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Soldiers' and Sailors' Civil Relief Act of 1940

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out of a motor vehicle accident.⁶⁴ This is also a new section, and it is a valid method of exercising jurisdiction over a foreign insurance corporation.⁶⁵

Exemptions from the operation of this article are made for particular persons and certain motor vehicles. This article does not apply to any motor vehicle for the operation of which security is required to be furnished under section seventeen of this chapter, *i.e.*, common carriers like taxi-cabs, thus overruling *Jones v. Hartnett* in that respect.⁶⁶ Nor does it apply to any motor vehicle registered under Section 18, automobiles belonging to the public service or transit commission; nor to any cars owned by the state or a political subdivision thereof.⁶⁷ Any person having registered in his name more than twenty-five motor vehicles may become a self-insurer if the Commissioner, in his discretion, reasonably believes that this person can satisfy any judgments arising under this article. This is a privilege and upon reasonable grounds may be cancelled.⁶⁸

The foregoing classifications have been held valid elsewhere and there is no doubt they will be sustained here.⁶⁹

The expenses of administering this article are charged to all insurance carriers who issued automobile liability insurance policies, to all self-insurers and persons who gave proof of financial responsibility by bond or deposit of money or securities, *pro rata* in proportion to the number of motor vehicles in connection with which proof of financial responsibility was furnished by them.⁷⁰

Finally this article is to be construed towards uniformity in all the states.⁷¹ It is not to be construed as preventing any other process,⁷² nor as repealing any other motor vehicle laws except Article 6-a.⁷³ And if any part is held to be unconstitutional, it shall not affect the validity of the remaining parts of this article.⁷⁴

BERNARD FROMARTZ.

SOLDIERS' AND SAILORS' CIVIL RELIEF ACT OF 1940.—In a joint letter to Congress dated September 1, 1917, Secretaries Baker and Daniel urged the earliest possible consideration of a bill "to free

⁶⁴ *Id.* § 94-p.

⁶⁵ *Meirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 N. Y. Supp. 165, 60 Sup. Ct. 153 (1939); *Gilbert v. Burnstine*, 255 N. Y. 348, 174 N. E. 705 (1931).

⁶⁶ 271 N. Y. 626, 13 N. E. (2d) 455 (1936).

⁶⁷ N. Y. V. & T. LAW § 94-ff.

⁶⁸ *Id.* § 94-gg.

⁶⁹ *Re Opinion of Justices*, 251 Mass. 509, 147 N. E. 681 (1925); 5 AM. JURIS. § 520, 39 A. L. R. 1028, 69 A. L. R. 397.

⁷⁰ N. Y. V. & T. LAW § 94-ii.

⁷¹ *Id.* § 94-jj.

⁷² *Id.* § 94-hh.

⁷³ *Id.* § 94-mm.

⁷⁴ *Id.* § 94-nn.

persons in the military and naval service of the United States from harassment and injury to their civil rights during their term of service, and to enable them to devote their entire energy to the military needs of the nation."¹ Toward such an end, Congress enacted the Soldiers' and Sailors' Civil Relief Act, effective in 1918. Today, with our nation once again engaged in an all-out defense effort, this same legislation has been re-enacted as the Soldiers' and Sailors' Civil Relief Act of 1940,² with but minor differences from the World War statute. It was deemed necessary completely to re-enact the main outline of the old law with appropriate changes due to the legal uncertainty which prevailed concerning its applicability to the present situation.

The objectives of the present Act are the same as those of its predecessor. It is entitled "An act to promote and strengthen the national defense by suspending enforcement of certain civil liabilities of certain persons serving in the military and naval establishments, including the Coast Guard." More specifically, the persons protected are: "All members of the Army of the United States, the United States Navy, the Marine Corps, the Coast Guard, and all officers of the Public Health Service detailed by proper authority for duty either with the Army or Navy."³ Selectees under the Selective Training and Service Act, when inducted into the land or naval forces, become immediately "persons in military service" under the terms of the Act.⁴ But a person accepted for military service who has not yet been inducted into the service is not protected.⁵ Nor do the provisions of the Act apply to the captain of a vessel carrying soldiers and munitions of war.⁶

