement. The court held that section 200 of the act was applicable, that an affidavit relative to the military service of interested parties should have been filed, and that, in an appropriate case, an attorney should be appointed to represent interested persons in military service. Judge Resecrans, in a well considered opinion, said:

"The authorities hold that a plaintiff is a person asking any relief by any form of proceeding (48 *C.J.* 1218) and that the term 'defendant' includes any other party as distinguished from the plaintiff or complaining party, and means anyone who is a necessary party to a complete determination of the action; . . ."

He further said:

"The definition of a 'judgment' as a final determination of the rights of parties includes decrees of equity and probate courts. 30 *Am. Jur.* 822, *tit. Judgments*, § 3. Since the federal act is for the purpose of protecting the rights of persons in military service and any judgment affecting the rights of such persons may be opened, stayed or vacated, a liberal construction should be accorded so that in probate court proceedings in default of any appearance by an interested party, either male or female, an affidavit as to military service should be filed or other action taken in accordance with the federal act."

It should be observed that subsection (3) of section 200 eliminates any question as to whether there can be any defendant in any probate proceeding by using the phrase "action or proceeding in which a person in military service is a party," and thus even more clearly indicates the applicability of the section to probate proceedings. Section 200, subsection (4), which deals with vacating a judgment "rendered in any

<sup>12</sup> *In re Adoption of a Minor*, (Ct. App. D. C. 1943) 136 F. (2d) 790.

<sup>13</sup> See note 9, *supra*.

action or proceeding governed by this section against any person in military service" obviously applies to probate proceedings, if the earlier parts of the section are applicable.

It would seem then that, if a person in military service is interested as heir, next of kin, legatee or devisee, but does not appear, the court should not proceed with a determination of the validity or invalidity of a will, the settlement of an account or with an order of distribution without providing for the representation of such person by counsel; that if such person "was prejudiced by reason of his military service in making his defense," the decree or determination may be vacated. An affidavit that there are no defendants in military service, as provided by the statute, would seem not to remedy the situation if in fact there are such defendants. Doubtless the provision as to vacating a judgment would also apply to a case where the person in military service had brought an action as a creditor of the decedent or had applied for appointment as executor or administrator and the decision was adverse to him.

Does this mean that no title is safe where it is derived from the estate of a decedent and there is a possibility of a person in military service claiming to set aside the decision on the ground that his interests were prejudiced by his military service? Probably no such sweeping assertion can be made. The last sentence of section 200 reads as follows: "Vacating, setting aside, or reversing any judgment because of any of the provisions of this Act shall not impair any right or title acquired by any bona fide purchaser for value under such judgment." Thus, the title may not continue indefinitely to be defective; but it is difficult to escape the conclusion that the original distributee of the estate, who is not a bona fide purchaser, must assume the risk of an attack on his title by a person in military service.

Section 201 provides for a stay of "any action or proceeding in any court in which a person in military service is involved." It is believed that this provision would be applicable to probate proceedings in situations already discussed. But as the stay is in the discretion of the court, no serious hardship to other litigants is likely to arise from the application of this provision in favor of a party in military service. Section 203 concerns the stay or vacation of executions, attachments and garnishments in the discretion of the court. While these methods of effectuating the orders of a probate court are not usual, to the extent that they are employed in connection with decedents' estates, it would seem that the statute would apply.

Without doubt the most perplexing question in connection with the application of the act to decedents' estates concerns section 205 involving statutes of limitation. Unlike other provisions, this is self executing and is not subject to judicial discretion. It reads in part as follows:

"The period of military service shall not be included in computing any period now or hereafter to be 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 by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action or the right or privilege to institute such action or proceeding shall have accrued prior to or during the period of such service. . . ."

This form of the act results from the amendments of 1942. The original form of section 205, which was identical with the corresponding section of the Act of 1918,<sup>14</sup> read as follows:

"The period of military service shall not be included in computing any period now or hereafter to be limited by any law for the bringing of any action by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action shall have accrued prior to or during the period of such service."

It is arguable that the original Act of 1940 had no application to probate proceedings in so far as this section is concerned. It referred only to "action" and not to "action or proceeding" as did all the other provisions for general relief. Moreover, the statement of the draftsmen of the 1918 Act quoted at the beginning of this discussion would seem to indicate that they did not regard this section as applying to probate proceedings. However, in a case before the Missouri Court of Appeals,<sup>15</sup> it was assumed, though not decided, that this section of the 1918 Act applied to the period of the non-claim statute. And at least two authors of recent discussions in periodicals have felt sure that the 1940 Act was applicable.<sup>16</sup> The 1942 amendments were doubtless intended to include in the provision as to statutes of limitation proceedings before administrative boards, but it would seem that the effect was also to make it clear that periods of limitation in probate proceedings are within the act, whether or not they were formerly included.

