Washington and Lee Law Review

Volume 2 | Issue 1 Article 2

Fall 9-1-1940

A Discussion of the Soldiers' and Sailors' Civil Relief Act of 1940

Karl R. Bendetson

Washington and Lee Law Review

Volume II FALL, 1940 Number 1

A DISCUSSION OF THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT OF 1940

KARL R. BENDETSON*

Enactment of the Soldiers' and Sailors' Civil Relief Act of 1940, approved October 27, 1940,[1] has given rise to considerable speculation and interest.

The extent to which this statute will affect the general practitioner is not yet calculable. Few deny that it will be of genuine concern to the many businessmen whose enterprises embrace installment selling. Every business transaction accomplished prior to October 17, 1940 involving a male of selective service age may be materially affected by the measure. To a substantial degree all pending legislation and all future transactions to which a potential selectee or volunteer is a party may be influenced.

The purpose and scope of this article will be to present, first, a brief history of the enactment; second, a resume of its provisions; third, a statement of the general method of the statute; fourth, a critical appraisement; and fifth, a discussion of its constitutionality.

I. HISTORY OF THE STATUTE

At the outset, it is pertinent to recall that Congress enacted similar legislation during the World War in the act of March 8, 1918.[2] This legislation was known as "The Soldiers' and Sailors' Civil Relief Act." The original draft was prepared in the Office of The Judge Advocate General of the Army, under the supervision of Professor John H. Wigmore, now Dean Emeritus of the School of Law, Northwestern University, then on active duty as a major in that office. The Secretaries of War and

* Captain, Judge Advocate General's Department, United States Army. The opinions expressed in this article are those of the author, and do not necessarily embrace the views of the Judge Advocate General or the War Department.

[1]Public, No. 861, 76th Congress.

[2]40 Stat. 440.

Navy joined in a letter commending the draft to Congress. That draft was introduced into the Senate as S. 2859, 65th Congress. It was concurrently introduced into the House of Representatives as H. R. 6110, 65th Congress. The bills were referred to the respective Committees on the Judiciary of the Senate and House. The House Committee worked over the submitted draft and produced a new bill, H. R. 6361. That bill was the vehicle for the act of March 8, 1918[3] in which form, with minor amendments, it became law.[4] The 1918 enactment expired by its own limitation six months following the termination of the World War.[5]

During the spring and early summer of 1940, the War Department took under consideration the advisability of undertaking the preparation of a draft of similar legislation for submission to the Congress should the necessity arise. During the course of this study and prior to its completion, the President, on July 29, 1940, requested Congress to grant him authority to order the National Guard of the United States, together with Regular Army retired personnel and Reserve officers, to active duty. On July 30, 1940, Senator Sheppard introduced Senate Joint Resolution No. 286, to carry into effect the President's request. On August 1, 1940, Senator Overton introduced as an amendment to the Resolution, a provision designed to revive and extend certain benefits of the 1918 act. Senate Joint Resolution No. 286 was the vehicle for the enactment of Public Resolution No. 96, 76th Congress, approved August 27, 1940, section 4 whereof carried the Overton proposal. This measure is popularly known as "The National Guard Bill." During this period and on August 14, 1940, Senator Overton introduced an amendment to Senate Bill No. 4164, 76th Congress, the Selective Training and Service bill, identical in substance to the one he introduced on August 1, 1940, in connection with the National Guard bill. That amendment, with certain changes, was the vehicle for section 13 of the Selective Training and Service Act of 1940.[6] On August 12, 1940, Mr. May, Chairman of the Committee on Military Affairs, House of Representatives, introduced H. R. 10338, 76th Congress, a bill embodying in substance all of the provisions of the 1918 law, with certain modifications proposed by the War Department, some of which were predicated

[3]40 Stat. 440.

[4]Hearings and memoranda before the Subcommittee of the Committee on the Judiciary, United States Senate, 65th Congress, 1st and 2nd sessions, on S. 2859 and H. R. 6361. See Ferry, Rosenbaum and Wigmore, The Soldiers' and Sailors' Civil Rights Bill (1918) 12 Ill. L. Rev. 449.

[5]Section 603, 40 Stat. 440.

[6]Public, No. 783, 76th Congress, approved September 16, 1940.

upon the recommendation of the heads of other interested Government departments whose suggestions had been requested during the course of preparation of the draft by the War Department. On August 14, 1940, Senator Overton introduced S. 4270, 76th Congress, embodying provisions substantially identical with those carried in H. R. 10338. The differences embodied changes incorporated by Senator Overton, and were all in connection with the persons to whom the benefits of the act, if approved, would apply.[7]

In view of the Overton amendments to the pending National Guard and Selective Training and Service bills, proposing to revive certain provisions of the 1918 act, with the introduction of S. 4270 and H. R. 10338 a rather complicated legislative situation developed. Among the difficulties presented by the Overton amendments to the Selective Service and National Guard bills, was that involving a determination of just what, if any, protection would be afforded to persons ordered into military service following enactment of the legislation. This was true because section 4 of Public Resolution No. 96, the National Guard bill, provides, *inter alia:*

> "The benefits of the Soldiers' and Sailors' Civil Relief Act, approved March 8, are hereby extended to all * * * personnel ordered into active military service under authority of this joint resolution * * * and except as hereinafter provided, the provisions of such Act shall be effective for such purposes."

Similarly, section 13 of Public, No. 783, 76th Congress, the Selective Service law, provides, *inter alia:*

> "The benefits of the Soldiers' and Sailors' Civil Relief Act, approved March 8, 1918, are hereby extended to all persons inducted into the land or naval forces under this Act, and to all members of any reserve component of such forces now or hereafter on active duty for a period of more than one month; and, except as hereinafter provided, the provisions of such Act of March 8, 1918, shall be effective for such purposes."

A rather nice legal question is presented in determining just what are and what are not the "benefits" of the Soldiers' and Sailors' Civil Relief Act, approved March 8, 1918. Furthermore, to extend the benefits of a statute no longer in existence is at least of questionable effect. Moreover, whereas the National Guard bill covers all reserve compon-

[7]As originally introduced by Senator Overton, S. 4270, section 101 (1) was designed to cover only those persons proposed to be ordered to duty under the pending National Guard and Selective Training and Service bills. Those excluded from the benefits of the bill as submitted by Senator Overton included all persons voluntarily enlisting in the Army and Navy.

ents of the Army of the United States, together with retired personnel of the Regular Army, section 13 of the Selective Training and Service Act of 1940, approved some twenty days later, repeats coverage as to all members of the reserve components of the Army of the United States ordered to active duty, applies to those inducted through selection for training and service, but excludes Regular Army retired personnel. The exceptions embraced in the phrase "except as hereinafter provided" in each of the two foregoing quotations, are not uniform, and therefore, the uncertainties presented by section 4 of the National Guard Law were further complicated by section 13 of the Selective Training and Service Act of 1940. Instead of perceiving that the best way out of the situation was the abandonment of the Overton proposals and the enactment of a new bill establishing uniformity and removing all doubt concerning just what protection and benefits were to be extended to persons in military service, considerable confusion befogged the matter, and the Overton amendments were nevertheless enacted as provisions of the National Guard and Selective Service bills.

However, on September 30, 1940, the Senate enacted S. 4270, with certain amendments, which will be discussed later, and transmitted the same to the House. On October 3, 1940, the House of Representatives took under consideration, by unanimous consent, H. R. 10338. Certain amendments thereto were made from the floor, which amendments will also be discussed later. Thereafter, on the same date the House substituted the provisions of the bill H. R. 10338, as amended from the floor, for S. 4270, having struck out of S. 4270 all matter after the enacting clause of the Senate bill. On October 5, the committee of conference on the disagreeing votes of the two Houses on the amendment of the House to S. 4270, convened and recommended that the Senate recede from its disagreement to the amendment of the House and agree to the same with an amendment. Both the Senate and the House of Representatives agreed to the conference reports without objection. The bill S. 4270 thus became the vehicle for the Soldiers' and Sailors' Civil Relief Act of 1940.[8]

During the pendency of these bills both Committees on Military Affairs of the Senate and House of Representatives conducted hearings during the course of which, amendments were made to the bills as initially introduced. It is proposed to direct a few comments toward a critical appraisement of the enactment in section IV hereof, and it is

[8]Public, No. 861, 76th Congress, approved October 17, 1940.

believed that a discussion of these hearings more properly belongs in that section.

II. A Resume of the Provisions of the Act

In presenting a brief resume of the provisions of the statute, quotations from each section will be employed only where essential.

A. Article I—*General Provisions*

Section 100 is the introductory paragraph. It recites that "the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons" who are in military service, where such proceedings and transactions would be prejudical if not temporarily suspended. It is stated that the object is "to provide for, strengthen, and expedite the national defense under the emergent conditions which are threatening the peace and security of the United States." It is further declared that the objective is "to enable the United States the more successfully to fulfill the requirements of the national defense, * * *". The paragraph states that persons in military service will thus be enabled "to devote their entire energy to the defense needs of the Nation, * * *". The recitations of Section 100 are of importance only in connection with a consideration of the constitutionality of the provisions enacted. It is, of course, elementary that the recitations themselves, standing alone, are of no value unless there is some reasonable conformity between the recitations, the constitutional power invoked, and the actual objective of and result to be expected from the statute.

Section 101 is one of definition. Subdivision (1) thereof defines five phrases. These are: (1) "persons in military service", (2) "persons in the military service of the United States", (3) "military service", (4) "active service", and (5) "active duty". The phrases "persons in military service" and "persons in the military service of the United States" are declared to be synonymous, and they are stated to "include the following persons and no others:"

(1) All members of the Army of the United States.
(2) All members of the United States Navy.
(3) All members of the Marine Corps.
(4) All members of the Coast Guard.
(5) All officers of the Public Health Service detailed by proper authority for duty either with the Army or the Navy.

It is pertinent to consider just what elements are included in the foregoing classification of persons. The Army of the United States is

defined by statute.[9] It consists of (a) the Regular Army, (b) the National Guard of the United States, (c) the National Guard while in the service of the United States,[10] (d) the Officers' Reserve Corps, (e) the Organized Reserves, and (f) the Enlisted Reserve Corps.[11] The United States Navy is also defined by statute. It includes the Regular Navy,[12] the Naval Reserve,[13] which includes the Fleet Reserve, the Organized Reserve, the Merchant Marine Reserve, and the Volunteer Reserve. The Volunteer Reserve of the Naval Reserve includes such female registered nurses as may be appointed by the Secretary of the Navy.[14] The Marine Corps is under the supervision and direction of the Navy Department and in addition to the Regular Marine Corps includes a Marine Corps Reserve.[15] Neither the Coast Guard nor the Public Health Service has reserve components. The Selective Training and Service Act permits the induction of persons into the land or naval forces.[16]

---

[9]Section 1 of the National Defense Act, act of June 3, 1916 (39 Stat. 166), as amended by the act of June 4, 1920 (41 Stat. 759), as amended by the act of June 15, 1933 (48 Stat. 153); 10 U. S. C. A. 2. N. B.: While the National Defense Act is not expressly amended by the Selective Training and Service Act of 1940, act of September 16, 1940 (Public, No. 783, 76th Cong.), nevertheless, all persons selected for induction will be upon induction and acceptance, a part of the Army of the United States in the broad sense of the term. Even if this were not so, by section 3 (d) of the Selective Service Act such persons will be "paid, allowed and extended the same pay, allowances * * * and other benefits as are provided by law in the case of other enlisted men of like grade and length of service * * *". The inclusion of selectees within the benefits accorded by the act is therefore beyond doubt.