In the administration of the Act, all courts of competent jurisdiction of the United States or of any state, whether or not courts of record, are clothed with authority.⁷ Its provisions apply to the United States, the several states and territories, the District of Columbia, and all territory subject to the jurisdiction of the United States "and to all proceedings commenced in any court therein, and shall be enforced through the usual forms of procedure obtaining in such courts or under such regulations as may by them be prescribed."⁸ The constitutionality of the Soldiers' and Sailors' Act of 1918, being based on the war power, was never seriously questioned.⁹ The power of Con-

¹ Ferry, Rosenbaum and Wigmore (1918) 12 ILL. L. REV. 449.

² 54 STAT. 1178, 50 U. S. C. A. § 501 *et seq.* (Supp. 1941).

³ SOLDIERS' AND SAILORS' ACT § 101(1).

⁴ *Ibid.*

⁵ Continental Jewelry Co. v. Minsky, 119 Me. 475, 111 Atl. 801 (1920).

⁶ Greenwood v. Puget Mill Co., 111 Wash. 464, 191 Pac. 393 (1920).

⁷ SOLDIERS' AND SAILORS' ACT § 101(4).

⁸ *Id.* § 102(1).

⁹ Hoffman v. Charlestown Five Cent Savings Bank, 231 Mass. 324, 121 N. E. 15 (1918); Erickson v. Macy, 231 N. Y. 86, 131 N. E. 744 (1921); Pierrard v. Hoch, 97 Ore. 71, 191 Pac. 328 (1920); Kuehn v. Mengebauer, 216 S. W. 259 (Tex. Civ. App. 1919).

gress to maintain an army and navy has also sustained its right to control the procedure in the state courts.¹⁰ By virtue of Article Six¹¹ of the Federal Constitution, the federal statute will supersede any similar state law.¹²

For the purposes of this note, discussion of the Act will be limited to Sections 205, 201 and 204, and 103. At the outset, it is important to observe that the method used throughout consists mainly in suspending the enforcement of certain civil liabilities of persons in military or naval establishments during their absence and a short time thereafter so that they might have an opportunity upon their return to be heard and to take measures to protect their interests.¹³ Such remedy is, however, to be afforded only when, in the opinion of a court, a person's opportunity to perform his obligations are impaired by reason of his being in the service.¹⁴

Section 205 provides that "the period of military service shall not be included in 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, executor, administrator, or assigns, whether such cause of action shall have accrued prior to or during the period of such service." In effect, this means that the Statute of Limitations is not to run during the period that defendant is in military service. Although the language of Section 205 does not use "Statute of Limitations", the words "any period limited by any law for the bringing of any action" are broad enough to include every form of action by which a soldier or sailor's right is affected.¹⁵

A provision for extension of the Statute of Limitations is not, in and of itself, extraordinary. Under our New York Civil Practice Act,¹⁶ for example, certain disabilities operate to extend the time in

¹⁰ *Konkel v. State*, 168 Wis. 335, 170 N. W. 715 (1919), where the court decided that regulation in respect to the service of civil process upon persons in the military service is of a purely national character and, therefore, the orderly administration of army and navy affairs requires that such regulation should be uniform throughout the United States.

See also *Clark v. Mech. Am. Nat. Bank*, 282 Fed. 589 (C. C. A. 8th, 1922), citing *Stewart v. Kahn*, 11 Wall. 493 (U. S. 1870) and *Erickson v. Macy*, 231 N. Y. 86, 131 N. E. 744 (1921); *Kosel v. First Nat. Bank of Ashley*, 55 N. D. 445, 214 N. W. 249 (1927).

¹¹ Article VI, par. 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land: and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding."

¹² *Pierrard v. Hoch*, 97 Ore. 71, 191 Pac. 328 (1920); *Konkel v. State*, 168 Wis. 335, 170 N. W. 715 (1919). *See also* *Selective Draft Law Cases*, 245 U. S. 366, 38 Sup. Ct. 159 (1918); *Sturges v. Crowninshield*, 4 Wheat. 122 (U. S. 1819).

