

Opinion No. 206.

**Soldiers and Sailors Civil Relief Act—
Military Service—Counties—Tax Sales
and Tax Deeds—Property, Sale of to
Persons in Military Service.**

May 8, 1944.

Mr. Raymond Sheldon
County Attorney
Carter County
Ekalaka, Montana

Dear Mr. Sheldon:

Held: (1) Contracts, regardless of the nature thereof, for the purchase of lands from counties entered into by persons since entering military service, draw interest at the contract rate, if such rate is not over six per cent, and the counties have no authority to accept installment payments without the payment of interest.

(2) Contracts entered into between the counties and persons now in military service for the purchase of real estate may only be cancelled by court actions and the courts may order the repayment of installments paid, or may stay proceedings upon its own motion, and shall stay such proceedings upon the motion of the person in service or someone in his behalf, unless the court determines that the military status of such person does not affect his ability to pay.

(3) Persons not in military service who are joint principals on a county purchase contract with a person now in military service are not protected by the Soldiers' and Sailors' Civil Relief Act of 1940 and amendments of 1942, but the county in terminating such interests must not interfere with the rights of the person in military service.

(4) That all tax proceedings, including the taking of tax titles for the collection of taxes owing by persons in military service on real or personal property, must be by court action and in any event the person in military service has six months after he is discharged, (not longer however than six months after the termination of the Soldiers' and Sailors' Civil Relief Act), within which to redeem or commence action to redeem property taking for payment of taxes.

You have requested an opinion of this office on the following questions:

"1. If a county contract of sale has been entered into with Carter County, by a person who is now in military service, are the annual payments and accrued interest payable when due, in accordance with the terms of said contract? Does the fact that the purchaser is in the armed service make the contract 'interest free' regardless of the fact that the purchaser obligated himself to pay said interest?"

"2. If a county contract of sale has been entered into with Carter County by two parties—one of whom is now in military service and the other being a civilian—are the annual payments and accrued interest payable, when due, in accordance with the terms of said contract? Does the fact that one of the purchasers is in the armed service make the contract 'interest free' regardless of the fact that the purchasers obligated themselves to make said annual payments and interest payments when due?"

"3. In either of the above cases would it be proper for the county to accept payments on the principal only, when there is accrued interest due on the contract? Would the fact that the purchaser (or one of the purchasers) is in the armed services delay the date of all unpaid installments, and cancel the charging of any interest?"

"4. Would the serviceman's obligation to make annual contract payments or payments of accrued interest vary, depending on whether the contract was a 'Taxpayer's Contract of Sale on Redemption of his Property,' a 'Contract of Sale on Private Sale to Stranger to Title,' or a 'Contract of Sale (Sale at Public Auction)'"

"5. If Carter County is now making application for tax deed by registered letter and posting to secure tax deeds to lands owned by a serviceman, and if the serviceman has received notice by mail, and before the issuance of tax deed, should file an affidavit, pursuant to Sec. 500 of

the Soldiers' and Sailors' Relief Act and Sec. 2234, Revised Codes of Montana, 1935, in which the soldier sets out that his real property has been assessed for taxes, that the same have become delinquent, and that he is unable to pay the amount of taxes thereon by reason of his military service, and that such affidavit is filed in the office of the county treasurer before she executes the tax deed, does the filing of such affidavit act as a stay of all further proceedings?"

Your questions, although pertaining to different circumstances, all fall within four general categories of the Soldiers' and Sailors' Civil Relief Act of 1940 and amendments; the first pertains to charging of interest; second, to enforcement of contracts of service men; third, to liability of non-service men; and fourth, to tax liabilities and stays of tax proceedings against service men. Due to the inter-relation of your questions, I shall answer them under the above mentioned categories.

Section 526, Title 50, U. S. C. A., provides in part as follows:

"No obligation or liability bearing interest at a rate in excess of 6 per centum per annum incurred by a person in military service shall, during any part of the period of military service which occurs after the date of enactment of the Soldiers' and Sailors' Civil Relief Act Amendment of 1942 (Oct. 6, 1942), bear interest at a rate in excess of 6 per centum per annum unless, in the opinion of the court, upon application thereto by the obligee, the ability of person in military service to pay interest upon such obligation or liability at a rate in excess of 6 per centum per annum is not materially affected by reason of such service, in which case the court may make such order as in its opinion may be just . . ."

In view of the above cited portion of Section 526 it is my opinion that interest is not eliminated from service men's obligations. Interest over six per cent per annum is eliminated, however, unless the obligee shows that the service man's ability to pay the contract rate is not affected by his service status. County contracts being at the rate of four per cent would not be affected by this law and would draw interest as per the contract. Thus, I do not see

any authority for the county accepting principal payments without interest.