[10]The Constitution expressly limits the purposes for which the National Guard of the several states and territories may be ordered into Federal service. These are (1) "to execute the laws of the Union," (2) to "suppress insurrections," and (3) to "repel invasions" (Art. I, § 8, cl. 15). Congress has therefore established the National Guard of the United States in order to provide a ready reserve component not thus fettered. It consists of the same persons comprising the National Guard of the several states and territories, provided such persons have met the necessary physical and professional qualifications to be enlisted or appointed in the National Guard of the United States. The persons whom the President is authorized to order to active duty under the National Guard law are the officers and men of the National Guard of the United States, not the members of the National Guard of the several states and territories.

[11]So far as is known at this time, no members of the Enlisted Reserve Corps are on active duty. Only a portion of the members of the Officers' Reserve Corps are on extended active duty, for the most part by their own consent, although the National Guard law, *supra*, authorizes the President to place them on extended active duty for twelve months without their consent.

[12]Chapters 1 and 2, 34 U. S. C. A., 4 et seq.

[13]Act of June 25, 1938, 52 Stat. 1175, 34 U. S. C. A., Supp., 853, known as the Naval Reserve Act of 1938.

[14]Act June 25, 1938, 52 Stat. 1176, 34 U. S. C. A., Supp. 853b.

[15]Act June 25, 1938. 52 Stat. 1175, 34 U. S. C. A., Supp. 853a.

[16]See Section 3 (a), Public No. 783, 76th Congress, approved Sept. 16, 1940.

"Military service" is defined by subdivision (1) of section 101 as "Federal service on active duty" with any component of the services and branches named above. It also includes "training or education under the supervision of the United States preliminary to induction into the military service". For example, if a state National Guard unit was undergoing its ordinary annual fortnight of field training, this would not be "Federal service". However, if a situation developed whereby there was constitutional authority for calling a state National Guard unit as such into the service of the United States and as a preliminary to an actual mustering of such an organization into the Federal service it was undergoing preliminary training, it would doubtless be considered as within the terms of the section.

The terms "active service" or "active duty" are declared to be synonymous and are defined to "include the period during which a person in military service is absent from duty on account of sickness, wounds, leave, or other lawful cause."

Subdivision (2) of section 101 defines the "period of military service". It is an important definition, because in many instances the period over which a proceeding or transaction may be stayed or suspended is measured by the "period of military service". It is also important because it may be controlling as to whether a particular individual is entitled to any relief at all. The phrase is defined in the following manner: As to persons in active service on the date when the act was approved (October 17, 1940), their service is deemed to have commenced on the date of the approval of the act. As to persons entering active service following the approval of the legislation, their service commences with the date of enlistment, appointment, or actual induction. In the latter case, induction is not complete until the military authorities accept the selectee, that is, find him physically and otherwise qualified. The period of active service terminates either (1) with the date of discharge from active service, or (2) upon death while in active service. In no case may this be later than the date when the act itself ceases to be in force.[17]

Subdivision (3) defines "person" when used in the act with reference to the holder of any right alleged to exist against a person in military service or against a person secondarily liable under such alleged right. Included are: individuals, partnerships, corporations and any other form of business association.

Section 102 (1) declares that the provisions of the act shall apply not

[17]Section 604 governs the effective period of the statute. See Section II, F, fifth paragraph, *infra*.

only within the United States and its territories, but also in "all territories subject to the jurisdiction of the United States, including the Philippine Islands while under the sovereignty of the United States." It obtains in respect of any proceedings commenced in any of the courts situated in the foregoing places. It is important to note that the provisions of the act are required to be enforced "through the usual forms of procedure obtaining in such courts or under such regulations as may be by them prescribed".

Subdivision (2) of section 102 permits application to any court for relief under the act where no proceeding has already been commenced with respect to the matter.

Subdivision (1) of section 103 gives the court discretionary power to make applicable any stay, postponement or suspension granted by it in respect of anyone in military service to "sureties, guarantors, indorsers, and others subject to the obligation or liability, the performance or enforcement of which is stayed, postponed, or suspended."

Subdivision (2) of section 103 grants similar discretion to the court in favor of sureties, guarantors, indorsers, and other persons liable with regard to setting aside or vacating in whole or in part any judgment or decree as provided in the act with respect to persons in military service.

B. ARTICLE II—*General Relief*

Section 200 relates to instances where in any action or proceeding commenced in any court there is a default of appearance by the defendant. The section consists of four subdivisions and is very far-reaching in the sense that before any plaintiff may take a default judgment, a certain definite procedure must be followed. This is so whether or not it has appeared in the proceeding that the defendant or, if there is more than one defendant, any one of the defendants is in military service. Before taking a default judgment, the plaintiff, if he can, is required to file an affidavit that the defendant is not in military service. If he is unable to file such an affidavit, the plaintiff must in lieu thereof file an affidavit setting forth either (1) that the defendant is in military service or (2) that the plaintiff is unable to determine the status of the defendant in this respect. If no affidavit is filed, no judgment may be entered without first securing an order directing such entry. In any event, no such order shall be made if the defendant is in military service until the court shall have appointed an attorney to represent such defendant and protect his interests. Unless it appears that the defend-

ant is not in military service the court may require the plaintiff to file a bond approved by the court, conditioned to indemnify the defendant "if in military service, against any loss or damage that he may suffer by reason of any judgment should the judgment be set aside in whole or in part." Moreover, the court is empowered to make such other and further order or enter such judgment as in its opinion may be necessary to protect the rights of the defendant under the act.

Subdivision (2) declares that the use of an affidavit known to be false, is a misdemeanor punishable by imprisonment not to exceed one year or by fine not to exceed $1000, or both.

Subdivision (3) reaffirms the court's power to appoint an attorney to represent a person in military service where such party does not have his own attorney and does not personally appear. The attorney appointed by the court, however, has no "power to waive any right of the person for whom he is appointed or bind him by his acts."

Subdivision (4) relates to the vacating, setting aside, or reversing of judgments entered against persons in military service during the period of such service or within thirty days thereafter. Within ninety days after the termination of such service, such a judgment may be opened and the person let in to defend, provided a showing is made that the person involved was prejudiced by reason of his military service in making his defense to the action and further, that he has a meritorious or legal defense to the action or some part thereof. The intervening rights of any bona fide purchasers for value under such judgments are expressly protected.

Section 201 relates to the granting of stays in any action or proceeding in any court in which a person in military service is involved either as plaintiff or defendant. If the application is made during the period of such service or within sixty days thereafter, the court may, in its discretion, grant a stay. Where it appears that the ability of the plaintiff to prosecute the action, or of the defendant to conduct his defense, is not materially impaired or affected by reason of his military service, a stay is discretionary, otherwise it is mandatory.[18]

Section 202 relieves against fines and penalties accruing in any case by reason of the failure to comply with the terms of any contract during the period of any stay ordered by a court in a proceeding instituted to enforce compliance with such contract. Courts are also empowered to relieve against a contractual fine or penalty for nonperformance on such terms as may be just where it appears (1) that the person was in

[18]The period of stay is governed by section 204, infra.

the military service when the penalty was incurred and (2) that the ability of the person to pay or perform was impaired by reason of such military service.

Section 203 relates to stays of execution and the vacation or stay of any attachment or garnishment whether before or after judgment. In respect of any proceeding commenced against a person in military service, either before or during or within sixty days after such military service, the court is given discretionary power on its own motion to stay execution or vacate or stay any attachment or garnishment. Such action is mandatory upon application to the court by such person, or by someone on his behalf, unless the ability of the defendant to comply with the judgment or order is not materially affected by reason of his military service.

Section 204 governs the period over which a stay may be granted. The maximum period is for the duration of the military service of the person affected and for three months thereafter. Stays may be subject to such terms as the court deems just, including a direction to pay installments in such amounts and at such times as the court may fix. It is provided that where the person in military service is a co-defendant with others, the court may nevertheless proceed against the others. This section is the one around which the entire act revolves, (excluding, of course, the insurance provisions of Article IV, and, in part, the provisions of Article V) in the sense that it specifies the measure of relief in connection with the stay of transactions and proceedings affecting persons in military service.

C. Article III—*Rent, Installment Contracts, and Mortgages*

Section 300 relates exclusively to rent, to the relation of landlord and tenant. Except in respect of a proceeding to collect unpaid rent after the relation of landlord and tenant has terminated, a proceeding which would be governed by Article II, this section contains the whole measure of relief afforded in this sphere. It comprises four subdivisions. The relief afforded is limited to the wife, children or other dependents of a person in military service. Impressions to the contrary notwithstanding, where an individual without dependents enters military service, no basis is afforded by this act alone for a termination of an existing contract of lease. A person without dependents is given no relief except that which may be afforded him by reason of the provisions of Article II, and then only, of course, where his landlord sues for unpaid rent and the person affected is able to show that his military service has

materially impaired his capacity to pay. In such case the proceeding for collection of the unpaid rent may be stayed for the period of military service and up to three months thereafter.[19]

Subdivision (1) is limited in application to premises occupied chiefly for dwelling purposes where the agreed rent does not exceed $80 per month and where the premises are occupied by "the wife, children, or other dependents of a person in military service". It prohibits summary proceedings for eviction or distress and provides that no eviction or distress shall be made during the period of military service "except upon leave of court granted upon application therefor" or granted in an action or proceeding affecting the right of possession.

Where the military service of the person whose wife, children, or other dependents are sought to be evicted has materially affected or impaired his ability to pay the agreed rent, subdivision (2) provides that the court may stay the proceedings for eviction or distress for not longer than three months or "make such other order as may be just."

Subdivision (3) makes a misdemeanor the action of any person who knowingly participates in an eviction or distress other than as provided in subdivision (1) of this section. A punishment of one year's imprisonment or $1000 fine or both may be imposed.

Subdivision (4) permits compulsory allotments. It empowers certain officials "to order an allotment of pay of a person in military service in reasonable proportion to discharge the rent of premises occupied for dwelling purposes" by his dependents. This power is accorded in appropriate cases to the Secretary of War, the Secretary of the Navy, and the Secretary of the Treasury with respect to the Coast Guard. No provision is made with regard to officers of the Public Health Service detailed with the Army or Navy. It is probable that the Secretary of War or the Secretary of the Navy, as the case may be, would be empowered to make such an order.

