

REPOSSESSION OF MORT-
GAGE PROPERTY UNDER THE
SOLDIERS' AND SAILORS'
RELIEF ACT OF 1940:

Under the Soldiers', etc. Civil Relief Act of 1940 a mortgagee cannot repossess an automobile bought by a person in military service prior to Oct. 17, 1940, if the mortgagor is unable to pay because of his military service.

June 3, 1942

Mr. Gordon P. Weir
Attorney at Law
Greenfield, Missouri

Dear Mr. Weir:

We have for answer your request of February 14, 1942, in which you inquire as follows:

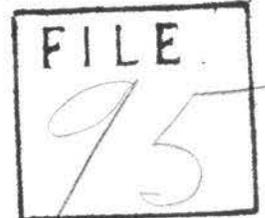
"I wonder if I can impose upon you for the answer to a legal question, while this may be out of order at the same time I will appreciate you informing me on the same.

"Where an automobile dealer has sold an automobile to a person and this party is called to service, can the dealer or the former car owner repossess the automobile during the absence of the mortgagor or is he compelled to wait until the selectee has returned from service?"

The question of whether or not a mortgagee may repossess an automobile of a person in the military service will depend upon a federal act commonly referred to as the Soldiers' and Sailors' Civil Relief Act of 1940, c. 888, sec. 301, 54 Stat. 1181, effective Oct. 17, 1940. This act is in part as follows(50 U. S. C. A. sections 531-532):

" * * * * * Installation contracts
for purchase of property

(1) No person who prior to the date of approval of this Act has received, or whose assignor has received, under a contract for the purchase of real



or personal property, or of lease or bailment with a view to purchase of such property, a deposit or installment of the purchase price from a person or from the assignor of a person who, after the date of payment of such deposit or installment, has entered military service, shall exercise any right or option under such contract to rescind or terminate the contract or resume possession of the property for nonpayment of any installment falling due during the period of such military service, except by action in a court of competent jurisdiction: Provided, That nothing contained in this section shall prevent the modification, termination, or cancellation of any such contract, or prevent the repossession or retention of property purchased or received under such contract, pursuant to a mutual agreement of the parties thereto, or their assignees, if 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.

(2) Any person who shall knowingly resume possession of property which is the subject of this section otherwise than as provided in subsection (1) hereof shall be guilty of a misdemeanor and shall be punished by imprisonment not to exceed one year or by fine not to exceed \$1,000, or both.

(3) Upon the hearing of such action

the court may order the repayment of prior installments or deposits or any part thereof, as a condition of terminating the contract and resuming possession of the property, or may, in its discretion, on its own motion, and shall, except as provided in section 303 (section 533 of this Appendix), on application to it by such person in military service or some person on his behalf, order a stay of proceedings as provided in this Act unless, in the opinion of the court, the ability of the defendant to comply with the terms of the contract is not materially affected by reason of such service; or it may make such other disposition of the case as may be equitable to conserve the interests of all parties.

C. 888, sec. 302, 54 Stat. 1182, effective October 17, 1940, is as follows:

"Mortgages, trust deeds, etc.

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

(2) In any proceeding commenced in any court during the period of military service to enforce such obligation arising out of nonpayment of any sum thereunder due or out of any other breach of the terms thereof occurring prior to or during the period of such service the court may, after hearing, in its discretion, on its own motion, and shall, except as provided in section 303 (section 533 of this appendix), on application to it by such person in military service or some

person on his behalf, unless in the opinion of the court the ability of the defendant to comply with the terms of the obligation is not materially affected by reason of his military service—

- (a) stay the proceedings as provided in this Act; or
- (b) make such other disposition of the case as may be equitable to conserve the interests of all parties.

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

C. 888, sec. 303, 54 Stat. 1183, effective October 17, 1942, is as follows:

"Stay of action to resume possession of motor vehicle, etc., encumbered by purchase money mortgage, conditional sales contract, etc.

No court shall stay a proceeding to resume possession of a motor vehicle, tractor, or the accessories of either, or for an order of sale thereof, where said motor vehicle, tractor, or accessories are encumbered by a purchase money mortgage, conditional sales contract, or a lease or bailment with a view to purchase, unless the court shall find that 50 per centum or more of the purchase price of said

property has been paid, but in any such proceeding the court may, before entering an order or judgment, 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 such judgment or order should the judgment or order be set aside in whole or in part. * * * * "

In the recent case of Jamaica Savings Bank v. Bryan, 25 N. Y. S. (2d) 17, being a case where it was sought to foreclose a mortgage given by a soldier in the service of the U. S. Army prior to October 17, 1940, the court construed the foregoing stated in the following language:

" * * * * * Of course, the fact that a defendant is in military service is not a defense to the action under the Soldiers' and Sailors' Civil Relief Act of 1940, 54 U. S. Stat. at Large, p. 1178, 50 U. S. C. A. Appendix sections 501-585. That act by no means contemplates that persons able to meet their obligations may set up the act in bar to prevent creditors from pursuing their remedies. It does mean that soldiers and sailors in the service who are handicapped by reason of their military service, either in making valid defenses to an action or in meeting their financial obligations, shall have the protection of the court to prevent prejudice to their rights by reason of such service.