¹³ HOUSE COMMITTEE REPORT 3001, Sept. 30, 1940.

¹⁴ SOLDIERS' AND SAILORS' ACT § 201.

¹⁵ *Clark v. Mech. Am. Nat. Bank*, 282 Fed. 589 (C. C. A. 8th, 1922).

¹⁶ CIV. PRAC. ACT §§ 43, 60.

which plaintiff may prosecute his action.¹⁷

Keeping in mind the purpose of the Statute of Limitations, it would seem that no extension should be permitted unless there exists sufficient justification for it. Under the Civil Practice Act, that justification takes the form of some disability on the part of the plaintiff. But can we find a satisfactory basis for the extension authorized by Section 205? Under the provisions of the Soldiers' and Sailors' Act, a person in military service when called upon to defend an action may procure a stay for the period of his service¹⁸ and three months thereafter.¹⁹ If the term of service should equal or exceed the limitation period applicable, plaintiff would find himself without a remedy upon defendant's release, as the statute would have run. Were it not for the provision that the Statute of Limitations should not run during the period of service, countless causes of action would be barred. There is, therefore, a sound basis for Section 205.

Section 201 provides: "At any stage thereof, any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such a person or some person on his behalf, be stayed as provided in this act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or defendant to conduct his defense is not materially affected by reason of his military service."

Section 204 provides: "Any stay of any action, proceeding, attachment, or execution, ordered by any court under the provision of the act may, except as otherwise provided, be ordered for the period of military service and three months thereafter or any part of such period, and subject to such terms as may be just, whether as to payment in installments of such amounts and at such time as the court may fix or otherwise. Where the person in military service is a co-defendant with others, plaintiff may nevertheless by leave of court proceed against the others."

Neither Sections 201 nor 205 presents any difficulty. But let us consider this case: *A* is the maker of a promissory note payable to *C*; *B*, the endorser. The date of maturity arrives and *C* wishes

¹⁷ PRASHKER, CASES AND MATERIALS ON NEW YORK PLEADING AND PRACTICE (2d ed. 1937) 104-110.

Those disabilities are:

- (a) Infancy
- (b) Insanity
- (c) Imprisonment on a criminal charge, or in execution upon conviction of a criminal offense, for a term less than life, and
- (d) Disability to sue in the courts of the state by reason of either party being an alien subject or citizen of a country at war with the United States.

¹⁸ SOLDIERS' AND SAILORS' ACT § 201.

¹⁹ *Id.* § 204.

to collect on his note. *A* is now in military service; *B*, however, is not. Under Section 201, *A* may, and does in fact, procure a stay. *C* then decides to proceed against *B*, the endorser. Is a party secondarily liable on an obligation entitled to any relief on the ground that the principal obligor has procured a stay under the Soldiers' and Sailors' Act? The answer to this question is found in Section 103(1) of the Act. Section 103(1) provides as follows: "Whenever pursuant to any of the provisions of this Act the enforcement of any obligation or liability, the prosecution of any suit or proceeding, the entry or enforcement of any order, writ, judgment, or decree, or the performance of any other act, may be stayed, postponed, or suspended, such stay, postponement, or suspension may, in the discretion of the court, likewise be granted to sureties, guarantors, endorsers, and others subject to the obligation or liability, the performance or enforcement of which is stayed, postponed, or suspended."

In our hypothetical situation, therefore, *B*, the endorser, would be entitled to procure a stay. There is one problem, however, arising under Section 103(1) which cannot be disposed of so simply. It was recently presented before the courts in two cases: *Modern Industrial Bank v. Zaentz*²⁰ and *Matter of Itzkowitz v. Empire Personal Loan Co.*²¹

In the first case, defendant Zaentz applied for and secured a loan from plaintiff in the sum of \$200, to be repaid in weekly payments, for a so-called investment certificate. The loan was evidenced by a note executed by defendants Resnick and Leiter, as well as by Zaentz, but was secured by the investment certificate of Zaentz only. Under the terms of the note, twelve months after date,

"Borrower	Bernard Zaentz	L.S.
Co-maker	Cy Resnick	L.S.
Co-maker	Hyman Leiter	L.S."

for value received, jointly and severally promised to pay \$200 to the order of the Modern Industrial Bank.