Section 301 relates to contracts of conditional sale and to contracts of lease or bailment with a view to the purchase of real or personal property. It relates only to those contracts executed prior to October 17, 1940, the date of approval of the act. Unless an installment had been paid prior to the date on which the statute was approved, no contract of this nature executed subsequent to October 17, 1940, is in any way affected by the provisions of Article III. Of course, on a suit to enforce payment of the balance of the purchase price, where the conditional vendor or his assignee had elected to pass title and sue for the price,

[19]Sections 203 and 204, Soldiers' & Sailors' Civil Relief Act of 1940.

the provisions of Article II might afford some relief and would affect such a proceeding irrespective of when the contract was executed.

Subdivision (1) of section 301 forbids the exercise of any right or option, under such a contract, to rescind or terminate the contract or resume possession of the property for nonpayment of any installment falling due during the period of the military service of the vendee "except by action in a court of competent jurisdiction". Stated otherwise, the summary right to repossession may no longer be exercised out of court as to contracts of this nature which are within the act. It is necessary to institute a proceeding and make application for forfeiture and repossession. Of interest is the proviso at the end of the section, presumably added for the purpose of clarity.[20] It expressly permits the modificaton, termination, or cancellation of any such contract and the repossession of the property conditionally sold pursuant to the mutual agreement of the parties or their assignees, where such agreement is executed in writing "subsequent to the making of such contract and during or after the period of military service of the person concerned." It is probable that the right to rescind by mutual agreement would have remained unaffected had this proviso been omitted. It is now fettered by the requirement that a rescissory agreement must be in writing and must be executed after the commencement of military service.

Subdivision (2) makes a resumption of possession otherwise than as provided in (1) a misdemeanor punishable by one year's imprisonment or $1000 fine, or both.

Subdivision (3) is modified by and must be read *in pari materia* with section 303. It grants the court discretion to stay proceedings for forfeiture and resumption of possession. It makes the granting of a stay mandatory upon the application of a person in military service unless it appears that such service has not materially impaired his capacity to pay or perform except as provided in section 303. The exception provided in section 303 relates to motor vehicles, tractors, and their accessories, and it applies in cases where less than fifty per cent of the purchase price has been paid. Where fifty per cent of the purchase price has not been paid, no stay can be granted in any action for forfeiture, foreclosure or repossession. The subdivision, however, confers discretionary power on the court in any case to make such equitable disposition of the matter as will conserve the interests of all parties, and this power is undiminished by section 303, irrespective of the percentage of the purchase price paid.

[20]A brief discussion concerning the addition of this proviso will be found in section IV hereof.

Section 302 relates to mortgages on real or personal property, including, of course, trust deeds and other security instruments in the nature of a mortgage. Its application is limited to instances where the obligation secured originated prior to the date of approval of the act (October 17, 1940) and then only where the real or personal property pledged to secure repayment of the obligation was owned by a person in military service at the time when his military service commenced and is still so owned by him.

Subdivision (2) is modified by section 303 and must be read *in pari materia* therewith. This subdivision empowers the court to stay proceedings for foreclosure against persons in military service where the capacity of the person to pay is materially impaired by such military service. On the application of such person and a showing of material impairment of capacity resulting from military service, a stay is mandatory except as provided in section 303. The exception provided in section 303 as already noted, relates to purchase money chattel mortgages of motor vehicles, tractors and accessories thereof, where less than fifty per cent of the purchase price has been paid. In any case, the court is endowed with discretionary power to make such other disposition of the proceeding as may be equitable to preserve the interests of all parties.

Subdivision (3) provides that sales under a power of sale or under a judgment entered upon warrant of attorney to confess judgment contained in a mortgage or trust deed, obligations shall be invalid if made during the period of military service or within three months thereafter. They are valid only if made upon an order of sale previously granted by the court and a return thereto made and approved by the court.

Section 303 has already been referred to in previous comments. It covers motor vehicles, tractors, and the accessories of either. It prohibits the granting of a stay of a proceeding to resume possession or for an order of sale, unless the court finds that fifty per cent or more of the purchase price has been paid. In any case, however, the court is given discretion to require the plaintiff to file a bond conditioned to indemnify the defendant if in the military service, against any loss or damage he may suffer by reason of such judgment or order should the judgment or order be set aside in whole or in part. It should be noted that notwithstanding section 303, and irrespective of the percentage of the purchase price paid, the power of the court to deal equitably with any such proceeding is retained.

D. ARTICLE IV—*Insurance*

The provisions of section IV will not be discussed in detail at this time, but will be left for subsequent comment. In general, it provides for the guarantee of premiums on life insurance up to a total insurance face value of $5,000, whether on one or more policies, where an insured in military service applies for the benefits of the article. The article covers any contract of life insurance on the level premium or legal reserve plan. It also includes any benefit in the nature of life insurance arising out of membership in any fraternal or beneficial association. No policy is eligible for guarantee of premiums where there is an outstanding loan or other indebtedness equal to or greater than fifty per cent of the cash surrender of the policy. Policies on which premiums have been unpaid for a period of a year or more are also ineligible. Where an individual applies for the benefits of the article, he must send the original of the application, on a form prepared by the Administrator of Veterans' Affairs, to the insurer, and a copy to the Veterans' Administration. If the Veterans' Administration finds that the policy is eligible for coverage, and the insurer consents to whatever modifications of the insurance contract are necessary, the United States Government, in effect, guarantees payment of the necessary premiums over the period of military service. Thus lapse is prevented during such service. Certificates of the United States, bearing interest at a rate to be prescribed from time to time by the Secretary of the Treasury are issued to each insurer covering the amount of premiums guaranteed by the Government in each company and in each fraternal or beneficial association. At the end of one year after the act ceases to be in force, the accounts between the United States and each insurer are settled and upon surrender of the certificates by the insurer to the Secretary of the Treasury, payment is made out of any moneys in the Treasury not otherwise appropriated. In order to arrive at the account stated between the Government and the insurer, the method employed is this: Each insured is given one year following the termination of his military service, which under subdivision (2) of section 101 cannot be later than the date when the act ceases to be in force, during which to pay to his insurer all past due premiums, that is, those guaranteed by the Government, together with those which might have been in default at the time of application for coverage. If this is not done, the policy lapses and becomes void. At this time there is credited to the United States the total cash surrender value of the policy plus any past due premiums which the insured might have paid. This credit is offset

against the face value of the certificates held as security by each insurer. The difference, if any, is paid by the Government to the insurer. If the cash surrender value in any instance is greater than the amount of past due premiums, the over-plus goes to the insured. During the last war, the loss to the Government was negligible. It aggregated under $20,000.[21]

Of further interest generally, is the provision that no contract of insurance is eligible if it is void or voidable at the option of the insurer, provided the insured is in military service. Contracts of insurance which provide for the payment of any sum less than the face thereof, or for the payment of an additional amount as premium in cases where the insured enters military service, are also ineligible.

E. ARTICLE V—*Taxes and Public Lands*

Sections 500 and 513 both relate to relief against certain taxes therein described. Section 500 comprises five subdivisions. The taxes to which section 500 is applicable are described in subdivision (1). These are any taxes or assessments, whether general or special, falling due during the period of military service in respect to real property. The real estate affected must be owned and occupied for dwelling, agricultural or business purposes either by a person in military service or by his dependents. It must have been so owned and occupied either by him or his dependents at the time of commencement of his military service. It is further requisite that such real estate be occupied by the person's dependents or employees when the particular taxes otherwise due are not paid.

The provisions of subdivision (2) grant a court of competent jurisdiction the power to stay proceedings for the enforcement of collection of such taxes or assessments and to stay a sale of such property in satisfaction of such unpaid taxes or assessments. A stay may be granted for a period extending not more than six months beyond termination of the military service of the person affected. In order to qualify for such relief, it is necessary that the person in military service file an affidavit with the tax collector, or with the officer whose duty it is to enforce the collection of the particular tax or assessment. The requisite affidavit must show (a) that a tax or assessment has been assessed upon

[21]During the last World War the Government guaranteed an aggregate of $362,399.50 in insurance premiums and recovered all but $19,518.40 of the premiums thus guaranteed. (See Annual Report of Director, United States Veteran's Bureau, 1924, page 445)

property of the character described in subdivision (1), (b) that the particular tax or assessment is unpaid and (c) that the deponent is in military service and that by reason of such service his ability to pay such tax or assessment is materially affected. Upon the filing of such an affidavit, no sale of property within the coverage of this article shall be made to enforce collection except upon leave of court granted upon the application of the officer charged with the enforcement and collection. No proceeding or action with a view to sale may be commenced except upon leave of court following the filing of such an affidavit.

Subdivision (3) makes provision for the instances in which such property may be sold or forfeited to collect taxes or assessments by granting the right to redeem or commence an action to redeem the property following sale. The redemption must be accomplished, or the action to redeem must be instituted, not later than six months following the termination of the person's military service. By reason of the provisions of subdivision (2) of section 101, this may not be later than six months following the date when the act ceases to be in force. The six months' redemption period thus granted does not, however, operate to shorten any period which may now or hereafter be provided by law in any state or territory for such remeption.

Subdivision (4) relates to the accrual of interest on unpaid taxes or assessments. It provides for interest at the rate of six per cent per annum and precludes the accrual of any other penalty or interest by reason of such nonpayment. Such interest is included in the lien of unpaid taxes and assessments.

Subdivision (5) is designed to make effective the protection afforded in this article by requiring the appropriate department heads, that is, the Secretary of War in the case of the Army, the Secretary of the Navy in the case of the Navy and the Marine Corps, and the Secretary of the Treasury in the case of the Coast Guard, to make appropriate provision for the giving of notice to persons under their jurisdiction of the benefits accorded by the section and of the action made necessary to enjoy such benefits by persons in military service.

Sections 501 to 512 inclusive, relate to rights in the public domain, including rights acquired under lode and placer mining claims, prospecting and exploration permits and leases under the mining and mineral leasing laws. In general, where the homesteader, permittee, licensee, lessee, or applicant is absent from the property involved by reason of military service or does not perform the requisite assessment work or annual labor, it is provided that his rights will not thereby be forfeited.

In the case of desert-land entry, under section 504 the time within which the entryman or claimant is required to make certain expenditures and effect reclamation is extended by the period of military service plus six months, together with any period of hospitalization made necessary by wounds or other disability incurred in line of duty. While certain minimum requirements are specified, the general method is to toll the requirements over the period of military service and up to six months thereafter, or, in some cases, for the period of enlistment or service plus any period of hospitalization due to wounds or other disability incurred in line of duty.

