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Recent Cases

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LIBEL AND SLANDER: Absolute privilege in respect to pleadings of one not a party to the litigation, but who causes the inclusion of the defamatory matter.

Laun v. Union Electric Company of Missouri[1]

This is an appeal from an adverse judgment sustaining a demurrer to a libel petition. Plaintiff charged that the defendant, a holding company having control and management of several power companies, maliciously communicated certain defamatory matter regarding the plaintiff to these companies, and that the defendant maliciously caused the member companies to publish the libelous statements by incorporating them in an amended complaint which they filed in the district court against the plaintiff on an embezzlement charge. The defendant contended that it was absolutely privileged to cause these allegations, though made with malice, to be inserted in the petition filed by member companies under their control. However, in reversing the previous decision the court held that merely because the defamatory matter was published on a privileged occasion[2] by one entitled to immunity arising from his relationship to that occasion[3] was no reason that the privilege should be extended to include the defendant and the position it allegedly occupied in the instant case.[4]

The decision brings to attention the conflict of two principles in the law of defamation: the right of the individual to enjoy his reputation unimpaired by defamatory attacks versus the necessity in public interest of a free and full disclosure of facts in the conduct of legislative, executive, and judicial proceedings.[5] Evolving on the grounds of public advantage from this clash of interests have come the two general classes of privileged defamatory matter—that which is "absolutely" privileged, and that which is "conditionally" or "qualifiedly" privileged.[6] The former

1. 350 Mo. 572, 166 S. W. (2d) 1065, 144 A. L. R. 622, 633 (1942).

2. McCormick v. Ford Mfg. Co., 232 S. W. 1010 (Mo. App. 1921) (defamatory matter contained in the pleadings filed in a court having jurisdiction of the cause, if pertinent and relevant to the issue, is absolutely privileged and cannot be made the basis for a suit of libel, even though the allegations were false and malicious).

3. 3 RESTATEMENT, TORTS (1938) § 587.

4. The court based its present holding on the rulings announced in the earlier cases of Rice v. Coolidge, 121 Mass. 393 (1876); Ewald v. Lane, 104 F. (2d) 222 (App. D. C. 1939); and Bigelow v. Brumley, 138 Ohio St. 574, 37 N. E. (2d) 584 (1941).

5. Young, *Liability of a Telegraph Company for Transmitting a Defamatory Message II* (1920) 20 COL. L. REV. 369, 374. For an exhaustive discussion on this subject refer to the article by Veeder, *Absolute Immunity in Defamation: Judicial Proceedings* (1909) 9 COL. L. REV. 463, 600; Veeder, *Absolute Immunity in Defamation: Legislative and Executive Proceedings* (1910) 10 COL. L. REV. 131.

6. Veeder, *Absolute Immunity in Defamation: Judicial Proceedings* (1909) 9 COL. L. REV. 463, 478.

term has reference to words spoken or written in the course of certain legislative, executive, or judicial proceedings, and the latter term or class is defined as a publication made on an occasion which furnishes a *prima facie* legal excuse for its making and which is privileged until some additional fact is shown which so alters the character of the occasion as to prevent its furnishing a legal excuse.[7] The effect of the "absolute" privilege when it exists is to afford "absolute immunity from suit."[8] but "qualified" privilege to be complete and furnish such absolute immunity must show good faith, an interest to be upheld, the statement properly limited in its scope, a proper occasion, and publication to proper persons. The absence of one or more of these elements will generally prevent the party from relying on a plea of the privilege.[9]

Thus, since the complete and unconditional immunity from defamation is accorded in a certain few cases of exceptional character[10] on the basis of social benefits[11] there is a definite tendency and policy on the part of the courts not to extend absolute privilege unless a clear public need for it is found to exist in the new situation. "He who seeks to stretch a wholesome rule beyond its legitimate application attacks the rule itself."[12] The purpose of the law in granting absolutely privileged occasions for freedom of speech to persons in proper relationships to the

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7. Merriam v. Star-Chronicle Publishing Company, 335 Mo. 937, 74 S. W. (2d) 592, (1934); 1 W. and P. (Perm. ed. 1940) 156.