If this is true, the consequences are far reaching. The following periods could be extended where persons in military service are involved: the period within which a will may be offered for probate or may be contested where the person in military service is a distributee;

<sup>14</sup> 40 Stat. L. 440, § 205 (1918).

<sup>15</sup> *Bolz Cooperage Corp. v. Beardslee*, 211 Mo. App. 109, 245 S. W. 611 (1922).

<sup>16</sup> Reed, "Soldiers' and Sailors' Civil Relief Act of 1940," 28 IOWA L. REV. 14 at 31 (1942); Cogswell, "Application of the Soldiers' and Sailors' Civil Relief Act to Probate Proceedings," 8 D. C. BAR ASSN. J. 398 at 405 (1941).



or where the person in military service is a creditor, the period within which claims against the decedent must be filed; or where the person in military service is a creditor and there was no administration proceeding whatever, the period within which all debts of the decedent are barred. Thus, after the normal statutory period has elapsed, a devisee in military service may present a will for probate; an heir may contest a will; or a creditor in military service may have a claim heard after the period of the non-claim statute has expired. Moreover, it would seem that a determination by the court that there is no person in military service involved in the proceeding, would not prevent such a person from asserting his rights.

It should, however, be clear that the extension of the statutory period has no application to a case where the real party to the action is not a soldier or sailor but the soldier or sailor, as executor or administrator of the estate of the real plaintiff or defendant, is prosecuting or defending the action. Thus, in a case where a soldier's wife brought an action for personal injuries, and on her death while the action was pending, her husband was appointed her executor, it was held that the husband suing in his representative capacity was not entitled to the benefit of the act with respect to the extension of the period of limitations.<sup>17</sup>

In conclusion, something should be said as to the effect of the Soldiers' and Sailors' Civil Relief Act on proceedings under statutes which are designed to bind the estate of a presumed decedent even though it subsequently appears that he is not in fact dead. It has long been recognized that, in an ordinary probate proceeding, the fact of death is jurisdictional;<sup>18</sup> and, therefore, if the presumed decedent is not in fact dead, he may reclaim the estate even after a probate court has distributed it. The Supreme Court of the United States asserted as a reason for this doctrine that the presumed decedent, not having been given any sort of notice, and not indeed being even a party to the probate proceeding, was being deprived of his property without due process of law by a judicial determination of his death under these circumstances.<sup>19</sup> Since that time a number of statutes have been enacted to enable the probate court to acquire jurisdiction over the presumed decedent by giving him reasonable notice. These are of at least two kinds: first, absentee statutes, which provide for the probate of estates of persons who have been absent for a given period and are presumed to be dead;<sup>20</sup> second, statutes providing for ordinary administration of decedents' estates, but making a special provision for

<sup>17</sup> *Halle v. Cavanaugh*, 79 N. H. 418, 111 A. 76 (1920).

<sup>18</sup> *ATKINSON, WILLS* 562, 563 (1937) and cases therein cited.

<sup>19</sup> *Scott v. McNeal*, 154 U. S. 34, 14 S. Ct. 1108 (1894).

<sup>20</sup> See, for example, *Mich. Stat. Ann. (1938) 27.3178 (321) to 27.3178 (351)*.

notice to the presumed decedent in cases where administration is based on a presumption of death.<sup>21</sup> As to the first type of statute, section 205 of the Soldiers' and Sailors' Civil Relief Act, as to the period of limitations, would appear to apply if there is a fixed period of absence before this proceeding can be initiated. And, indeed, that section may extend the period of the presumption of death as to the second type of statute. As to both types of statutes, it would seem that, if there is any probability that the presumed decedent is in military service, he should be represented by an attorney. And, in view of the fact situation presented in such cases, it would seldom, if ever, be known positively that the presumed decedent was not in military service. Thus it appears that the attempt of modern legislation to bind a presumed decedent will often be frustrated by the operation of the Soldiers' and Sailors' Civil Relief Act. Though the act doubtless does not deprive the court of jurisdiction over the presumed decedent who is in military service, it does permit him to make a direct attack on the proceedings when he otherwise could not do so.

*L. M. S.*

<sup>21</sup> See Ill. Ann. Stat. (Smith-Hurd 1941) c. 3, §§ 252, 448, and 449; 1 Ill. Laws 1941, p. 5, § 1.