Under section 505 placer and lode mining claims are not extinguished through failure to perform the $100 worth of labor or improvements ordinarily required in each year. The requirements are suspended over the period of the military service plus six months, or over the period of service together with any period of hospitalization due to wounds or other disability incurred in line of duty.

Under section 506, a permittee or lessee under the Federal mineral leasing laws may elect to suspend all operations under such permit or lease for a period of time equivalent to his military service plus six months. The running of time under the permit or lease is tolled for that period. It is necessary, however, that within six months following his entry into the service, the lessee or permittee notify the General Land Office of his intention to claim the benefits of the section.

Under section 508, the Secretary of the Interior is authorized in his discretion to suspend, over the period while the act remains in force, with regard to persons in military service, those provisions of the statute known as the "Reclamation Act", requiring residence upon lands in private ownership or within the neighborhood in order to qualify for securing water for the irrigation of such lands.

Provisions of section 509 direct that the Secretary of the Interior shall issue through appropriate military and naval channels, for distribution by military and naval authorities to persons in military service, a notice explaining the provisions of Article V.

Under section 510 homestead entrymen are permitted leave of absence from their entries for the purpose of performing farm labor. Time spent in farm labor is deemed constructive residence on the entry if within 15 days after leaving his entry he files notice in the district in which his homestead is situated. Such homestead entrymen who are not persons in military service are of course not excused from making improvements or from performing the cultivation upon their entries required under existing law.

Section 511 extends to persons under the age of 21 who serve in the military service while the act remains in force, the same rights under the laws relating to lands owned or controlled by the United States as are accorded to persons who have attained majority under present law.

Section 512 provides that should the United States become involved in a war and become allied with any other nation in the prosecution of that war, citizens of the United States who serve with such allied forces shall be entitled to all the relief and benefits afforded by Article V. This grant is, of course, predicated upon the requirement that the service rendered to the allied country is military service as defined in the act, that the persons serving be honorably discharged from such service, and either (1) that they resume United States citizenship or (2) that they die in the service of the allied forces as the result of such service.

Section 513 relates to all taxes upon the income of any person in the military service whether falling due prior to or during his period of service. If it appears that such person's ability to pay such tax is materially impaired by reason of his military service, payment of the tax may at his election be deferred for a period extending to not more than six months following the termination of his military service. Neither interest nor penalty may accrue for the period of deferment. Provision is made in favor of the Government for the tolling of the statute of limitations against the collection of the particular tax by distraint or otherwise. The income tax on employees imposed by section 1400 of the Federal Insurance Contributions Act[22] is expressly excepted from the benefits of the section. To the extent that Congress has power to affect the power of the several states to levy and collect taxes, it is undoubted that the section applies to any excise tax which is levied upon or measured by the income of the person affected.

F. ARTICLE VI—*Administrative Remedies*

Section 600 is designed to prevent the use of the act as a sword rather than as a shield. When any interest in land under a contract is assigned or transferred for the purpose of claiming the benefits of the act with intent to delay or defraud the just enforcement of any right, the benefits of the act become inapplicable. Subdivisions (1) and (2) of section 601 provide for the issuance of certificates of record of military service. Under this section The Adjutant General in the case of the Army, the Chief of the Bureau of Navigation in the case of the

[22]Act of Feb. 10, 1939, 53 Stat. 1400 (Part I)

Navy, and the Major General Commandant of the United States Marine Corps in the case of the Marine Corps are required upon proper application therefor to issue a certificate that the person concerning whom the application is made has not been, or is, or has been, in military service. If the person concerning whom the certificate is requested has ever been in military service or is now in military service, all pertinent data as to the time, place and length of service, the rank, branch and unit of the service, the monthly pay received, must be included in the certificate. In any proceeding under the act, such certificate, when produced, shall be prima facie evidence as to such facts. It is made the duty of the officers involved to furnish such certificates upon application. However, since the certificates are for use in "any proceeding under the Act," it is believed that the policy of the various departments concerned will be to deny a request unless it appears that there is a bona fide proceeding pending, otherwise the burden involved would be inestimable. For example, in the War Department alone, there are over 12,000,000 separate sets of records of military service and if a search were made upon a frivolous request, the waste of time would be substantial and damaging to the efficiency of the office affected.

Subdivision (3) of section 601 relates to persons in military service who have been reported missing. It provides that until such person has been accounted for, he shall be presumed to be in the service. It further directs that no period limited in the act which begins or ends with the death of such persons shall begin or end until the death of such person is in fact reported to or found by the Department of War or Navy, or any court or board thereof, or until such death is found by a court of competent jurisdiction. It is further provided that the provisions of the section cannot operate to extend a period otherwise limited by the death of such person for a period beyond six months after the time when the act ceases to be in force.

Section 602 refers to interlocutory orders made under the provisions of the act by any court. It is provided that such court upon its own motion or otherwise, may revoke, modify or extend such order upon such notice to the parties affected as the court may require.

Section 603 is the separability clause. It provides: "If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the act, and the application of such provision to other persons or circumstances, shall not be affected thereby."

Section 604 provides that the act shall remain in force until May 15,

1945. A proviso is appended, however, to the effect that should the United States be then engaged in a war, the act continues in force for a period of six months following the termination of such war by a treaty of peace proclaimed by the President. A second proviso of importance is also attached. It is to the effect that wherever under any section of the act a proceeding, remedy, privilege, stay, limitation, accounting, or other transaction has been authorized or provided with respect to military service performed prior to the date fixed for the termination of the act, the applicable section shall be deemed to continue in force for so long as may be necessary to the full exercise and enjoyment of such proceedings, etc.

Section 605 is designed to operate as a repeal clause in respect of the provisions of section 4 of the National Guard law and the provisions of section 13 of the Selective Training and Service Act of 1940.[23] It is phrased so as to make the cited sections of law inapplicable with respect to any military service performed following October 17, 1940. However, any rights which attached under the cited sections prior to October 17, 1940, are clearly preserved.[24]

[23]Act of August 27, 1940 (Public Resolution No. 96, 76th Cong.)

III. The General Method of the Statute

The act confers wide discretionary powers on all courts in which actions may be commenced to grant a stay at any stage of such proceeding or action where it is commenced either by or against a soldier or sailor and irrespective of the subject matter of the action. These powers may be exercised in the discretion of the court on its own motion or upon application thereto. It is not contemplated that any hindrance be placed in the way of the commencement of actions against soldiers and sailors. On the contrary it will be noted that the general method of the act is such that summary proceedings ordinarily exercised by persons such as conditional vendors, chattel mortgagees, landlords and tax collectors (depending upon the laws of each particular

[24]A rather unusual method employed was to render it perfectly clear that the repeal was not to be retroactive from October 17, 1940. Since no one was inducted into military service prior to October 17, 1940, The Soldiers' and Sailors' Civil Relief Act of 1940 will govern exclusively as to selectees. As to personnel ordered to active duty under the authority of Public Res. No. 96, 76th Congress, approved August 27, 1940, between August 27 and October 17, 1940, the provisions of the 1918 relief act (40 Stat. 440) as revived and extended by section 4 of the Resolution will govern *only* where a creditor between those dates filed suit against a person so ordered to duty. In such case the 1918 act, as so revived will govern. In all other cases, the 1940 act will control. (Articles IV and V of the 1918 law were not revived by the Resolution.)

state) may not be pursued. They may be exercised only upon application to a court. Thus, each case is brought within the contemplation and jurisdiction of the proper court. During the Civil War, legislation whereby provision was made conferring upon all persons in military service a sweeping exemption from the service of process was the order of the day. The act is a definite departure from that method. In requiring the creditor to exercise all summary remedies only by leave of court the rights of a person in military service are, upon a proper showing, preserved intact for the time being.

The central theory of the act is such that (excluding, of course, the provisions of Article IV, relating to life insurance and those provisions of Article V relating to public lands) no relief is afforded, nor any benefit extended, unless the individual affected makes a showing that his ability to pay or perform is materially impaired by reason of military service. If those whose ability to pay or perform remains unaffected notwithstanding military service were automatically granted a stay against the necessity of responding to their obligations, a serious dislocation of economy might ensue.

In most instances, the court is given a wide latitude of discretion to enter such order as will equitably conserve and protect the interests of all parties. As a condition precedent to the granting of the stay, the court, for example, may require that the person in military service, if able, make some small payment on the obligation involved. So far as possible, the objective is to preserve the status quo. Manifestly, the act is not of itself a moratorium upon the obligations of persons in military service. No ipso facto absolution is accorded. Reposing confidence in the courts of the nation, it is left to them largely to do equity in each case as it arises. In no instance is anyone relieved from his obligations, but upon a proper showing, the time for performance or the time when enforcement may be effected is deferred until the soldier or sailor may return to his own community and attempt to take such steps as are available to him to pick up the threads of his civilian pursuits and meet his commitments.

Further to insure an opportunity to present a defense, reasonable provision for the setting aside, vacation, or reopening of judgments and decrees is made. However, in any instance, a showing must be presented before such relief will be extended. It must appear that the individual had a meritorious defense which he was prevented from interposing by reason of his service. Moreover, elasticity is insured in that any interlocutory order may be modified by the court to meet chang-

ing conditions and new developments. For example, where a court has granted a stay on condition that a soldier pay certain installments on the obligation concerned, it might subsequently develop that he will become less able to comply with such order. It would then be just and equitable to modify the order or vary it in some way. Section 602 makes provision for this contingency.

The subjects of partnership, bankruptcy proceedings and trusts are omitted from the enactment. However, the discretion granted in the act to stay all proceedings of any nature is doubtless sufficiently broad to cover most special cases. For example, in a proceeding for the dissolution of a partnership or in a bankruptcy proceeding, the court has plenary power to stay the action if it is adverse to the soldier or sailor, where it appears that his capacity to defend is impaired by reason of his military service. Of course in the matter of probate proceedings and trusts, it would be difficult to treat of these fields of law separately without interfering with the administration of rights involved in all decedents' estates.

Under the provisions of section 202, relief against the accrual of penalties is afforded. Thus, for example, where under a contract to pay a certain sum it is provided that upon default in any installment the creditor at his option may declare the whole sum due, the court is empowered to relieve against such a penalty if it appears that the capacity of the individual to pay was impaired by reason of his military service. In the case of a person purchasing real estate under one of the several current mortgage plans at a favorable interest rate and with long amortization of principal, where he is rendered unable to meet the installments by reason of his military service he does not necessarily face, upon his return to civil life, the prospect of having to pay the entire balance, or the hazard of refinancing on less favorable terms. Under section 202 plenary power is accorded to the courts to relieve against such a penalty, provided the person was in the service when the penalty was incurred and makes the proper showing.