Payments for the investment certificate were made totalling \$48 up to November 25, 1940, at about which time Zaentz was inducted into the military service of the United States. Induction was followed by non-payment. Plaintiff sued to recover the balance due under the note. Resnick and Leiter set up the defense *inter alia*, that Zaentz was then in military service. Relying on Section 103(1) of the Soldiers' and Sailors' Act, they moved to stay the further prosecution of the action during the period of military service of Zaentz, and for a period of sixty days thereafter. The court refused to exercise

²⁰ *Modern Industrial Bank v. Zaentz*, 177 Misc. 132, 29 N. Y. S. (2d) 969 (1941).

²¹ *Matter of Itzkowitz v. Empire Personal Loan Co.*, 177 Misc. 269, 30 N. Y. S. (2d) 336 (1941).

its judicial discretion in their favor because there had been no compliance with statutory conditions precedent to the granting of a stay. The final part of Section 103(1) qualifies the provision for stay of a proceeding by the words "*the performance or enforcement of which is stayed, postponed, or suspended.*" In other words, before Resnick and Leiter could procure a stay, it had to appear that a stay already existed in favor of the obligor in military service. Were this not so, the act would present the anomaly of a stay in favor of one obligated to pay on default of the borrower, while the principal debtor in military service could be harassed by legal process. As the papers were silent on the point, and as the court could not say whether Zaentz had procured a stay, there was no basis for the exercise or denial of discretion in favor of the co-makers.

Plaintiff in resisting the stay urged that Resnick and Leiter as accommodation makers were primary, not secondary obligors under the Negotiable Instruments Law, and that the moratory provisions of Section 103(1) are applicable to secondary obligors only. The court rejected this contention and held that if it had been shown that a stay already existed in favor of Zaentz, co-makers Resnick and Leiter, under Section 103(1) would have been entitled to the same relief. Judge Wecht based his decision on the following grounds: (1) Resnick and Leiter, regardless of how they were denominated in the instrument they executed, were in the position of sureties, (2) Section 103(1) is not applicable to secondary obligors only as it refers to both secondary and *primary* obligations. (3) Assuming the co-makers were not sureties, they would still be among the "others subject to the obligation or liability" enprivileged by the act to seek the protection of a stay.

Judge Pecora, however, in the case of *In re Itzkowitz* came to a directly opposite conclusion. Application was there made for an order pursuant to the provisions of the Soldiers' and Sailors' Act for a stay of the enforcement of the applicant's liability as a co-maker upon a promissory note signed by him and another person who was at the time of the application in military service. Again the question to be decided was whether a co-maker on a note fell within the purview of Section 103(1). The court held that that part of Section 103 which specifically mentions sureties, guarantors, and endorsers refers only to secondary obligations and that the sentence following which concerns "all others subject to the obligation or liability" is, therefore, similarly limited in its application. As the obligation of an accommodation maker is primary, he could not seek protection under the Act.

Although the title of Section 103(1) (Protection of Persons Secondarily Liable) might lead to such a conclusion, this decision cannot be sustained. While it is true that the obligation of a guar-

antor²² and an endorser²³ is secondary, in that it is conditioned upon default of the principal debtor, the obligation of a surety is concededly *primary*.²⁴ A contract of suretyship is a contract by which the surety becomes bound as the principal debtor is bound.²⁵ It is a primary obligation, and the creditor is not required to proceed first against the principal before he can recover from the surety.²⁶ It cannot be true, then, that Section 103, which specifically mentions a surety, refers only to secondary obligations. The title of the Act is inconsistent with its provisions.²⁷