8. TOWNSHEND, SLANDER AND LIBEL (4th ed. 1890) § 221. It is the rule in England that immunity exists as to any utterance arising out of the judicial proceeding whether the defamatory matter is pertinent or impertinent to any issue involved. Astley v. Younge, 2 Burr. 807, 97 Eng. Reports 572 (K. B. 1750); PROSSER, TORTS (1941) 825. Nearly all American courts, however, have limited this freedom by saying there is no immunity unless the particular statement is relevant to some issue in the case. Andrews v. Gardiner, 224 N. Y. 440, 121 N. E. 341 (1918). When the statement is irrelevant the privilege is conditional. Gilbert v. People, 1 Denio 41 (N. Y. 1845); Keeley v. Great Northern Ry., 156 Wis. 181, 145 N. W. 664 (1914). But in order to circumvent difficulties arising from the technical interpretation of the "relevancy" of evidence, many of the courts have adopted a liberal definition of what is "relevant" and require only that the statement have some relation to the subject of the inquiry, and all doubts are to be resolved in favor of the defendant. See Union Mut. Life Ins. Co. v. Thomas, 83 Fed. 803 (C.C.A. 9th, 1897); Wels v. Rubin, 254 App. Div. 484, 5 N. Y. Supp. (2d) 350 (1st Dep't. 1938). This, then in effect, seems to come close to the English ruling. Note (1922) 16 A. L. R. 746.

9. Ivins v. Louisville and Nashville R. R., 37 Ga. App. 684, 141 So. 423, (1928); 35 W. and P. (Perm. ed. 1940) 596. 33 AM. JUR., LIBEL AND SLANDER, § 126; ODGERS, LIBEL AND SLANDER (5th ed. 1912) 227; NEWELL, SLANDER AND LIBEL (3d ed. 1914) § 492. Malice destroys the privilege, but the mere fact that the belief in the truth of the statement is based on negligence or undue credulity does not destroy the privilege. POLLOCK, LAW OF TORTS (12th ed. 1920) 288; Bays v. Hunt, 60 Iowa 251, 14 N. W. 785 (1882).

10. Veeder, *Absolute Immunity in Defamation: Judicial Proceedings* (1909) 9 COL. L. REV. 463, 479.

11. *Id.* at 478 ("Perfect freedom to say in pleadings whatever the parties choose to bring to the consideration of the court or jury tends obviously to promote the intelligent administration of justice.")

12. Barber v. St. Louis Post-Dispatch Company, 3 Mo. App. 377, 385 (1877).

occasions[13] is not to protect malice and malevolence, but to guard persons acting honestly in the discharge of public duty or in defense of their rights from incurring the risk of criminal prosecution or being harassed by actions imputing to them dishonesty and enmity.[14] In the use of the judicial tribunals to assert or protect these interests there must be perfect freedom for the parties to present any matter for the considerations of the courts, and lack of restraint in these instances has greater social significance than does the occasional harm arising from any defamatory statements made regarding individuals. Were the rule otherwise numerous cases would arise out of previous litigation on actions for libel and slander brought against persons required to "act at their peril" during the court proceedings.[15]

However, in cases where the party asserting the privilege in a judicial proceedings[16] is not a party thereto, a judge,[17] juror,[18] witness,[19] counsel,[20] or party to the litigation,[21] and thus under no duty or requirement to speak or act, there seems to be no sound reasoning to support the extension of absolute immunity.[22] In these instances the party is not presenting any matter for the consideration of the court in view of the ultimate administration of justice, but instead is prompted to activity by some interest of his own[23] or from a feeling of moral or social duty.[24] Therefore, sufficient protection may be given and social interests satisfied in these situations by conditioning the immunity from counter-action by one whose rights are damaged upon the honest and reasonable belief that the defamatory matter is true or upon the absence of ill will on the part of the publisher.