Provision is also made to avoid wherever possible the total suspension of legal proceedings. This is accomplished by providing that if in any manner the court learns that the defendant who is not represented in a proceeding is a soldier or sailor, an attorney may be appointed to represent him and protect his interests. While such attorney may not waive any of the rights of the person in the military service whom he represents, nevertheless in such cases where the court feels justified on the particular facts, it may proceed to a hearing in the de-

fendant's absence. In according power to impose terms upon the granting of a stay, a new practice is injected. The courts in the United States have seldom made their judgments payable by installments. However, it is obvious that this is an exceedingly beneficial jurisdiction.

An important provision is the proviso carried in subdivision (1) of section 301. In view of the fact that subdivision (2) of that section makes criminal the resumption of possession in cases of contracts of conditional sale, other than as provided in section 301 (1), it was felt by the Congress that a large number of vendors would be afraid to explore the possibilities of genuine cooperation between vendor and vendee. Although section 301 (1) apart from the proviso does not preclude the parties from disposing of their differences in any mutually agreeable manner, yet during pendency of the legislation a large number of persons expressed the view that because of the penalty section, a vendor might hesitate to come to an equitable settlement with his vendee out of court. Therefore, the proviso was added. It was, however, fettered with the condition that a contract in modification, alteration, or rescission of an existing contract of conditional sale be in writing and that it be executed subsequent to the date when the original contract was made and after the commencement of the military service of the vendee. Thus the vendee is protected from the threatening pressure of an unscrupulous vendor who tries to force him to give up his equity under an existing contract in contemplation of pending selection for military service. On the other hand, the equitable disposition of cases by mutual agreement is encouraged. It is probable that in a majority of cases, the persons concerned will cooperate in good faith and thereby eliminate the necessity of court proceedings. Where a vendor is, however, unscrupulous, a vendee is (if his contract was executed and an installment was paid prior to October 17, 1940) protected because in such instances, it is necessary that the vendor make application to a court for repossession of the chattel involved. The court is empowered to stay the forfeiture where the person in military service is unable to pay.

The act in Article III establishes a distinction between the two general types of security transactions. Section 301 refers to contracts for the purchase of real or personal property and to contracts of lease or bailment with a view to the purchase of such property. It applies in all cases where a person or his assignor has received a deposit or installment of the purchase price from any person or from such person as assignor (if prior to October 17, 1940), and the payer of the installment or deposit enters military service after the date when such deposit or in-

stallment was paid. The net effect of the section is to require the party who receives such deposit or installment or the assignee of such party, to institute action in court for the exercise under his contract of any right or option to rescind or terminate it or to resume possession of the property involved. The payee of the deposit or installment or his assignee is prohibited from proceeding to exercise any contractual right of forfeiture out of court.

On the other hand, section 302 applies to obligations secured by a mortgage, trust deed or other security in the nature of a mortgage on real or personal property where such real or personal property was owned by a person at the time of the commencement of his military service and where such property is still so owned by him. A reading of sections 301 and 302 might lead to the conclusion that a hiatus has been left in the protection afforded by the statute. This appears to be the case because section 302 does not expressly require a mortgagee or his assignee to foreclose his mortgage in court. Subdivision (2) of section 302 provides that "In any proceeding commenced in any court during the period of military service to enforce such obligation," the proceedings may be stayed or the court may make such disposition of the case as may be equitable. Bearing in mind that no conditional vendor or his assignee under subdivision (1) of section 301 may exercise any right granted by the contract to declare a forfeiture "except by action in a court of competent jurisdiction" the question will naturally arise as to what protection a soldier or sailor is given in cases where, under the laws of a particular state, a chattel mortgage may be foreclosed without court action. It nowhere appears that such a method of foreclosure is proscribed. While subdivision (3) of section 302 renders invalid a sale under a power of sale or under a judgment entered upon warrant of attorney to confess judgment, if made during the period of the mortgagor's military service or within three months thereafter, unless upon an order of sale provisionally granted by the court, foreclosure by summary process is not treated expressly. In other words, where a particular state requires or directs that chattel mortgages be foreclosed in a judicial proceeding, the action, of course, must be instituted in a court of competent jurisdiction before any foreclosure of the mortgagor's rights can ensue. Similarly, by reason of the express provisions of subdivision (3) of section 302 where the mortgage contract itself confers a power of sale or a warrant of attorney to confess judgment, the mortgage must apply to the court in order validly to accomplish such a sale. In that case, of course, the action is cognizable by a court of com-

petent jurisdiction and the court may of its own motion or upon application to it enter such an order as may be equitable, to protect the soldier's interest during the period of his service. However, nothing is expressly provided with regard to foreclosure in states where the method of foreclosure is by summary remedy and without judicial process. There is no express provision contained anywhere in the statute whereby a mortgagee in such a state is required to apply to any court in order to exercise that remedy of foreclosure.

It has already been held that a purchase money chattel mortgage is not a contract for the purchase of property. On this authority, summary foreclosures would not come within the meaning of section 301.[25] Without discussing whether any court might adopt the view that a purchase money chattel mortgage is a contract within the meaning of section 301, it is believed that, notwithstanding the apparent omission in the statute regarding foreclosures by summary process, in the states where such procedure is authorized, since the mortgagor or his assignor must be given notice of the institution of the summary proceedings in one way or another, the right to obtain relief is nevertheless fully enjoyed. Reference is made to a subdivision (2) of section 102 providing that "when under this Act any application is required to be made to a court in which no proceeding has already been commenced with respect to the matter, such application may be made to any court." In cases where a given state permits foreclosure by summary process the person in military service need only apply to the court for a stay or for such other order as may in the premises be deemed equitable by the court. The proceedings then fall within the cognizance of the court and it becomes a proceeding to enforce a mortgage obligation even though the applicant is the defendant. If this procedure is not indicated, the mortgagor may always apply for a temporary restraining order and for an injunction *pendente lite,* to present any defense, and thus transfer the summary foreclosure to court. Upon so doing, of course, the nature of the proceeding is precisely similar to that described in section 302 (1) and the benefits of the act may be invoked.[26]

It becomes apparent then that the method of the act with regard to rents, installments, contracts and mortgages is such that no landlord, vendor or mortgagee can proceed to enforce his summary remedy except by action in court. This is subject to the modification already dis-

[25]Bassham v. Evans, 216 S. W. 446, 451 (Tex. Civ. App. 1919).

[26]Elder v. Massachusetts Mortgage Co., 159 Wash. 450, 293 Pac. 711 (1930), 85 A. L. R. 638 (1933); Western Machinery Exchange v. Gray's Harbor County, 190 Wash. 447, 68 P. (2d) 613 (1937).

cussed as to chattel mortgages in states where foreclosure is by summary process. However, in the case of a purchase money chattel mortgage it would be unsafe for a mortgagee or his assignee to proceed with summary foreclosure in such a state, in view of the possibility that such a contract would be construed to fall within section 301. A rather severe penalty is provided in subdivision (2) of section 301 for exercising any rights under a contract to forfeit except by application to a court. The purchase money chattel mortgage and the conditional sales contract perform identical functions in trade and commerce today. By its very name the purchase money chattel mortgage strongly suggests that it should be regarded as a contract for the purchase of personal property. In the opinion of the writer there is no logical or compelling basis for the conclusion that a purchase money chattel mortgage is not a contract within the meaning of subdivision (1) of section 301, the *Evans* case[27] to the contrary notwithstanding. There is some reason for concluding that a purchase money chattel mortgage stands on the same footing within the contemplation of the act as a conditional sales contract.[28]

All installment sellers, lending institutions, including automobile finance companies, etc., are left unaffected by the act as to sales made subsequent to October 17, 1940, the date on which the act was approved. This is so, except in a limited sense, even if the installment purchaser, in whatever of several ways the installment purchase is effected, subsequently enters or is inducted into military service. However, the general relief accorded by Article II is not restricted in point of time to matters arising prior to the date of the approval of the act. Therefore in any instance where a creditor does enter court in quest of his remedy against a debtor who has entered military service the act may supervene, notwithstanding the transaction occurred subsequent to October 17, 1940. This is so because section 203 is general in its terms. It provides that "In any action or proceeding commenced in any court against a person in military service, before or during the period of such service, or within sixty days thereafter," the court may stay the execution of any judgment or order entered against such person or it may vacate or stay any attachment or garnishment. Moreover section 201 provides that "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," the court may in its discretion grant a stay; and it

[27]Bassham v. Evans, 216 S. W. 446 (Tex. Civ. App. 1919).

[28]Sec. 303 Soldiers' and Sailors' Civil Relief Act of 1940. This section accords the same treatment to both types of installment purchases so far as automobiles, tractors and their accessories are concerned.

must, on application, grant such a stay where a showing is made that the ability of the plaintiff to prosecute the action, or of the defendant to conduct his defense, is materially affected by reason of his military service. Furthermore, subdivision (1) of section 200 is also general in its terms. It provides that in any proceeding or action, commenced in any court where there is a default of appearance, the plaintiff is similarly fettered and the defendant soldier or sailor similarly protected. Thus, with the possible exception of instances where state law permits foreclosure of a chattel mortgage without court process, that is to say by summary remedy, and of cases where under a contract of conditional sale or other method of installment purchase executed after October 17, 1940, forfeiture and repossession may be accomplished out of court, the entry of a stay order is authorized. This would follow, despite the fact that the mortgage was executed after October 17, 1940, because while section 302 contains a recitation that "the provisions of this section shall apply only to obligations originating prior to the date of the approval of this Act," none of the sections in Article II is so limited. Thus, the method of the act is such that transactions must be accomplished with a view to the possibility of delay in the realization of a remedy, irrespective of the date of the transaction.

IV. A Critical Appraisement

No attempt will be made in this section to cover the entire field wherein the relief of persons or the relief of dependents of persons who are selected for induction into the military service is indicated. It is, of course, manifest that the selectee may suffer a complete dislocation of his economic situation. He and his dependents, although it may fall upon them by lot, admittedly share the brunt of the burden of national defense. Those who by operation of the doctrine of chance are not inducted and those who by reason of physical disability, age or other circumstances are exempted from so serving, do not in any measure suffer a similar impact. It is, therefore, patent that a wide distribution of this burden is not only equitable but necessary to the continued morale of the citizens of the nation and to the maintainance of a sound national defense. As a consequence, the scope of this subject is one of extreme breadth and may not be treated with any justice within the limitations of an article of this nature. This appraisement will, therefore, be limited in scope strictly to those matters which the Congress undertook to touch and affect by the statute, and to a discussion of the effectiveness and soundness of the method pursued with regard to those subjects.

In the opinion of the writer, the most important article in the statute is Article III. Of course, the act would be empty without Article II, but from the standpoint of the number of cases and situations affected Article III is to be regarded as of cardinal importance to the prospective selectee and volunteer. This is so because of the tremendous volume of business done on the installment plan. In view of this fact, just how soundly and effectively has the Congress treated the subject of installment contracts?

