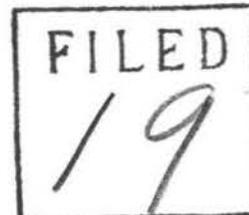


TAXATION AND REVENUE:

Tax deed conveying land of army inductee should not be made and delivered until after full compliance with Soldiers' and Sailors' Relief Act.

March 8, 1944



Honorable Maurice W. Covert
Prosecuting Attorney
Texas County
Houston, Missouri

Dear Mr. Covert:

This is an acknowledgment of your opinion request to the General, relating to the Jones-Munger Law, and Soldiers' and Sailors' Relief Act, which is as follows:

"This county has township organization and the treasurer who is also ex-officio collector of the back taxes has a problem which I am not sure about the legal rights involved. I am therefore submitting it to you with a request for your opinion.

"A tract of land originally belonged to Ida Davis who died a couple of years ago. While she was living she placed a mortgage on this land this mortgage was foreclosed in January, 1942 and the Trustee's Deed was made to Lynn Davis. This Lynn Davis was Ida Davis' nephew and as she had no direct heirs he was one of her heirs at the time she died. He entered the Army in November, 1942 and has been outside of the United States in his military service. The Trustee's Deed to Lynn Davis was never recorded and he never filed with the treasurer and ex-officio collector the affidavit required by the statutes to prove that he was in military service, however, he is well known here at Houston and is known by everyone to be in the military service and is known to be Ida Davis' heir, all this in addition to being the purchaser in the trustees

sale although that deed has never been placed on record.

"The first of this month this land was sold at third sale to a man who lives here at Houston and now demands a deed from the collector. The collector feels that he should not make this deed knowing the above facts to exist. He had made no particular investigation of this tract of land until after the land was sold at third sale, but all of these facts have been called to his attention since then. We are asking that based on these facts what your opinion would be as to the collector's duty in this connection. Please send me a extra copy of this opinion for delivery to our collector."

Section 11130, R. S. Mo., 1939, is in part as follows:

"Whenever any lands have been or shall hereafter be offered for sale for delinquent taxes, interest, penalty and costs by the collector of the proper county for any two successive years and no person shall have bid therefor a sum equal to the delinquent taxes thereon, interest, penalty and costs provided by law, then such county collector shall at the next regular tax sale of lands for delinquent taxes, sell same to the highest bidder, and there shall be no period of redemption from such sales. No certificate of purchase shall issue as to such sales but the purchaser at such sales shall be entitled to the immediate issuance and delivery of a collector's deed.***"

Therefore such sale is final unless the consideration is so grossly inadequate as to amount to fraud or, unless such sale is subject to the provisions of the Soldiers' and Sailors' Civil Relief Act.

In regard to the sale of land for delinquent taxes, for a grossly inadequate consideration, the Supreme Court, in the case of J. C. Nichols Insurance Co. v. Roorbach, 162 S. W. 2d. 274-5, held:

"On the merits the only question presented for consideration is whether the deed should be set aside and title decreed in the plaintiff solely on the ground that the \$40 paid by Roorbach for the lot "is so grossly inadequate as of itself alone to amount to a fraud".

"The identical question has been ruled by the court en banc in Bussen Realty Co. v. Benson et al., Mo.Sup., 159S.W.2d 813, 814. In that case we considered the questions presented by the defendants in the instant case and ruled that a consideration of \$11 for real estate of the value of \$2,000 was "so grossly inadequate as of itself alone to amount to a fraud". Likewise, we think that a consideration of \$40 for a lot of the value of \$1,000 "is so grossly inadequate as of itself alone to amount to a fraud".

Section 510, Art. 1 of the Soldiers' and Sailors' Relief Act, 50 U.S.C.A. Appendix, was involved in a decision of the Supreme Court of Arkansas in relation to a matter of taxes on real estate. Therein the court, in the case of Reynolds v. Haulcroft, 170 S.W. 2d 678, 679 held:

"It is undisputed in this case that appellant, James W. Reynolds, was a sailor in the service of the Navy of the United States at the time this action was instituted in the lower court, and was not present during any of the proceedings leading up to the decree and was not present when the decree was entered.

"The record discloses that appellant objected to, and sought to stay, all proceedings in the lower court during his absence in his country's service, in accordance with the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, supra. Such was the effect of appellant's pleadings.

"After a careful review of the record before us, we think the trial court abused its discretion in denying to appellant, James W. Reynolds, the stay prayed. The Congress of the United States declared the purpose of the Soldiers' and Sailors' Civil Relief Act to be, 50 U.S.C.A. Appendix Section 510: "In order to provide for, strengthen, and expedite the national defense under the emergent conditions which are threatening the peace and security of the United States and to enable the United States the more successfully to fulfill the requirements of the national defense, provision is hereby made to suspend enforcement of civil liabilities, in certain cases, of persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the nation, 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 herein specified over which this Act remains in force."