In contrast is the situation where the courts have found that a party to the judicial proceedings is absolutely privileged when the alleged defamation inserted

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13. 33 AM. JUR., LIBEL AND SLANDER, § 125.
14. Veeder, *Absolute Immunity in Defamation: Judicial Proceedings* (1909) 9 COL. L. REV. 463, 469.
15. *Id.* at 470; *see* Rice v. Coolidge, 121 Mass. 393 (1876) (The reasons that testimony of witnesses is privileged is that it is given on compulsion and in order to promote thorough investigation in the courts of jurisdiction, and thus public policy requires that witnesses shall not be restrained by fear of actions against them. These reasons do not apply to a stranger to the suit).
16. PROSSER, TORTS (1941) 826. "The 'judicial proceeding' to which the immunity attaches has not been defined very exactly. It includes any hearing before a tribunal which performs a judicial function, ex parte or otherwise, and whether the hearing is public or not."
17. Note (1922) 20 A. L. R. 407.
18. PROSSER, TORTS (1941) 823 ("For the same reason, a similar absolute immunity is conferred upon grand and petit jurors in the performance of their functions.") *See* Engelke v. Chouteau, 98 Mo. 629, 12 S. W. 999 (1889); Irwin v. Murphy, 129 Cal. App. 713, 19 P. (2d) 292 (1933).
19. Note (1921) 12 A. L. R. 1247.
20. Note (1926) 44 A. L. R. 389.
21. 3 RESTATEMENT, TORTS (1934) § 587.
22. Note (1943) 144 A. L. R. 633.
23. 3 RESTATEMENT, TORTS (1934) § 596: "An occasion is conditionally privileged when circumstances are such as to lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that facts exist which another sharing such common interest is entitled to know."
24. 33 AM. JUR., LIBEL AND SLANDER, § 127.

in the pleadings has reference to a third party unrelated to the litigation.[25] Here the immunity from action is not dependent on the absence of malice, but instead is absolute and unconditional. Both the English and American courts have seemed to assume in dealing with this question of absolutely privileged libelous matter that it in no manner depends upon whether the defamatory statements relate to or were uttered about a stranger to the suit or not.[26] The mere fact that the plaintiff is not a party to the suit in which the alleged defamation occurred does not change the principle of public policy upon which the privilege is founded, and immunity afforded to the participant in the judicial proceeding should not depend upon whether or not the plaintiff is a party litigant. It would seem that such a distinction could not be made without disregarding the idea of social advantage upon which the whole rule depends.[27]

The instant case seems to present a circumstance where the defendant would be justified in a reliance on the conditional privilege[28] had it communicated this libelous matter to the other companies in good faith for the protection of a mutual business interest.[29] Furthermore, the defendant was the holding company having control and management of the recipient companies.[30] However, since the amended petition filed by the plaintiff contained allegations of the defendant's express and actual malice in communicating these defamatory statements to their member companies, the plea of "qualified" privilege was obviously insufficient to support their demurrer, and because of the express malice allegedly present in its actions the defendant company has lost all right to the conditional privilege. On the other hand, since it is not necessary in order to support effectively the policy on which the absolute privilege is founded to extend the immunity it grants beyond the

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25. Jones v. Brownlee, 161 Mo. 258, 61 S. W. 795 (1901).

26. *See* Johnson v. Brown, 13 W. Va. 71, 137 (1878).

27. There is nevertheless one American case, Ruohs v. Backer's next friend, 53 Tenn. 395 (1871) which decides that if a libelous statement made in the course of judicial proceedings is made in regard to a third person, such statement is not an absolutely privileged publication, but is only conditionally privileged, and is actionable, if made with malice without probable cause, and under such circumstances as would not reasonably create the belief that they were true. See criticism of this holding in Johnson v. Brown, 13 W. Va. 71, 138 (1878).

28. 33 AM. JUR., LIBEL AND SLANDER, § 170.

29. *Ibid.* Business communications are qualifiedly privileged if made without malice and for the protection of mutual interest. However, the privilege is lost if the communications are for the purpose of defaming.

