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PAWNBROKER — NO AUTHORITY TO SELL AT PRIVATE SALE, PAWNED ARTICLE, WHERE PAWNER JOINED MILITARY SERVICE — SOLDIERS' AND SAILORS' CIVIL RELIEF ACT, PUBLIC NO. 861, APPROVED OCTOBER 17, 1940 — LIMITATION DURING MILITARY SERVICE AND THREE MONTHS THEREAFTER — PAWNED ARTICLE MAY BE SOLD ONLY UPON ORDER OF SALE PREVIOUSLY GRANTED, RETURN THEREOF AND APPROVAL OF COURT — SECTION 6341-1 G.C.

SYLLABUS:

If prior to October 17, 1940, the date the Soldiers' and Sailors' Civil Relief Act, Public No. 861, was approved, an article was pawned in Ohio by a person who joined the military service, as defined in Sections 101 and 512 of the Act, the pawnbroker is without authority to sell the pawned article at private sale as provided in Section 6341-1, General Code, during the period the pawner remains in the military service and for three months thereafter. Such pawned article may be sold only upon an order of sale being previously granted and upon return thereof, the sale being approved by the court.

Columbus, Ohio, September 27, 1941.

Hon. Paul L. Selby, Chief, Division of Securities,
Columbus, Ohio.

Dear Sir:

Your request for my opinion reads as follows:

“Section 6337 of the Ohio General Code provides that it shall be unlawful for any person, firm, partnership, association or corporation to engage or continue in or carry on the business of lending money on deposit or pledge of personal property other than securities or printed evidences of indebtedness or in the business of purchasing personal property or choses in action or other valuable things and selling or agreeing to sell the same back to the seller at a price other than the original purchase price at a total charge, rate of interest or discount or other re-

muneration in excess of 8% per annum without first having obtained a license so to do from the Commissioner of Securities.

The following Section 6338 of the General Code of Ohio is substantially the same except that the acts of the person, firm, partnership or association are defined and declared to be those of a pawnbroker within the meaning of this Act.

Section 6341-1 of the Ohio General Code provides that if the pledgor shall fail to redeem any articles of jewelry, gems, silverware, goldplate, precious stones and kindred articles within six months from the date of the loan or sale or becomes six months in arrears in the payment of interest, or shall fail to redeem any other articles pledged or sold within thirty days after maturity of loan, it shall be the duty of the licensee to notify the pledgor or seller by registered mail demanding return receipt therefor to the last place of address given by said pledgor or seller that unless said pledge or property is redeemed within thirty days from the date said notice is mailed, specifying in said notice the time and place said sale will take place, it shall be sold at public or private sale at the option of the licensee and the proceeds applied to the payment of the indebtedness or amount advanced with all interest and charges. This section further provides that if the pledgor or seller fails to redeem or repurchase said pledge or property within the thirty day period specified in said notice, licensee shall proceed to offer said pledge or property at public or private sale to the highest bidder, on the date fixed in said notice and said licensee may become the purchaser.

The above mentioned provisions have been in force for a number of years and are at present in full force and effect.

There has, however, been enacted by the 76th Congress of the United States an Act known as the Soldiers' and Sailors' Relief Act of 1940, which Act was approved on October 17, 1940. This Act according to statements found in Section 100, Article I provides that provision is made in said Act to suspend enforcement of civil liabilities in certain cases of persons in the military service and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the period specified over which the Act remains in force.

In view of the fact that the Federal Act purports to suspend enforcement of civil liabilities against persons in the military service, your opinion is respectfully requested as to the applicability of the Soldiers' and Sailors' Relief Act of 1940 as it relates to the above mentioned provisions of the pawnbrokers laws, particularly with reference to the procedure outlined in Section 6341-1 of the Ohio General Code. Is the procedure outlined in Section 6341-1 in any way modified or suspended by the Soldiers' and Sailors' Relief Act of 1940?"

As you have observed in your inquiry, the Soldiers' and Sailors' Civil Relief Act, Public No. 861, Federal Code Annotated, Title 50, Appendix 9, was passed by the 76th Congress of the United States and was approved on October 17, 1940. The Act was substantially a reenactment of the 1918 Act bearing the same name. In discussing the 1918 Act, it was said in *Clark v. Mechanics' American National Bank*, 282 Fed., 589, 591:

"The Act of Congress is comprehensive, and, as stated in section 100, it was the purpose to extend protection to persons in military service in order to prevent injury to their civil rights during their terms of service and to enable them to devote their entire energy to the military needs of the nation. The Act provides for stays of suits in which soldiers are parties, prevents defaults, relieves against fines and penalties accruing, grants rights to stay of execution or of attachment and garnishment. It limits the right of eviction by landlords, the right to rescind or terminate contracts for nonperformance and the right to foreclose mortgages when the soldier would be affected. There are other provisions granting relief from sales for taxes and granting protection to the soldier in matters relating to insurance, homesteads, and under the irrigation and mining laws."