In the same case the court, in defining the purpose of such act, held:

"Commenting upon this section, the New York Supreme Court in *Hunt v. Jacobson et al.*, February 10, 1942, 178 Misc. 201, 33 N.Y.S.2d 661, 664, said: "The purpose of such enactments is to relieve a person so engaged in military service from the mental distress occasioned by the handicap of his being in the military service, resulting in his inability to function with the freedom of action which he possessed prior to his induction

into the military establishment, causing inability to meet financial and other obligations and commitments, the mental distress resulting from inability to adequately protect legal rights and interests or to make proper defense to suit brought against him, it being recognized that such distress has the tendency to impair his efficiency as a member of the militia, and, as well, the tendency to impair the efficiency of the organization with which he may be associated;--the design was 'to prevent interference with military duties! Andrews v. Gardiner, supra (185 App.Div. 477, 173N.Y.S. (1), 2)."

Section 520 of the Soldiers' and Sailors' Relief Act is as follows:

" (1) In any action or proceeding commenced in any court, if there shall be a default of any appearance by the defendant, the plaintiff, before entering judgment shall file in the court an affidavit setting forth facts showing that the defendant is not in military service. If unable to file such affidavit plaintiff shall in lieu thereof file an affidavit setting forth either that the defendant is in the military service or that plaintiff is not able to determine whether or not defendant is in such service. If an affidavit is not filed showing that the defendant is not in the military service, no judgment shall be entered without first securing an order of court directing such entry, and no such order shall be made if the defendant is in such service until after the court shall have appointed an attorney to represent defendant and protect his interest, and the court shall on application

make such appointment. Unless it appears that the defendant is not in such service the court may require, as a condition before judgment is entered, that the plaintiff 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 thereafter set aside in whole or in part. 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.

" (2) Any person who shall make or use an affidavit required under this section, knowing it to be false, shall be guilty of a misdemeanor and shall be punishable by imprisonment not to exceed one year or by fine not to exceed \$1,000, or both.

" (3) In any action or proceeding in which a person in military service is a party if such party does not personally appear therein or is not represented by an authorized attorney, the court may appoint an attorney to represent him; and in such case a like bond may be required and an order made to protect the rights of such person. But no attorney appointed under this Act to protect a person in military service shall have power to waive any right of the person for whom he is appointed or bind him by his acts.

" (4) If any judgment shall be rendered in any action or proceeding governed by this section against any person in military service during the period of such service or within thirty days thereafter, and it appears that such person was prejudiced by reason of his military service in making his defense thereto, such judgment may, upon application, made by such person or his legal representative, not later than ninety days after the termination of such service, be opened by the court rendering the same and such defendant or his legal

representative let in to defend; provided it is made to appear that the defendant has a meritorious or legal defense to the action or some part thereof. Vacating, setting aside, or reversing any judgment because of any of the provisions of this Act shall not impair any right or title acquired by any bona fide purchaser for value under such judgment." (Under-scoring ours.)

Section 521 thereof is 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."

Section 560 thereof is as follows:

" (1) The provisions of this section shall apply when any taxes or assessments, whether general or special (other than taxes on income), whether falling due prior to or during the period of military service, in respect of personal property, money, or credits, or real property owned and occupied for dwelling, professional, business, or agricultural purposes by a person in military service or his dependents at the commencement of his period of military service and still so occupied by his dependents or employees are not paid.

" (2) No sale of such property shall be made to enforce the collection of such tax or

assessment, or any proceeding or action for such purpose commenced, except upon leave of court granted upon application made therefor by the collector of taxes or other officer whose duty it is to enforce the collection of taxes or assessments. The court thereupon, unless in its opinion the ability of the person in military service to pay such taxes or assessments is not materially affected by reason of such service, may stay such proceedings or such sale, as provided in this Act, for a period extending not more than six months after the termination of the period of military service of such person.

" (3) When by law such property may be sold or forfeited to enforce the collection of such tax or assessment, such person in military service shall have the right to redeem or commence an action to redeem such property, at any time not later than six months after the termination of such service, but in no case later than six months after the date when this Act ceases to be in force; but this shall not be taken to shorten any period, now or hereafter provided by the laws of any State or Territory for such redemption.

" (4) Whenever any tax or assessment shall not be paid when due, such tax or assessment due and unpaid shall bear interest until paid at the rate of 6 per centum per annum, and no other penalty or interest shall be incurred by reason of such nonpayment. Any lien for such unpaid taxes or assessment shall also include such interest thereon."