30. Prins v. Holland-North American Mfg. Co., 107 Wash. 206, 181 Pac. 680 (1919); 5 A. L. R. 451, 455 (1920); *See* Walgreen Co. v. Cochran, 61 F. (2d) 357 (C. C. A. 8th, 1932); Nichols v. Eaton, 110 Iowa 509, 81 N. W. 792 (1900); Bohlinger v. Germania Life Insurance Co., 100 Ark. 477, 140 S. W. 257 (1911); and Philadelphia, W. & B. R. R. v. Quibley, 21 How. 202, 16 L. ed. 73 (U. S. 1859). In some of these cases the defendant corporation has been unduly protected on the grounds that there was no actual publication of the libelous statements. Notes (1920) 5 A. L. R. 455 (1922) 18 A. L. R. 776; (1930) 28 MICH. L. REV. 348.

actual participants to the judicial proceedings, the defendant fails to come within this boundary, and therefore is not eligible for any privilege which the law of defamation has developed.

JANE RUSK DALTON

SOLDIERS' AND SAILORS' CIVIL RELIEF ACT—STAY OF ACTION—PROCEDURE IN CASE OF DEFAULT

Boone v. Lightner[1]

An attorney, serving in the armed forces and trustee of a fund for his minor daughter, was summoned into a state court of North Carolina in an action to require an accounting and to remove him as trustee. A continuance was granted because his attorney was entering the service, and on the trial date defendant, through more recently retained counsel, demanded that the trial be stayed until the termination of his service under Section 201 of the Soldiers' and Sailors' Civil Relief Act of 1940. The Supreme Court of North Carolina[2] affirmed the trial court's denial of a stay and the decision was upheld by the Supreme Court of the United States on the grounds that the petitioner was using the act as a shield. His ability to carry on his defense was not materially affected by reason of his military service, for the record indicated that he had carried on other litigation during this same period. The trust fund might be materially endangered should such a stay be granted. On these facts the Supreme Court felt that the trial court exercised proper use of its discretionary power in refusing the stay and further held that the trial court has discretion to determine who must carry the burden of establishing whether or not the stay should be granted.

Section 201 of the Soldiers' and Sailors' Civil Relief Act[3] provides:

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

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1. 319 U. S. 561, 63 Sup. Ct. 1223, 87 L. ed. 1587 (1943) (*rehearing denied* Oct. term, 1943).

2. Lightner v. Boone, 222 N. C. 205, 22 S. E. (2d) 426 (1942).

3. 54 Stat. 1178, 1181 (1940); 50 U. S. C. A. §§ 501-585, l. c. 521 (Supp. 1943). This is virtually a reenactment of the Soldiers' and Sailors' Civil Relief Act of March 8, 1918, 40 Stat. 440 (1918). The 1940 act was extended somewhat by an amendment effective Oct. 6, 1942, 56 Stat. 769 (1942), 50 U. S. C. A. §§ 501-590 (Supp. 1943). Extensive discussion on these acts and amendments may be found in: Ferry, Rosenbaum and Wigmore, *The Soldiers' and Sailors' Civil Rights Bill* (1918) 12 ILL. L. REV. 449; Russell and Bridwell, *The Soldiers' and Sailors' Civil Relief Act as Amended* (1942) 8 JOHN MARSHALL L. Q. 137; Rooks, *Soldiers' and Sailors' Civil Relief Act of 1940 as Amended 1942* (1942) 13 Mo. B. J. 211.

The granting of a stay is left to the discretion of the court and is not an absolute right accruing to any service man.[4] Such discretion has been exercised, almost unanimously, to protect the service man where there is doubt as to his ability to conduct his defense while in the service. The language of the act is broad and the courts have frequently said that it should be given a liberal construction.[5] In personal injury actions the courts have usually granted a stay on the application of the service man. Thus, where the defendant has admitted negligence,[6] or has admitted and been convicted of criminal negligence and placed on probation,[7] and even where it seemed possible that the defendant could get a furlough in order to come back and defend himself,[8] the court has granted a stay until the termination of the defendant's military service. This stay in the latter case was granted, although it was evident that it would work a hardship on the plaintiff.[9] However, one case[10] allowed the proceedings to continue when the defendant was insured and the plaintiff agreed to limit his claim to the amount of the protection. There the court felt that although the suit was prosecuted against the service man personally, the burden of payment would fall on the insurance company.