The only portion of the Act which might be considered directly relevant to the subject of your inquiry is Section 302, which is as follows:

"(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, 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."

The pledging or pawning of property as security for loans is a form of bailment for the mutual benefit of both the bailor and bailee. 8 C.J.S., 243, section 8, and 6 Am. Jur., 147, section 19. While the pawning of an article may be distinguished from a mortgage or trust deed, the transaction is in effect a "security in the nature of a mortgage, upon * * * personal property." In *Casey v. Cavaroc*, 96 U.S., 467, 24 L.Ed., 777, it is said:

"The difference ordinarily recognized between a mortgage and a pledge is, that title is transferred by the former, and possession by the latter."

These differences are even less distinct in Ohio, for title to mortgage chattels does not pass to the mortgagee prior to default and whether or not possession passes to the mortgagee is entirely a matter of agreement. *Commercial Credit Company v. Standard Baking Company*, 45 O.App., 403, 406.

In 11 C.J., 402, section 3, it is said:

"The securing of the payment of a debt or the performance of other obligations is equally the object of both pledges and chattel mortgages; hence, it is sometimes difficult to determine into which class a particular transaction falls, although there are well recognized distinctions between them."

And in 10 Am. Jur., 723, section 10, it is stated:

"It has been said that a mortgage is in the nature of a pledge to secure payment of the mortgage debt. Also, in equity a mortgage and a pledge in most respects are subject to the same rules, and the term 'mortgage' as used in a statute has been held to include a pledge."

In the case of *Palmer v. Mutual Life Insurance Company*, 114 Minn., 1, 130 N.W., 250, the court said in the opinion:

"It is often difficult to determine whether a particular

transaction amounts to a mortgage or a pledge, and in such cases the abstract form of the transaction usually controls the question."

Thus it is seen that the distinction between pledges and chattel mortgages may be more a matter of form than substance, and pledges or pawns may well be included in the provision of Section 302(1) as being "other security in the nature of a mortgage upon * * * personal property."

The foregoing construction is in entire harmony with the purpose of the Act, for the rights of a person in the military service would be as readily prejudiced by the sale of articles he has pawned, as by the sale of articles he has mortgaged. And concern over pawned articles would jeopardize his ability to devote his entire energy to the defense of the nation no less than a mortgage on the same articles. Furthermore, the courts have said that the Act should be liberally construed in favor of the men in the service. In *Clark v. Mechanics' American National Bank*, 282 Fed., 589, it was said, with reference to the 1918 Act:

"A statute of this nature should be liberally construed in favor of the rights of the man engaged in military service, absorbed by the exacting duties required of him, and unable to give attention to matters of private business."

The second headnote in the case of *Steinfeld v. Massachusetts Bonding and Insurance Company*, 80 N.H., 39, 112 Atl., 800, to the same effect, reads:

"The Soldiers' and Sailors' Relief Act (U.S. Comp. St. 1918, Comp. St. Ann. Supp. 1919, Sections 3078 $\frac{1}{4}$ a-3078 $\frac{1}{4}$ ss) should be liberally construed, and the remedial purpose should not be defeated by a narrow or technical construction."

Holding, as I am constrained to do, that pawns are included within the provisions of the Soldiers' and Sailors' Civil Relief Act, the view of the court in the case of *Kondel v. State*, 168 Wisc., 335, 170 N.W., 715, is governing with respect to the conflict between the provisions of Section 6341-1, General Code of Ohio, and those of Section 302(3) of the Act, it having been said in the *Konkel* case, with respect to such conflicts:

"Congress having spoken fully on the subject, the power of the state to enact a law on the same subject is suspended."

If the pawnbroker disregards the provisions of Section 302 of the Act, he does so at his own peril. In the case of *John Hancock Mutual Life Insurance Company v. Lester*, 234 Mass., 559, 125 N.E., 594, it is said:

“It is well settled that during the time the Soldiers’ and Sailors’ Civil Relief Act (Act March 8, 1918, c. 20) is in force a mortgagee forecloses under a power of sale contained in a mortgage at his own peril ‘unless upon an order of sale previously granted by the court and return thereto made and approved’ by it; and that while a sale is not necessarily bad, it is of no validity if made during the ‘military service’ of an owner of land, or within three months thereafter, if consummated without such order and return.”

In specific answer to your inquiry, I am therefore of the opinion that if prior to October 17, 1940, the date the Soldiers’ and Sailors’ Civil Relief Act, Public No. 861, was approved, an article was pawned in Ohio by a person who joined the military service, as defined in Sections 101 and 512 of the Act, the pawnbroker is without authority to sell the pawned article at private sale as provided in Section 6341-1, General Code, during the period the pawner remains in the military service and for three months thereafter. Such pawned article may be sold only upon an order of sale being previously granted and upon return thereof, the sale being approved by the court.

Respectfully,

THOMAS J. HERBERT,
Attorney General.