Section 590 thereof is as follows:

" (1) A person may, at any time during his period of military service or within six months thereafter, apply to a court for relief in respect of any obligation or liability incurred by such person prior to his period of military service or in respect of any tax or assessment whether falling due prior to or during his period of military service. The court, after appropriate notice and hearing, unless in its opinion the ability of the applicant to comply with the terms of such obligation or liability or to pay such tax or assessment has not been materially affected by reason of his military service, may grant the following relief:

" (a) In the case of an obligation payable under its terms in installments under a contract for the purchase of real estate, or secured by a mortgage or other instrument in the nature of a mortgage upon real estate, a stay of the enforcement of such obligation during the applicant's period of military service and, from the date of termination of such period of military service or from the date of application if made after such service, for a period equal to the period of the remaining life of the installment contract or other instrument plus a period of time equal to the period of military service of the applicant, or any part of such combined period, subject to payment of the balance of principal and accumulated interest due and unpaid at the date of termination of the period of military service

or from the date of application, as the case may be, in equal installments during such combined period at such rate of interest on the unpaid balance as is prescribed in such contract, or other instrument evidencing the obligation, for installments paid when due, and subject to such other terms as may be just.

" (b) In the case of any other obligation, liability, tax or assessment, a stay of the enforcement thereof during the applicant's period of military service and, from the date of termination of such period of military service or from the date of application if made after such service, for a period of time equal to the period of military service of the applicant or any part of such period, subject to payment of the balance of principal and accumulated interest due and unpaid at the date of termination of such period of military service or the date of application, as the case may be, in equal periodic installments during such extended period at such rate of interest as may be prescribed for such obligation, liability, tax, or assessment, if paid when due, and subject to such other terms as may be just.

" (2) When any court has granted a stay as provided in this section no fine or penalty shall accrue during the period the terms and conditions of such stay are complied with by reason of failure to comply with the terms or conditions of the obligation, liability, tax, or assessment in respect of which such stay was granted."

The above decision is based upon a tax collection under court procedure and not by summary action similar to that provided in the Jones-Munger law.

The above act contains provisions of the Soldiers' and Sailors' Relief Act of 1918. In construing the right

of a soldier or sailor under the 1918 Act with reference to taxes enforced in a summary manner, in 12 Illinois Law Review 453 we find the following statement:

"This bill in addition to reposing in the courts a discretion to grant a stay of any action or execution at any stage, deals also specifically with contracts which impose a continuing liability upon a soldier or sailor during his term of service. These include such contracts as those for policies of insurance, rent for dwellings, interest on mortgages on property used for dwelling or business purposes by the soldier or sailor or his dependents, and purchase of real or personal property by installment contracts calling for the payment of installments during the period of military service; and the same principle is applied to liability for taxes on property. In these cases the creditor is generally given by the terms of the contract the right to exercise certain remedies without the intervention of a court; but this bill prohibits or restrains the exercise of such remedies and preserves intact for the time being, as far as possible, the rights of the soldier and sailor. This is accomplished mainly by requiring the creditor to exercise all such remedies only by leave of court or to institute an action in court which then becomes subject to the general provisions for stay of action and execution." (Underlining ours.)

In regard to procedure relating to a summary sale of realty under a deed of trust, in construing the 1918 Act the Supreme Court of Massachusetts in *Hoffman v. Charleston Bank*, 231 Massachusetts Reports 324, 328-9 said:

"***The section does not forbid the foreclosure of mortgages on property owned by persons in the military service of the United States. What the section does forbid is the foreclosure of such a mortgage under a power of sale (contained in it) "unless (the sale under the power is made)

upon an order of sale previously granted by the court and a return thereto made and approved by the court." Clause 3 of Section 302 was enacted to secure to every person in the military service of the United States who owns property subject to a mortgage within the act the relief to which he is entitled under the act. The defendant has urged against this construction of the section, that if that be the true construction of it the result is that until the termination of the time specified in the act no mortgage can be foreclosed by any mortgage except under an order of court and it cannot be that that was the intention of Congress. We are of opinion that this is the result of the true construction of the act, for in that way alone can a mortgagee be certain that the foreclosure of his mortgage will not be made in violation of the act. We are of opinion, that since this is the result of the true construction of the act, this must be taken to have been the intention of Congress."

The Act of 1940 was a substantial reenactment of that of 1918. The legislative history of the 1918 antecedent of this act shows that judicial discretion conferred on the trial court regarding the stay of proceedings instead of rigid and indiscriminating suspension of civil proceedings was the very heart of the policy of Section 521 supra. *Boone v. Lightner* N. C. 1943, 63 S. Ct. 1223, certiorari granted 63 S. Ct. 770, 318 U. S. 750. Vol. 87-No.17, U. S. Supreme Court Advance Opinions, page 1099.

In a court procedure, under the act an affidavit must be filed before default judgment can be obtained showing that defendant is not in military service. If such affidavit is

not filed no judgment shall be entered "without first securing an order of court".