Returning to the *Zaentz* case, we find that Resnick and Leiter were accommodation parties only; they received none of the proceeds of the loan. The resemblance of their contract with that of the surety justified the court in holding that they were sureties. Since the facts in the *Itzkowitz* case were essentially the same as the facts in the *Zaentz* case, the conclusion should have been the same. In all probability, the court failed to consider the suretyship element only because of its construction of the Negotiable Instruments Law. It should be noted that the Negotiable Instruments Law has not had the effect of removing suretyship from the law of negotiable instruments merely because it failed to mention it. N. I. L. § 7 states that in any case not provided for in the Act, the rules of Law Merchant shall govern. And although the *term* suretyship was not known to

²² While both a guarantor and a surety is, as to the principal, collaterally liable, as to the creditor or obligee, the surety is primarily and directly liable on his contract from the beginning, whereas the liability of the guarantor is secondary, and is fixed only by the happening of the prescribed condition at a time after the contract itself is made. *Transcontinental Pet. Co. v. Interocean Oil Co.*, 262 Fed. 278 (C. C. A. 8th, 1920); *J. W. Watkins Med. Co. v. Lovelady*, 186 Ala. 414, 65 So. 52 (1914); *Fields v. Willis*, 123 Ga. 272, 51 S. E. 280 (1905); *Booth v. Irving Nat. Exchange Bank*, 116 Md. 668, 82 Atl. 652 (1911); *Stein v. Whitman*, 156 App. Div. 861, 142 N. Y. Supp. 4 (1st Dep't 1913), *rev'd on other grounds*, 209 N. Y. 576, 103 N. E. 1133 (1913); *Home-wood People's Bank v. Hastings*, 263 Pa. 260, 106 Atl. 308 (1919).

²³ See NEGOTIABLE INSTRUMENTS LAW § 3: "The person 'primarily' liable on the instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are 'secondarily' liable."

²⁴ *Peterson v. Miller Rubber Co. of N. Y.*, 24 F. (2d) 59 (C. C. A. 8th, 1928); *Alabama Bank and Trust Co. v. Garner*, 225 Ala. 269, 142 So. 568 (1932); *Massell v. Prudential Ins. Co. of America*, 57 Ga. App. 460, 196 S. E. 115 (1938); *In re Brock*, 312 Pa. 7, 166 Atl. 778 (1933).

²⁵ Notes (1911) 31 L. R. A. (n.s.) 152.

²⁶ *Ibid.*

²⁷ In *Griswold v. Cady*, 27 N. Y. S. (2d) 302 (Spec. Term N. Y. 1941), an action had been commenced against William Cady involving the operation of his car, but had been stayed because Cady was at the time in the United States Navy. On original motion, the court denied the application to stay proceedings as to the defendant Ora Cady, wife of defendant William Cady, on the theory that such wife, as owner of the car, had a liability which was independent of the liability of her husband, as operator of the car, and that plaintiff could have sued Ora Cady as *sole defendant* had she so elected. On motion for reargument, the court held that the case came within the purview of Section 103(1) of the Soldiers' and Sailors' Act and granted a stay in favor of the wife. Clearly, this was not a case of secondary liability.

the law merchant, it cannot be denied that the *relationship* was known.²⁸ Therefore, the incidents of suretyship can attach to a negotiable instrument.²⁹

With that proposition as a starting point, we are free to look behind mere form in order to determine the true relationship between the parties. In determining the existence of the suretyship relation, we are not bound by signatures; we look rather at who lent the credit and for whose benefit the loan was made. If a person incurs a primary liability in person or estate for the benefit of another without sharing in the consideration, he stands in the position of a surety, whatever may be the form of his obligation.³⁰ The arrangement and equities between the debtors or obligors fix the relation and that relation may be known to the creditor or wholly unknown.³¹ It does not necessarily require a formal written agreement to create it, but may arise out of any implied parol agreement.³² The authorities hold that it may be shown by evidence *aliunde* that a joint maker of a promissory note is, in fact, but a surety.³³