The courts have refused to grant stays upon request of the service man where the facts indicated that he was merely using the act as a shield,[11] or where he was at that time attending to other personal business, thus indicating he could also defend in the present suit;[12] or where the defendant was stationed nearby and was able to conduct his defense.[13] Stay has also been denied where the defendant's presence could have no bearing on the case as the facts had all been determined and submitted;[14] or where all that remained to be done was the submitting of briefs which could be done by attorneys;[15] or where the only thing to be determined was the construction of an existing contract.[16] In the case of the abatement of a public nuisance, stay of proceedings was refused as a matter of public interest.[17] In the

4. Boone v. Lightner, 319 U. S. 561, 63 Sup. Ct. 1223, 1226, 87 L. ed. 1587 (1943) cited *supra* note 1.

5. *Ibid;* Royster v. Lederle, 128 F. (2d) 197 (C. C. A. 6th, 1942); Clark v. Mechanics' American Nat. Bank, 282 Fed. 589 (C. C. A. 8th, 1922).

6. Laperouse v. Eagle Indemnity Co., 202 La. 686, 12 So. (2d) 680 (1942).

7. Royster v. Lederle, 128 F. (2d) 197 (C. C. A. 6th, 1942).

8. Craven v. Vought, 43 Pa. D. & C. 482 (1941). *Cf.* note 13 *infra.*

9. *Ibid.* In other types of cases the courts have sometimes been influenced by the hardship to be borne by the plaintiff should a stay be granted. Swiderski v. Moodenbaugh, 45 F. Supp. 790 (D. Or. 1942); State *ex rel.* Clarke v. Klene and Clark, 201 Mo. App. 408, 212 S. W. 55 (1919); Associates Discount Corporation v. Armstrong, 33 N. Y. S. (2d) 36 (City Ct. Rochester 1942).

10. Swiderski v. Moodenbaugh, 45 F. Supp. 790 (D. Or. 1942).

11. Boone v. Lightner, 319 U. S. 561, 63 Sup. Ct. 1223, 87 L. ed. 1587 (N. C. 1943); Flushing Sav. Bank v. Hallewell, 35 N. Y. S. (2d) 521 (Sup. Ct. 1942).

12. Dietz v. Treupel, 184 App. Div. 448, 170 N. Y. Supp. 108 (2d Dep't 1918).

13. Fennell v. Frisch's Adm'r., 192 Ky. 535, 234 S. W. 198 (1921); See note 8 *supra.*

14. *In re* Bashor, 16 Wash. (2d) 168, 132 P. (2d) 1027 (1943).

15. Rosenthal v. Smith, 42 N. E. (2d) 464 (1942).

16. Davies & Davies v. Patterson, 137 Ark. 184, 208 S. W. 592 (1919).

17. City of Cedartown v. Pickett, 194 Ga. 508, 22 S. E. (2d) 318 (1942).

case where judgment had been rendered, stay of execution was not granted where the ability of the defendant to comply was not affected by reason of his military service.[18] Taken as a whole the cases indicate broad discretion in the granting or refusing of a stay where the defendant has made an appearance in the case.

A more difficult problem is presented where the defendant has been served and has failed to appear in the action. Section 200 (1)[19] specifically provides that in the event of a default of appearance of an interested party, the one prosecuting, before entering judgment, must file an affidavit that the defendant is not in the service;[20] or if unable to do this, the plaintiff must file an affidavit that the defendant is in the service or that the plaintiff is not able to determine whether or not the defendant is in the service.[21] If an affidavit is not filed it is provided that no judgment shall be entered without order of the court, and no order directing entry of judgment shall be given if the defendant is in the service until the court shall appoint an attorney to represent the defendant. Unless it is clear that the defendant is not in the service, the court may require as a condition before entering judgment that the plaintiff file a bond to protect the defendant service man should the judgment later be set aside. Section 200 (3)[22] states that "... no attorney appointed under this act to protect a person in the military service shall have power to waive any right of the person for whom he is appointed or bind him by his acts."