In a summary action, under the Jones-Munger Law, with such type of statutory process shall the collector have a greater right than the court would have in a plenary action and sell the land without first determining whether the land owner is in military service? The word "action" would certainly comprehend summary actions, as well as plenary actions or proceedings.

Under the provisions of Section 532 of such act, no mortgages or deeds of trust executed by a person in military service may be foreclosed or the property seized for non payment, whether under power of sale, or under a judgment entered upon warrant of attorney to confess judgment there-in - except as provided in Section 517 of the act - which exceptions arise from subsequent contractual relations - "unless upon an order previously granted by the court and a return thereto made and approved by the court".

Effective operation of the section is made to hinge almost entirely on the court's discretion just as in Section 520 supra. The section seems to apply only to obligations originating prior to the passage of the act on property owned by persons now in military service at the commencement of such service and still so owned. This brings all the self-help type of mortgages within the protection. The case of Hoffman v. Charleston Bank supra, was based upon the rights of equitable ownership of owners who was in military service. The court held that relief was not limited to mortgaged property used by a sailor or soldier or his dependents for business or dwelling purposes, but include all property owned by a sailor or soldier.

Section 560 supra, which was an amendment, dated October 6, 1942, related only to the property of a special group of soldiers or sailors the status of whose property was as follows:

"***real property owned and occupied for dwelling, professional, business, or

agricultural purposes by a person in military service or his dependents at the commencement of his period of military service and still so occupied by his dependents or employees are not paid paid."

Under the provision of subsection 2:

"No sale of such property shall be made to enforce the collection of such tax or assessment, or any proceeding or action for such purpose commenced, except upon leave of court granted upon application made therefor by the collector of taxes or other officer whose duty it is to enforce the collection of taxes or assessments.***"

Under the provision of subsection 3, such property, even when sold under legal procedure, might be redeemed or an action commenced for such purpose at any time not later than six months after the termination of such service.

In event a soldier or sailor, not being privileged to relief from taxes under the above Section 560, owned realty on which taxes had been assessed, whether falling due prior to or during his period of military service, he might obtain relief under the provisions of Section 590 supra.

The relief granted under the above section might, in the discretion of the court, be granted, by stay during military service, or by order within six months after such service.

Section 532 of said act, and Section 590 thereof, were construed, with reference to a stay in the case of Application of Aber, 40 N.Y.S. 2d.48, in the following language

"Petitioner is, however, entitled to the granting of his motion in so far as it seeks to set aside the notice of sale.

March 8, 1944

The 1942 amendment, which took effect after the seizure and before the date fixed for the proposed sale, provides (Section 10, 50 U.S.C.A. Appendix Section 532) that "No sale * * * of property for nonpayment of any sum due under any such obligation (referring to obligations specified in Section 302 (1) as amended in 1942) * * *, whether under a power of sale, under a judgment entered upon warrant of attorney to confess judgment contained therein, or otherwise, shall be valid if made after the date of enactment of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942 * * * and during the period of military service * * * unless upon an order previously granted by the court and a return thereto made and approved by the court."

"The obligations referred to in the above quotation, under the terms of the 1942 Amendments to Section 302 (1) of the 1940 Act, include petitioner's obligation to the respondent. See Section 9, subd. b. of the 1942 Act. Petitioner, a member of the Enlisted Reserve Corps, has been ordered to report for "military service", within the meaning of Section 106, added by the 1942 Act, 50 U.S.C.A. Appendix Section 516, for "military service" as defined in the 1940 Act, includes "training or education under the supervision of the United States preliminary to induction into the military service."

"It follows that the proposed sale of the car without a court order is unauthorized and would, if consummated, constitute a violation of petitioner's rights under the 1942 statute."

"Petitioner is further entitled, under Section 700 (1) (b), added by the 1942 Act, 50 U.S.C.A. Appendix Section 590, to stay of the enforcement of his obligation to respondent for the period of his

March 8, 1944

military service, subject to payment of the balance of principal and accumulated interest due and unpaid at the termination of his military service, in equal periodic installments with appropriate interest as provided for under that section.

"In the event that an application is made to the court for the sale of the car, the court may make such provision as may be just for appropriate credit to petitioner upon his obligation to respondent."

Therefore, it is the opinion of this department that general taxes assessed against the property of parties in military service, who are comprehended by Section 560 supra, whether falling due prior to or during the period of military service, may not be offered for sale and sold by the Collector "except upon leave of court granted upon application made therefor by the Collector."

All other parties in military service, with respect to tax assessments on realty whether falling due prior to or during their period of military service, may obtain relief under the provisions of Section 590 supra. In view of such section the collector should offer such taxed lands for sale, under the provisions of the Jones-Munger law, during such period of military service unless ordered to stay such proceedings by court order.

Respectfully submitted

S. V. MEDLING
Assistant Attorney General

SVM:EH

APPROVED

ROY MCKITTRICK
Attorney-General