It is believed by some that Article III is wanting, not only in scope but also in design. Predicated as it is upon the antecedent World War enactment,[29] they contend that it has not been revised to meet the striking metamorphosis in business occurring since that war.

While it has already been suggested that there is no logical reason for regarding a purchase money chattel mortgage as other than a contract for the purchase of personal property, yet in view of the mentioned possibility that such a conclusion may be generally adopted, the approach to the problem might have been made with closer regard to the nature of each transaction involved.

Transactions affecting chattels could have been combined in one class, that is to say, all contracts involving installment purchases of personal property, whether by the device of purchase money chattel mortgage, conditional sales contract or of lease or bailment with a view to the purchase of such property, could have been placed in one category. All contracts for the installment purchase of real property, whether by contract of conditional sale or purchase money mortgage or otherwise, could have been placed in a second category. All true loans secured by a mortgage or other security device on chattels could have been separately classified, and as a fourth category, all loans secured by a mortgage, trust deed or other security in the nature of a real estate mortgage could have been separately classified.

In the case of installment purchases by whatever method or device, the statute could have expressly provided against pursuit of a summary remedy out of court against a defaulting purchaser. In this manner the uncertainty in this respect would have been obviated. In a majority of instances chattels are subject to rapid depreciation. Where an insubstantial proportion of the purchase price of a given article being purchased on the installment plan has been paid at the time when an individual enters military service, it may seem unfair to require that the vendor await the passage of a year or fifteen months, while the chattel

[29] 40 Stat. 440.

is depreciating and his security is perhaps being wholly extinguished before he can repossess. In this class of cases, the court might have been empowered to order a return of an equitable portion of the purchase price in all instances as a condition precedent to repossession. In that case its power to grant a stay in a forfeiture proceeding might have been limited to those instances where a reasonably substantial proportion of the purchase price has been paid.

Of course, section 303 of Article III which concerns motor vehicles, tractors and their accessories, is designed to accomplished this for the particular items mentioned, but the merchant who sells a radio, a washing machine, or a refrigerator, is subject to the same risks as an automobile dealer. It has been suggested that there is no sound reason for this distinction. Moreover the claim is made that it is unreasonable to permit the possibility of foreclosure without court action in some cases and not in others on the mere chance that a particular state authorizes chattel mortgage foreclosures by summary process. No one can deny that uniformity should be insured and that this matter should not have been left to speculation.

It will readily be admitted that the character of real estate is such that it occupies a totally different position from that occupied by chattels generally. Real estate does not ordinarily depreciate as rapidly. It may not be removed and whether the device employed for the installment purchase of real estate is one of conditional sale or purchase money mortgage makes very little difference. Generally the same kind and measure of relief should be accorded. The most natural and logical kind of relief is to subject the vendor to a delay in pursuing his remedy for the period of the purchaser's military service and for a reasonable time thereafter. Moreover the purchaser should not, in the average case, suffer loss of his right to take up the balance of installments following his return to civilian life. Section 202 of Article II authorizes courts generally to relieve against a fine or penalty provided in any contract as a result of non-performance. Therefore, in a proper case this portion of the relief has been made available. The point is made by some that the classification of installment purchase contracts on both real and personal property together is unsound for the reasons already stated.

Some contend that real estate loans should have been distinguished from chattel loans. They further suggest that true loans should have been treated separately from purchase money transactions.

The position taken by some who consider that the choice of means

was not wholly appropriate may be stated as follows: "In the case of chattel loans, it is inequitable completely to tie the hands of the lender for a year or fifteen months while the chattel rapidly depreciates before he can consummate his remedy. Both parties must be protected and there is but one equitable means to accomplish this. Since the equities of each case vary, the broadest discretionary powers should be accorded to a court to enter such orders as will conserve the interests of both parties. A stay should never be mandatory unless a substantial portion of the loan has been repaid. The lender should never be permitted to pursue a summary remedy out of court. Where an insubstantial portion of the loan has been repaid and the chattel is one of a rapidly depreciating nature, the matter should be treated in the same manner as has already been suggested in the case of installment purchase contracts. Another method would be to have the chattel appraised by disinterested parties appointed by the court and to require the lender, as an alternative to foreclosure, to pay the borrower a reasonable sum in discharge of the borrower's equity and of his obligation, pass title to the lender, leaving him to the realization of whatever the chattel will bring in liquidation of the outstanding loan.

"In the case of true loans secured by real estate, broad discretionary powers should be accorded to the courts to enter any order calculated to conserve the interests of all the parties. Because of the inherent nature of real estate the entry of a stay order is normally not inequitable. Upon the return of the person in military service to civilian status he should be accorded the opportunity of continuing the installment repayment of the loan on a reasonable basis. Of course, as to acceleration clauses, section 202 of Article II grants the court the power to relieve against a penalty such as the acceleration of maturity for default in repayment of any installments.

"The restrictions contained in sections 301 and 302 as to what obligations and transactions are covered is probably the weakest feature of the act." Within the limitations of this article it would be impracticable to set forth the complete history surrounding the insertion of these limitations. However, a brief resume of the background will serve to make plain the reasons therefor.

Primarily because of the fact that each class of transactions was not treated separately, a great deal of rather groundless fear arose in the minds of many persons connected with lending, automobile financing and other related enterprises. These fears were transmitted to the Congress at the several hearings held on the measure when it was

pending in committee. It was threatened that should the Congress fail to insert in section 302 the provision that the section would apply "only to obligations originating prior to the date of the approval of the Act," the potential credit of all males between the ages of 21 and 36 would be frozen. This was based upon the suggestion that it would be impossible to determine from time to time just who would and who would not be selected for induction into the military service. As a consequence, representatives of many lending institutions took the position that a substantial dislocation of national economy would ensue, that a great hardship would be cast upon all potential selectees and that as a practical matter, there was no point in providing protection in a field of business which would become nonexistent. This danger was particularly emphasized with regard to automobile loans. However, it was greatly magnified and doubtless resulted from a failure on the part of the lenders fully to analyze the problem, together with the fact that Congress did not treat separately the various classes of transactions covered by Article III.

Between rendering it less safe for a lender to lend and unsafe for a borrower to borrow, it has been urged that there is no real difference. Theoretically the result would appear to be identical. That is to say, credit transactions would ostensibly cease. In practice, however, the identity of result does not follow. The effect on credit transactions is more serious in relegating the borrower to borrow at his peril than it is where the risk in lending has been enhanced. This is basically so because the merchant and the banker may take steps to insure against a consequent loss in this particular field of his business. No one could reasonably suggest that the burden of military service should fall upon any one person or upon any particular group of persons. It should be evenly distributed so far as possible. By increasing interest rates to a limited extent, insurance against consequent loss could be provided in each case. If all persons beyond the age limits of the Selective Service Act were required to pay a slightly higher interest rate, the monies so realized, together with the sums realized from the potential selectee class, could adequately offset the loss, and the burden would be more evenly distributed.

For example, in one instance presented to the writer by a banker who felt that he would have been compelled to cease lending to potential selectees if the limitation had not been inserted, the following appeared. His bank had approximately 9000 pending automobile loans. Of these loans, 3000 were owned by persons between the ages of 21 and

36. Under the Selective Training and Service Act of 1940, it is provided that, except in time of war, there shall not be in active training and service "more than 900,000 men inducted under the provisions of the Act."[30] Moreover, the act further provides that the President may not induct any greater number of men "than the Congress shall hereafter make specific appropriation for from time to time."[31] There are approximately 16,000,000 persons between the ages of 21 to 36, subject to registration. Therefore, in time of peace not more than six per cent of the total may be inducted in any one year. As a consequence, in the example case, not over six per cent of the automobile loans of this bank outstanding in the selective service age group could reasonably be affected in any one year. Stated otherwise, not over six per cent of 3,000, or 180 loans out of a total of 9,000 loans, would normally be affected by the operation of the Selective Service Act. The banker admitted that probably not more than 25 per cent of those selected would take an unreasonable attitude or fail to co-operate, and not over 25 per cent would be rendered less able to complete and perform their obligations. Assuming that 50 per cent of these borrowers would be unable to perform or would attempt to repudiate their obligations, not over one-half or 90 of such loans would become "duds". Even if a stay were granted for a year or fifteen months, some realization could be made from the chattel. But assuming the worst, that the loan would become a total loss, this would constitute but one per cent per year of the total loans in this classification (9000). The banker involved stated that present interest rates are predicated upon an annual loss of one half of one per cent. By increasing interest rates in this classification by one per cent not only on loans to persons between the ages of 21 and 36 but also on loans to persons of greater age, the consequent increase in revenue thus provided would more than adequately insure against and offset any losses within reason.

It is probable that the threat of frozen credit was based upon a failure to analyze the true situation. The Congress, however, adopted the view that a real possibility of frozen credit existed if the limiting words were not inserted in the act, and although no request was made therefor so far as the record discloses, a similar limitation was placed in section 301 with respect to installment sales. Thus, in the attempt to provide relief in an important field to all potential selectees, the net result in practical fact is that only those inducted during the current year who

[30]Section 3 (a) of the Act. Public No. 783, 76th Congress, approved Sept. 16, 1940.
[31]Section 6 of the Act, *supra*.

had incurred obligations of this nature prior to October 17, 1940 will be accorded any relief whatsoever. Therefore, the man who as a potential selectee faces induction some two, three or four years hence has no protection and is left from day to day in a position of great uncertainty. He has no means of self insurance. He can only stand one "strike," whereas the lender or the merchant has available means to provide some reasonable self insurance upon a basis whereby the creditor, the borrower older than 36 years, and the potential selectee all share in the burden.