Full compliance with the act by filing an affidavit that the defendant is in the military service, and appointment of an attorney to represent him, does not assure final settlement of the case, for under Section 200 (4)[23] the court may, in its discretion, open a default judgment against a service man, provided he makes application to open the judgment within ninety days after his discharge, shows that he was prejudiced by reason of his military service in making his defense, and further shows a meritorious or legal defense. However, it is provided that this does not affect title to anything purchased by a bona fide purchaser for value under such default judgment.

What of those default cases in which the plaintiff fails to comply with Section 200 (1) as to filing the proper affidavit, and the court fails to appoint an attorney

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18. Pope v. United States Fidelity and Guaranty Company, 67 Ga. App. 415, 21 S. E. (2d) 289 (1942). *See* Kelley v. Kelley, 38 N. Y. S. (2d) 344 (Sup. Ct. 1942) (stay may be granted if the defendant's ability to comply is affected by reason of his service).

19. 54 Stat. 1178, 1180 (1940); 50 U. S. C. A. §§ 501-585, l. c. § 520 (Supp. 1943).

20. *See In re* Estate of Cool, 19 N. J. Misc. 236, 18 A. (2d) 714 (Surr. Ct. 1941) (affidavit should be filed, as nearly as practical, contemporaneously with the making and entry of default judgment).

21. See affidavit forms in: C. C. H. 1943 Manpower L. Serv. ¶ 19,109; Russell and Bridwell, cited *supra* note 3. See also National Bank of Far Rockaway v. Van Tassell, 178 N. Y. Misc. 776, 36 N. Y. S. (2d) 478 (Sup. Ct. 1942); Melotti v. Melotti, 44 Pa. D. & C. 514 (1942).

22. 54 Stat. 1178, 1180 (1940), 50 U. S. C. A. §§ 501-585, l. c. 520 (3) (Supp. 1943).

23. *Id.* at 1180 (1940), 50 U. S. C. A. §§ 501-585, l. c. 520 (4) (Supp. 1943).

to represent the non-appearing defendant? Will this be an error fatal to the plaintiff's action? Nowhere does the act visit any penalty upon the plaintiff for non-compliance, nor does it state how non-compliance inures to the benefit of the service man. The act is surely open to the construction that the provisions of Section 200 (1) are merely directory and that no particular consequences follow from mere non-compliance with its provisions.[24]

On the surface, this state of affairs seems hardly reasonable but on further study it can be seen that a satisfactory solution is reached through the general desire of courts to protect the man in the service and their ability to give that protection under the act. The act was not designed to suspend all civil actions against men in the service nor to avoid all judgments rendered against them, as had been done by the various state acts in the Civil War and World War I,[25] but was intended rather to call the attention of the court to the possibility of a defendant's being in the service so that the judge may protect any defaulting defendant who might possibly be a service man before entering final judgment by default.

The majority of the cases are not concerned with default judgments due to statutory requirements for personal service,[26] but the problem becomes particularly acute in probate,[27] divorce and other proceedings where service by publication is allowed. In such cases if the interested party is in the service, usually he knows nothing of the proceedings and has no way of learning of them. In the default cases generally, the majority of the courts say that no rights other than those of persons actually in the service are intended to be protected and that failure to file affidavits, etc., does not make every judgment void, but merely voidable at the instance of those in service.[28] It has been held, however, that a defaulting civilian defendant can challenge the failure to file an affidavit and appoint an attorney and have the judgment set aside.[29] Another case held that failure to comply made a judgment absolutely void where the defaulting defendant was in the service at the time.[30] At least one court has said that the judgment against a service man was not void when the plaintiff failed to file an affidavit as to the defendant's military service and the court failed to appoint an attorney to represent the absent defendant, because

24. *See* Combs v. Combs, 180 N. C. 381, 104 S. E. 656 (1920). See also cases cited *infra* note 25.