The *Itzkowitz* case is also out of line with *Akron Auto Finance Co. v. Stonebraker*,³⁴ where the court was much more cautious than in the *Zaentz* case. The note in question was signed by two people: Calvin Weber and Frank Stonebraker. The payee finance company entered a judgment against Stonebraker and an order in aid of execution was issued. Stonebraker appeared and made a motion for an order staying the enforcement of the judgment on the ground that Weber, the other signer of the instrument, was in military service and that he, Stonebraker, signed the instrument for the accommodation of Weber and solely for the purpose of lending his credit to Weber. He relied on Section 103(1). The finance company contended that, as a matter of law, Stonebraker was not as to the instrument in question a "surety, guarantor, or indorser" but on the contrary a principal. The trial court held that one signing a contract without receiving value therefor and for the purpose of lending his credit to another, is included in Section 103(1). On appeal the order of stay was approved. The appellate court, reluctant to hold that Stonebraker was a surety (again obviously because of the Nego-

²⁸ EDGAR, JR., *WORKBOOK IN THE LAW OF SURETYSHIP AND GUARANTY* (2d Temp. ed. 1941) 18.

²⁹ Raymond, *Suretyship at Law Merchant* (1916) 30 HARV. L. REV. 141.

³⁰ *Howell v. War Finance Corp.*, 71 F. (2d) 237 (C. C. A. 9th, 1934); *Kellogg v. Lopez*, 145 Cal. 497, 78 Pac. 1056 (1904); *Hoffman v. Habighorst*, 38 Ore. 261, 63 Pac. 610 (1901).

³¹ *Tennessee-Hermitage Nat. Bank v. Hagan*, 218 Ala. 390, 119 So. 4 (1928).

³² BRANDT, *SURETYSHIP* § 287.

³³ *Fullerton Lumber Co. v. Snouffer*, 139 Iowa 176, 117 N. W. 50 (1908); *Piper v. Newcomber*, 25 Iowa 221 (1868); *Chambers v. Cochran and Brock*, 18 Iowa 159 (1864); *Lovell v. Potts*, 112 Ore. 538, 226 Pac. 111 (1924).

³⁴ *Akron Auto Finance Co. v. Stonebraker*, 66 Ohio App. 507, 35 N. E. (2d) 585 (1941).

tible Instruments Law) nevertheless decided that such a signer is one of the "general class, kind, or nature known as sureties or guarantors" specifically enumerated in the Act and is therefore included in the "others subject to the obligation or liability" mentioned therein. The position taken in the *Akron* and *Zaentz* cases is a sound one. Even if we assume that co-makers are excluded from the immunities of "sureties, guarantors and endorsers", they would still be among "the others subject to the obligation or liability" entitled to the protection of a stay.

Perhaps the only failing in the Act itself lies in its maximum time limit of three months after termination of military service for suspension of liabilities. It is highly unrealistic to assume that a man just released from the army, who has been receiving about \$30 a month while in service, will be able to earn sufficient money in three months to discharge an indebtedness which has accumulated over a period of years. No other similar statute gives such inadequate protection.³⁵

Amendment of the Act in this regard, accompanied by a more liberal interpretation of its provisions in the courts, would more closely achieve the avowed purposes of its drafters.

ROSE GRESS.

CONTRACTS—PAST CONSIDERATION—ASSIGNMENTS WITHOUT CONSIDERATION—IRREVOCABILITY OF OFFERS

A. Introduction

A promise made upon a past or executed consideration, if the promise is in writing and signed by the promisor, and if the writing expresses the consideration and if the consideration was actually given or performed and would be a valid consideration if it were not for the time when it was given or performed, shall not be denied effect as a valid contractual obligation.¹

An assignment for which there was not any consideration shall not be denied the effect of irrevocably transferring the assignor's interests if in writing and signed by the assignor.²

An offer of contract, which states that it is irrevocable and which is made in a writing signed by the offeror, has been made irrevocable

³⁵ Australia allows six months, Alberta and Saskatchewan two years. Great Britain and Manitoba set no limit, leaving the matter to judicial discretion in each case.

¹ N. Y. PERS. PROP. LAW § 33(3) and N. Y. REAL PROP. LAW § 279(2) (both eff. Sept. 1, 1941).

² N. Y. PERS. PROP. LAW § 33(4) and N. Y. REAL PROP. LAW § 279(3) (both eff. Sept. 1, 1941).