One of the chief reasons why the bankers and the financial institutions threatened the freezing of credit was because of the failure to treat separately the various classes of transactions described above. What the financial institutions most feared was that where, in case of an automobile loan or other type of loan, a small down payment had been received, and the borrower was thereafter selected for induction, the lender would be unable to realize any remedy for a year or fifteen months. Over this waiting period the motor vehicle would, of course, rapidly depreciate, not only through use but through the running of time. Had the Congress classified these transactions and treated them separately as indicated above, the threat of frozen credit would doubtless not have been made. In all justice to the bankers and banking institutions, it should be stated that they were not unwilling to accept a part of the burden; and under the circumstances and due to their failure through lack of time to carefully analyze the situation, it is understandable that the threat was made. The time limitation was inserted by the Congress solely because it was honestly feared that credit would be frozen.[32]

A minor omission of no great importance occurs in section 601. That section establishes as *prima facie* evidence of certain facts a certificate signed by The Adjutant General of the Army as to persons in the Army, by the Chief of the Bureau of Navigation as to persons in the United States Navy, "or in any other branch of the United States service while serving pursuant to law with the United States Navy"

[32]Congressional Record, Senate, September 30, 1940, p. 19364. "Mr. Gurney: * * * In reference to S. 4270, section 301, division 1, * * * it is suggested that the clause 'originating prior to the date of the approval of this Act' * * * be reinstated in this section. * * *

"The elimination of these words will cause a hardship to those persons who are in military service or who are to be called in because it will freeze their credits. * * *

"It is obvious that no lending agency will allow a possible draftee to borrow money on a chattel * * * unless he [the lender] has a protection that the words that have been deleted from this section will give [if restored] * * *."

and by The Major General Commandant, United States Marine Corps as to persons in the Marine Corps, etc. Under section 101 the members of the Coast Guard are expressly covered by the Act. The Coast Guard is at present under the direction of the Secretary of the Treasury. In time of war the President is empowered to declare an emergency and place it under the supervision of the Secretary of the Navy. If such a thing were done, then the Chief of the Bureau of Navigation should issue certificates of this nature to cover members of the Coast Guard. At the present time, however, he has no jurisdiction to do so because the Coast Guard is not now serving pursuant to law with the Navy. This is, of course, of minor importance because the Coast Guard has no reserve component as such and because with regard to the matters covered by Articles II and III it would be difficult to conceive of a circumstance wherein a member of the Coast Guard would be entitled to any relief. This is true because it is improbable that any showing could be made that service in the Coast Guard today or next month or next year renders a person serving any less able to perform his obligations than he was before the passage of the act or at any other time, assuming, of course, that as a professional sailor he was in the Coast Guard when the obligation was incurred. Due to this there will be relatively few cases arising at present as to Coast Guard members. Moreover, it is not essential to the enjoyment of any provision of the Act that such a certificate be procured.

V. Constitutionality

Considerable attention was devoted to the question of constitutionality, while the antecedent World War enactment was under consideration by the Committees on the Judiciary of the Senate and House of Representatives.[33] The same general considerations are before us now.

The Federal Constitution (Art. I, sec. 8) provides that:

> "The Congress shall have Power To * * * provide for the common Defence and general Welfare of the United States; * * * To raise and support armies * * * to provide and maintain a navy * * * To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions * * * To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers * * *".

[33]Hearings before the Committee on the Judiciary, House of Representatives, 65th Congress, 1st Session, on H. R. 6110, September 21, 1917. Hearings and memoranda before the Subcommittee on the Judiciary, United States Senate, 65th Congress, 1st session and 2nd Session on S. 2859 and H. R. 6361, September 14, 22, and 25, 1917 and January 18, 1918. See pages 160-167, inc., of Senate Hearings and Memoranda; see H. Rept. 181, 65th Congress, 2nd session.

It is a grant, the scope of which is limited only by the words themselves. It is limited only as to the manner of exercise.[34] Any legislation which is conducive, convenient or appropriate to these purposes and which is not specifically prohibited by the Constitution is authorized thereby. Congress may exercise its judgment in the selection of the means and is not limited to those only which are indispensable or absolutely necessary. The foregoing principle of constitutional construction was originally announced by Chief Justice Marshall in the case of *McCulloch v. Maryland*.[35] In that case the Court said:

> "But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consist with the letter and spirit of the Constitution, are constitutional."

Under the provisions of the Act,[36] the enforcement of creditors' remedies against debtors in military service is delayed in a proper case. Where it appears that the capacity of an individual to meet his obligations has been impaired by reason of his military service, the courts are endowed with discretionary power to stay his creditor's hand for as long as the period of his military service and up to three months thereafter. The objective is to stimulate and sustain the morale of persons entering military service, thereby the better to provide for the common defense. It is generally conceded that the stimulation and preservation of morale is an essential ingredient of an effective national defense. Moreover, few will claim that a debtor, harrassed by his creditors, is normally imbued with an appreciable degree of morale. This discussion, therefore, will proceed on the assumption that where morale is not safeguarded, the efficacy of the national defense is imperiled; that the granting of respite to debtor-soldiers during their military service in instances where such service has impaired their capacity to respond to antecedent committments is conducive to the stimulation and preservation of morale.

---

[34]Art. I, § 9, Cl. 2-8 incl. Amendments I to X incl., Fed. Const.

[35]4 Wheat. 316 (U. S. 1819).

[36]Soldiers' and Sailors' Civil Relief Act of 1940, Act of October 17, 1940 Public No. 861, 76th Congress.

It has been suggested that the method of the subject enactment is such that a deprivation of property without due process of law or a taking of private property without just compensation will result; that therefore the Fifth Amendment to the Federal Constitution is contravened. It will not be denied that private contractual relations are affected by the enactment, and that valuable existing remedial rights are materially altered, in that their availability is deferred or their exercise made conditional.

In respect of the constitutionality of such provisions, the principal questions presented are these:

(1) What is the constitutional warrant for such an enactment?

(2) Is there a deprivation or a taking of private property in violation of the provisions of the Fifth Amendment?

The ensuing discussion deals with these questions jointly, for they are too closely related to admit of separate treatment without considerable repetition.

While the Constitution expressly prohibits the several states from passing laws impairing the obligation of contracts, there is no provision of the Constitution similarly restraining Congress.[37] The substance of the cases on the question is to the effect that while Congress may not appropriate private property for the public use without making just compensation therefor, there is no prohibition against congressional action impairing the obligations of contracts.

Even the states, which are specifically forbidden to impair the obligations of contracts,[38] may interfere with or abrogate existing contracts in the exercise of sovereign powers. Laws prohibiting lotteries, the sale of intoxicating liquors, or the maintenance of nuisances, zoning laws, laws regulating rates and services of utilities, and numerous other enactments, may all have the effect of destroying contracts, but they are none the less valid.[39] In *Home Building & Loan Assn. v. Blaisdell*,[40]

---

[37]Art. I, § 10, Cl. 1, Fed. Const. Legal Tender Cases, 12 Wall. 457 (U. S. 1870); Mitchell v. Clark, 110 U. S. 633 (1883); Waignt v. Bank of Roanoke, 300 U. S. 440 (1937); Gold Clause Cases, 294 U. S. 317, 330 (1935).

[38]Art. I, § 10, Fed. Const.

[39]Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 692 (1897); Manigault v. Springs, 199 U. S. 473, 480 (1905); Atlantic Coast Line R. R. Co. v. Goldsboro, 232 U. S. 548, 558 (1913); Chicago & Alton R. R. Co. v. Tranbarger, 238 U. S. 67, 76-77 (1915); Union Dry Goods Co. v. Georgia Pub. Serv. Corp., 248 U. S. 372, 376 (1919); Producers Transp. Co. v. R. R. Comm. of California, 251 U. S. 228, 232 (1920); Levy Leasing Co. v. Siegel, 258 U. S. 242 (1922); Sutter Butte Canal Co. v. Railroad Comm., 279 U. S. 125, 138 (1929); Stephenson v. Binford, 287, U. S. 251, 276 (1932); St. Paul Fire & Marine Ins. Co. v. Eldracher, 33 F. (2d) 675 (C. C. A. 8th, 1929), cert. den., 280 U. S. 604 (1929).

[40]290 U. S. 398, 435 (1934).

Mr. Chief Justice Hughes thus summarized this power of the states to affect existing contracts:

> "Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. * * *"

In the *Blaisdell* case,[41] a statute of the State of Minnesota was under consideration. The enactment authorized the district courts of that state upon application of a mortgagor or his successor in interest, to extend the period of redemption in connection with foreclosure sales "for such additional time as the court may deem just and equitable, but in no event beyond May 1, 1935"; to "withhold deficiency judgments for a like period and to substitute judicial sales for the sales by advertisement stipulated in mortgages."[42] The Minnesota Court held that "the present economic emergency justifies the use of police power to effect a change or temporary postponement of the mortgagee's remedy, even though there results an impairment of the obligation of the mortgage contract."[43] On an appeal from the judgment of the state court the United States Supreme Court in upholding the constitutionality of the Minnesota statute, denied that there was an impairment and concluded that the act was justified as an exercise of the state's reserved power in a public emergency.

Even greater power, it has been suggested, is granted to Congress to affect contracts, since there is no prohibition in the Constitution against impairment by the national legislature.[44]

In *Hamilton v. Kentucky Distilleries Co.*[45] the United States Supreme Court considered the War-Time Prohibition Act,[46] approved ten days after the armistice with Germany was signed. It was there contended that while the Congress might have the implied power, if reasonably necessary, to forbid the sale of liquor in order to guard and promote the efficiency of the men composing the Army and Navy and of the workers engaged in supplying them with arms, munitions, trans-

---

[41]290 U. S. 398 (1934).

[42]Minn. Laws (1933) C. 339.

[43]Blaisdell v. Home Building and Loan Ass'n, 189 Minn. 422, 249 N. W. 334 (1933), aff'd., 189 Minn. 448, 249 N. W. 893 (1933). Affirmed by the Supreme Court of the United States, Home Building & Loan Ass'n v. Blaisdell, 290 U. S. 398 (1934).

[44]Legal Tender Cases, 12 Wall. 457, 550 (U. S. 1870); Mitchell v. Clark, 110 U. S. 633 (1883); Evans-Snider-Bud Co. v. McFadden, 105 Fed. 293, 297 (C. C. A. 5th, 1900); United States v. United Shoe Machinery Co., 264 Fed. 138, 152 (E. D. Mo. 1920).

[45]251 U. S. 146 (1919).

[46]Act of Nov. 21, 1918, 40 Stat. 1046.

portation, and supplies, it could not thereby appropriate private property without just compensation. It was argued that the net result of the legislation was to restrict the sale and disposition of liquor stocks on hand; that this constituted taking property without just compensation. In upholding the act, however, the Court said:

> "* * * The War-Time Prohibition Act fixed a period of seven months and nine days from its passage during which liquors could be disposed of free from any restriction imposed by the Federal Government. Thereafter, until the end of the war and the termination of demobilization, it permits unrestricted sale for export and, within the United States, sales for other than beverage purposes. The uncompensated restriction upon the disposition of liquors imposed by this act is of a nature far less severe than the restrictions upon the use of property acquired before the enactment of the prohibitory law[s] which were held to be permissible in cases arising under the Fourteenth Amendment. *Mugler* v. *Kansas,* 123 U. S. 623, 668; *Kidd* v. *Pearson,* 128 U. S. 1, 23. * * *"

In the case of *Wright v. Vinton Branch*[47] it was contended that section 75 (s) of the Bankruptcy Act, as amended June 28, 1934,[48] popularly cited as the New Frazier-Lemke Act, which offered distressed farmers means of rehabilitation under the bankruptcy clause, was unconstitutional. That act provided for a stay of foreclosure of farm mortgages, in the discretion of the court, up to three years. During all such period, the property was subject to control and jurisdiction of the court. The principal argument advanced against constitutionality of the statute was that it violated the Fifth Amendment in taking from the mortgagees the right to control the property during the period of default, subject only to the discretion of the court, and deprived them of the right to have the rents and profits collected by a receiver for the satisfaction of the debt. The court said:[49]

> "* * * The question which the objections raise is not whether the Act does more than modify remedial rights. It is whether the legislation modifies the secured creditor's rights, remedial or substantive, to such an extent as to deny the due process of law guaranteed by the Fifth Amendment. * * *"

The Court concluded that the questioned enactment made "* * * no unreasonable modification of the mortgagee's rights * * *". Stated otherwise, in exercising the powers conferred upon it under the bank-

[47]300 U. S. 440 (1937).
[48]48 Stat. 1289.
[49]300 U. S. 440 at 470 (1937).

ruptcy clause of the Constitution,[50] the fact that some reasonable interference with the rights of a secured creditor vested prior to congressional action, was not fatal.