25. *See* Boone v. Lightner, 319 U. S. 561, 63 Sup. Ct. 1223, 87 L. ed. 1587 (1943); Notes (1919) 9 A. L. R. 6.

26. Ferry, Rosenbaum, and Wigmore, *supra* note 3.

27. *In re* Estate of Cool, 19 N. J. Misc. 236, 18 A. (2d) 714 (Surr. Ct. 1941); Cogswell, *Application of the Soldiers' and Sailors' Civil Relief Act to Probate Proceedings* (1941) 8 J. B. A. D. C. 389; Comment (1943) 42 MICH. L. REV. 480.

28. Howie Mining Co. v. McGary, 256 Fed. 38 (D. C. W. Va. 1919); Eureka Homestead Soc. v. Clark, 145 La. 917, 83 So. 190 (1919); Harrell v. Shealey, 24 Ga. App. 389, 100 S. E. 800 (1919); Schroeder v. Levy and Levy, 222 Ill. App. 252 (1921). These are cases in which stay was denied even though there was failure to comply with the act, because the defendant was not in the military service.

29. Bobkoff v. Chesticoff, 24 Haw. 447 (1918).

30. Blume v. Battaglia, 28 Pa. Dist. 689 (1919).

the defendant did not make application to open judgment within ninety days after his discharge nor did he show that he had a meritorious defense.[31]

If it has been determined that the defaulting defendant is in the armed forces and if the court then appoints an attorney to represent him, can the plaintiff insist on his right to proceed? There are undoubtedly cases where the defendant's interests are negligible or where an attorney appointed by the court can represent his interest adequately, so that he would not be prejudiced by reason of his military service. There are other cases where the attorney, so appointed, cannot properly protect the interests of the absent defendant. Protection of the service man's interests often may be effected by requiring the plaintiff to post a bond.[32] If the court proceeds in a divorce case, however, future difficulties might be encountered for the posting of the bond could not "save harmless."[33] No uniform answer can be given for such problems but each case must be determined on its own merits. There is no express provision of the act applicable to the situation where the attorney appointed by the court to represent the absent service man applies for a stay. Probably the granting or refusal of the stay lies within the discretion of the court in much the same way as in case of application by a service man who has appeared as in the principal case.

The act is an attempt to maintain a delicate balance between the protection of civilian litigants and the protection of the members of the armed forces. A compromise is reached between the continuation of "business as usual" and complete suspension of all suits which involve a service man or which might concern one. The act apparently vests broad discretionary powers in the courts so that each new case must be dealt with individually. The intention of the act is to expedite the national defense by suspending the enforcement of civil liabilities in certain cases to enable service men to devote their entire energy to the defense of the nation. To further that end Congress provided: "And the court may 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 this Act."[34]

In short, the trial courts will usually insist that the requirements of the act be fulfilled before default judgment is entered. By itself this fact will lead to due protection of service men's rights in most cases. If the attorney appointed by the court applies for a stay it is probably in the discretion of the court as to whether it shall be granted, the same as in the situation of the principal case where the party has appeared and is represented by counsel. The courts should be liberal in

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31. Combs v. Combs, 180 N. C. 381, 104 S. E. 656 (1920).

32. *See* Davison v. Lynch, 103 N. Y. Misc. 311, 171 N. Y. S. 46 (Sup. Ct. 1918).

33. The court was confronted with a comparable situation in Combs v. Combs, 180 N. C. 381, 104 S. E. 656 (1920).

34. 54 Stat. 1180 § 200 (1) (1940), 50 U. S. C. A. § 520 (1) (Supp. 1943).

granting stay in favor of service men.[35] Whether or not there is compliance with the act, relief from a default judgment against a service man should be restricted to proceedings under Section 200 (4)[36] and no other person should be permitted to complain.

T. H. PARRISH

35. H. R. Rep. No. 2198, 77th Cong., 2nd Sess. (1942), "Any doubts that may arise as to the scope and application of the act should be resolved in favor of the person in military service involved."

36. 54 Stat. 1180 § 200 (4) (1940), 50 U. S. C. A. § 520 (4) (Supp. 1943).