The question then arises: Is the defendant John W. Bryan prejudiced by his service herein and is his ability to conduct his defense materially affected by such service? If such be the fact, then while what is set forth in his answer does not constitute a denial, a

defense or a counterclaim and really is no answer to the matters set forth in the complaint, the court could stay all proceedings herein, pursuant to Section 201 of the Soldiers' and Sailor's Civil Relief Act of 1940, 54 U. S. Stat. at Large, p. 1181, 50 U. S. C. A. Appendix section 521. That section provides, as follows: 'At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person, or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.'

There is absolutely nothing before the court on which it could base an opinion to the effect that defendant's ability to conduct his defense is materially affected. The answer and the affidavit submitted set forth the bare facts as to his service.

Accordingly, the court will take proof on the matter which may be either in the form of affidavits or testimony, whichever the parties agree upon. After such proof has been furnished, the court will be in a position to determine whether or not a stay should be granted, the length thereof and the terms and conditions to be imposed pursuant to Section 204 of the act (54 U. S. Stat. at Large, p. 1181, U. S. C. A. tit. 50, Appendix, Section 524). *

* * * * *

The period of a stay of proceedings is fixed by 50 U. S. C. A. sec. 524, 54 Stat. 1181, which provides:

"Any stay of any action, proceeding, attachment, or execution, ordered by any court under the provisions of this Act may, except as otherwise provided, be ordered for the period of military service and three months thereafter or any part of such period, and subject to such terms as may be just, whether as to payment in installments of such amounts and at such times as the court may fix or otherwise. Where the person in military service is a codefendant with others the plaintiff may nevertheless by leave of court proceed against the others."

In construing this statute, we believe any doubt should be resolved in favor of the person in military service, because the Act was plainly enacted for his benefit.

Careful consideration must be given to the question whether the granting of a stay of proceedings is discretionary or mandatory, when the conditions stated in the statute are found to exist. Throughout this statute it is provided that when the conditions of the granting of a stay are found to exist, the court may, on its own motion, and shall on application being made, grant such stay (50 U.S.C.A. Sections 521, 531 and 532.)

One of the conditions of the granting of a stay is prescribed by 50 U.S.C.A. section 533, which in part provides that, "No court shall stay a proceeding to resume possession of a motor vehicle . . . unless the court shall find that 50 per centum . . . of the purchase price . . . has been paid . . ."

Nothing in that section provides whether the granting of the stay is discretionary or mandatory when the 50 per centum of the purchase price has been paid. Said Section 533 must be construed together with the whole Act, including Section 531 of the same Title, which in part provides, ". . . the court . . . may in its discretion, on its own motion, and shall, except as provided in section 303 (section 533 of this Appendix) on application to it by such person in military service . . . order a stay of proceedings . . ." (italics ours) Substantially the same provisions are in Section 532. Reading Sections 531, 532 and 533 together, it is our opinion that where a motor vehicle is the subject of the action, a stay cannot be granted in any event unless the court finds that 50 per centum of the purchase price has been paid, but that when the courts so finds, and finds that the other necessary conditions exist, it may, on its own motion, but must, on application being made, grant such stay. Section 533, supra, does not affect the question whether the granting of the stay is discretionary or mandatory; it merely adds an additional condition to the granting of such stay, where a motor vehicle is the subject of the action.

CONCLUSION.

In view of the above authorities, and the purpose for which the Soldiers' and Sailors' Civil Relief Act of 1940 was enacted, it is our opinion that a mortgagee cannot repossess the automobile of a person in military service where a deposit or installment of the purchase price has been paid prior to October 17, 1940, except by action in a court of competent jurisdiction.

If such action, if the court finds that the ability of the defendant to conduct his defense is materially affected by his military service, and that 50 per centum of the purchase price of the motor vehicle has been paid, the court may, on its own motion, but must on application being made, grant a stay of proceedings for the duration of the defendant's

military service and three months thereafter, or some part of such period.

If the court finds that the ability of the defendant to comply with the terms of the contract is materially affected by his military service, and that 50 per centum of the purchase price of the automobile has been paid, the court may, on its own motion, but must, on application being made, grant a stay of proceedings for the period stated above.

If the court finds that less than 50 per centum of the purchase price of the automobile has been paid, the court cannot grant a stay of proceedings, but may, either on its own motion, or on application being made, (1) order repayment of prior installments or deposits or part thereof, as a condition of terminating the contract and repossessing the automobile, (2) or the court may require the plaintiff to file a bond to indemnify the defendant against loss in the event the judgment is later set aside, (3) or the court may make such other disposition of the case as may be equitable.

Respectfully submitted,

ERNEST HUBBELL
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

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