In many other instances the Congress has touched upon vested rights, and in fact impaired the obligations of contracts, in legislating under the commerce clause.[51] In *New York v. United States*[52] the State of New York contended that an order of the Interstate Commerce Commission directing the railroads to "put intra state passenger fares, excess baggage charges, sleeping-car surtaxes, and milk rates on the level with interstate rates", was unconstitutional. The State of New York had a charter contract with the New York Central Railroad Company, by which the latter was bound not to charge more than two cents a mile for passenger carriage between Albany and Buffalo. The state contended that if the Transportation Act permitted the Interstate Commerce Commission by such an order to enable the railroad company to violate its contract, it impaired the obligation of a contract, and further that it deprived the State of New York and her people of property without due process of law. The Supreme Court, however, concluded that the continuance of the intrastate rates at their former level would constitute an "* * * 'undue, unreasonable, and unjust discrimination against interstate * * * commerce', which is declared to be unlawful and prohibited by sec. 13, par. 4, of the Interstate Commerce Act, as amended by sec. 416 of the Transportation Act of 1920, 41 Stat. 456, 484, and which the Interstate Commerce Commission is authorized therein to remove by fixing intrastate rates for the purpose * * *." In short the paramount power of Congress is not fettered by any necessity to maintain or leave unaffected, existing arrangements.[54]

---

[50]Art. I, § 8, Cl. 4, Fed. Const.

[51]Art. I, § 8, Cl. 3, Fed. Const.

[52]257 U. S. 591 (1922).

[54]Philadelphia, V. & W. R. R. Co. v. Schubert, 224 U. S. 603, 613, 614 (1912). In that case the court upheld the power of Congress to abrogate existing arrangements whereby the receipt of benefits under a company relief plan constituted a waiver of the right to sue for damages. The court speaking through Mr. Justice Hughes said: "The power of Congress, in its regulation of interstate commerce, and of commerce in the District of Columbia and in the Territories, to impose this liability, was not fettered by the necessity of maintaining existing arrangements and stipulations which would conflict with the execution of its policy. To subordinate the exercise of the Federal authority to the continuing operation of previous contracts, would be to place, to this extent, the regulation of inter-state commerce in the hands of private individuals, and to withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their agreements. The Constitution recognizes no such limitation. It is of the essence of the

In a similar vein William Whiting, in his treatise on "War Powers Under the Constitution of the United States"[55] stated that one of the chief objects in the formation of the Union was to "provide for the common defense and general welfare of the United States". In discussing the emancipation of the slaves during the Civil War, he stated:[56]

> "* * * If it should be urged that to release slaves from their servitude would be, in effect to impair or destroy the obligation of contracts, it may be replied that though States have no right to pass laws impairing the obligation of contracts, Congress is at liberty to pass such laws. The right to abrogate and cancel the obligations of apprentices and slaves does not rest solely upon the power of Congress to appropriate private property to public use; but it necessarily results in its obligation to use the proper means to accomplish one of the chief objects for which the Union was formed, namely, to provide for the *common defense* and *general welfare* * * *".

The question is resolved to a consideration of whether any constitutional warrant is afforded Congress for the exercise of the powers concerned. Its power to enact the legislation in question must be sought for in the implied powers attendant upon the power "to make all laws which shall be necessary and proper for carrying into execution" the powers to provide for the common defense, to raise and support armies, and to provide and maintain a navy.[57] These powers are commonly called "the war powers."

The relation of the Soldiers' and Sailors' Civil Relief Act of 1940[58] to the war powers of the Congress is demonstrated by reason of the fact that an army composed of men without morale is an inefficient army indeed. The Congressional power to provide for the common defense

---

delegated power of regulation that, within its sphere, Congress should be able to establish uniform rules, immediately obligatory, which as to future action should transcend all inconsistent provisions. Prior arrangements were necessarily subject to this paramount authority."

See also Calhoun v. Massie, 253 U. S. 170 (1920); Louisville & Nashville Railroad v. Mottley, 219 U. S. 467 (1911); De Laval Steam Turbin Co. v. United States, 284 U. S. 61 (1931); Northern Pacific Ry. Co. v. Duluth, 208 U. S. 583 (1907); New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453 (1905); C., B. & Q. R. R. Co. v. Drainage Commissioners, 200 U. S. 561 (1905); C. & A. R. R. Co. v. Tranbarger, 238 U. S. 67 (1915); Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 230 (1899).

[55]Whiting, War Powers Under the Constitution of the United States (43rd. ed.).

[56]Whiting, War Powers Under the Constitution of the United States (43rd. ed.) 26.

[57]Art. I, § 8, Fed. Const.

[58]Act of Oct. 17, 1940, Public No. 861, 76th Congress.

carries with it the power to do whatever is reasonable to insure a complete and efficient defense.

No real question is raised by the enactment regarding the taking of property without compensation within the meaning of the Fifth Amendment. Therefore, cases like *Monongahela Navigation Co. v. United States*,[59] have no application. Such cases involve an appropriation by the Government for its own use of property belonging to private parties. It may be interposed that the Congress may not take property from one person and give it to another, or directly alter contracts between private parties. This objection is answered by the fact that there is no taking from one person by the Congress and a giving to another. There is merely a change in contract rights resulting from an exercise by the Congress of its delegated powers. Such changes have been uniformly sustained by the Supreme Court. It need appear only that the change occur in the exercise by the Congress of its paramount powers.[60] These questions were settled by the Supreme Court when it decided the Legal Tender Cases.[61] In the Legal Tender Cases[62] the Court concluded that certain obligations could be satisfied upon payment, dollar for dollar, in irredeemable greenbacks. The obligations affected were those in existence before enactment of the Legal Tender Acts. When these obligations were incurred, gold and silver coin alone were legal tender and every obligation previously incurred in dollars carried either an express or implied coin clause.

That the United States lacks "the police power" and that this was reserved to the states by the Tenth Amendment is true. But it is none the less true that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a state of its police power, or that it may tend to accomplish a similar purpose.[63] The "war power" of the United States, like its other powers and like the police power of the states, is subject to applicable constitutional limitations.[64] The Fifth Amendment, however, imposes in this respect no greater limitation upon the

[59]148 U. S. 312 (1892).

[60]Lynch v. United States, 292 U. S. 571 (1934). Briefs in the Gold Clause cases: U. S. v. Bankers Trust Co., Case No. 471 and 472, pp. 83, 87-94; Perry v. U. S., Case No. 532 pp. 59, 68-69.

[61]12 Wall. 457, 550 (U. S. 1870).

[62]12 Wall. 457, 550 (U. S. 1870).

[63]McCrary v. United States, 195 U. S. 27 (1903); Hoke v. United States, 227 U. S. 308 (1913); United States v. Doremus, 249 U. S. 86 (1919).

[64]Ex parte Milligan, 4 Wall. 2, 121-127 (U. S. 1866).

national power than does the Fourteenth Amendment upon state power.[65] If the nature and conditions of a restriction upon the use or disposition of property, or property rights, or the pursuit of remedies incident thereto is such that a state could, under its police power, impose such a restriction consistently with the Fourteenth Amendment without making compensation, then the United States may, for a permitted purpose, by a method reasonably calculated to achieve such purpose, impose a like restriction consistently with the Fifth Amendment without making compensation.[66]

It is clear, then, that no exercise of a paramount power of the Congress has been invalidated because it interfered with or destroyed existing contracts. Numerous acts of Congress having such purpose and effect have been sustained.

The due process clause of the Fifth Amendment, as applied to legislative action, requires only that the action be not arbitrary or capricious, and that there be some reasonable relation between it and the legitimate powers of the Congress. The standard of due process has thus been laid down by the Supreme Court in *Ling Su Fan v. United States:*[67]

> "To justify the exercise of such a power it is only necessary that it shall appear that the means are reasonably adapted to conserve the general public interest and are not an arbitrary interference with private rights of contract or property. * * *"

The familiar standard equally applicable in a Fourteenth Amendment due process case was repeated in *Nebbia v. New York:*[68]

> "And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. * * *"

As it has now been settled that reasonable "stay laws", when enacted by the states, are constitutional notwithstanding a resultant impairment of the mortgage contract under emergent conditions,[69] it must follow that the Congress in exercising its granted power "to provide for the common defense" may constitutionally affect contract rights through legislation enacted with a view to providing for the

---

[65]In re Kemmler, 136 U. S. 436, 448 (1890); Carroll v. Greenwich Ins. Co., 199 U. S. 401, 410 (1905).

[66]See supra notes 44 and 54.

[67]218 U. S. 302, 311 (1910).

[68]291 U. S. 502, 525 (1933).

[69]Home Building & Loan Ass'n v. Blaisdell, 290 U. S. 398 (1933).

common defense. What higher public necessity is there than the common defense?

In substance, the legislation constitutes a course of action involving the exercise of Congressional power to "provide for the common defense and general welfare," to "raise and support armies" and "to promote and maintain a navy." It is manifest that worry over domestic responsibilities, private debts, and other contractual obligations and liabilities would tend to impair the morale of our soldiers and sailors to such an extent that they would in many instances be unable to devote their best thoughts and efforts to their military duties. It must follow that the Congress not only has the power but also the obligation to do what is reasonable to obviate this disadvantage. The reasonableness of that which is here proposed needs no extended statement.

It is submitted, therefore, that the legislation is constitutional as falling within the "war power" of Congress.

VI. Conclusion

The timely action of Congress in passing this legislation[70] is highly commendable indeed. In contrast to the delay attendant upon enactment of the World War Statute[71] which followed our adoption of Selective Military Service by almost a year, we have had prompt legislative action in this field.

Congress has designed the act so that the extension of credit to men of Selective Service age will not be frozen.[72] However, because the process of selection for military service will probably be staggered over a five-year period, it is the view of many that some alteration in Article III will be necessitated to protect those men who enter installment contracts and other security transactions between now and the next few years and who are inducted two, three, four or five years hence.

---

[70]Soldiers' and Sailors' Civil Relief Act of 1940, Act of Oct. 17, 1940, Public No. 861, 76th Congress.

[71]Act of March 16, 1918, 40 Stat. 440.

[72]Congressional Record, Senate, September 30, 1940, p. 19364.