Section 531, Title 50, U. S. C. A., provides as follows:

"(1) No person who has received, or whose assignor has received, under a contract for the purchase of real or personal property, or a lease or bailment with a view to purchase of such property, a deposit or installment of the purchase price, or a deposit or installment under the contract, lease or bailment, 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 thereunder due or for any other breach of the terms thereof occurring prior to or during the period of such military service, except by action in a court of competent jurisdiction.

"(2) Any person who shall knowingly resume possession of property which is the subject of this section otherwise than as provided in subsection (1) of this section or in section 107 (Section 517 of this Appendix) or attempt so to do, shall be guilty of a misdemeanor and shall be punished by imprisonment not to exceed one year or by fine not to exceed \$1,000.00, 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, 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."

Section 107 or 517, referred to in paragraph (2) of the act just quoted, provides for written waivers by the person in service. Thus, it is seen that no service man's contract on which a payment has been made may be cancel-

led without court action, unless he has waived such court action in writing after entering service.

In the event of suit the court may make certain orders requiring repayment of installments or any part thereof, as a condition of terminating the contract and resuming possession of the property, or may on its own motion, and shall, on application of the person in military service or some one on his behalf, order a stay of proceedings, unless it finds that the ability of the person to comply with the terms of the contract are not materially affected by the military status. Thus, the county may order an action brought to enforce the contract, in the event of delinquencies, but the court may order the prior payments of a portion thereof paid back as a condition of cancellation, or if it is shown that the military status of the debtor affects his ability to pay or maintain his defense a stay may be given.

The courts have held the mere fact that a person is in military service is not a defense, but the court may stay the proceedings if it is shown that such a status materially affects his ability to make the payments or maintain his defense. (See *Jamaica Sav. Bank v. Bryan et al.*, 25 N. Y. S. (2nd) 17.)

Where there are two purchasers, one now in military service and one not, it is necessary to consider Section 526, Title 50, U. S. C. A. This section provides that sureties, guarantors, endorsers, accommodation makers and others, whether primarily or secondarily subject to the obligation or liability, may have a stay of proceedings if a stay is given the principal who is in military service. It is to be noted that joint principals are not mentioned within the provisions of this section and also that even those who are provided for do not have a right to the stay unless it is granted to the service man. Thus, the joint principal would have no rights under the act, but it is difficult to see how the county could gain by enforcing the contract against the non-military principal as at the most it could only get an undivided one-half interest in the contract cancelled. Further, there is the question of taking possession of the undivided one-half interest without disturbing the possession of the principal in military service which would be prohibited by paragraph (2) of Section 531.

It is my opinion that the county may proceed against the person liable as a principal not in military service, but to do so would be a useless act if the principal in military service maintained his rights under the law. It is to be considered, however, that if the person in military service does not show, or evidence is not entered in his behalf, or the court does not find on its own motion, that the military status materially affects the ability of the person in military service to make the payments in accordance with the contract, that such contracts may be enforced by suit. It is not the intent of the law to prohibit collection on such contracts; it is merely to preserve the rights and opportunities of persons whose ability to pay is materially affected by being in the service. (See Volume 19, Report and Official Opinions of the Attorney General, No. 499.)

Section 560, Title 50, U. S. C. A. pertains to taxation of premises of persons in military service. This section provides 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 credit, 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 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 six per centum per annum, and no other penalty or interest shall be incurred by reason of such non-payment. Any lien for such unpaid taxes or assessments shall also include such interest thereon.

"(5) Repealed Oct. 6, 1942, c. 581, *14(b), 56 Stat. 776. Oct. 17, 1940, c. 888, *54 Stat. 1186, as amended Oct. 6, 1942, c. 581, *14, 56 Stat. 776."

The Montana legislature by Chapter 181, Laws of 1943, passed an act, the title of which pertains only to income tax, but the second paragraph of which might be taken also as to pertain to real and personal property tax, which gives the taxpayer in military service the right to apply for relief to the courts, within six months after discharge, from any tax obligation or tax liability. Whether or not that chapter would be construed to deal with personal and real property, is not properly involved in your request but if it were its only further relief to the person in military service is that interest is not to be charged during the term of the stay therein provided for.

In view of the said Section 560, it is my opinion that a county cannot proceed to take tax title to land belonging to a man in military service for taxes coming due before or after his commencement of service, except by court action made upon application therefor by the collector of taxes. Under such circumstances the property may be taken for such taxes only on a finding by the court that the ability of the taxpayer to pay such taxes is not affected by his military status. Under the amendment of October 6, 1942, no

affidavit is necessary from the service man. Further, the service man has a right within six months after his release to redeem the property. It is my opinion that the taking of the tax deed, even if the property had been previously sold and certificate taken, would be considered as a part of the procedure of tax sale, and therefore would be included within the prohibition of said Section 560. It certainly is a part of the proceedings to enforce the collection of the tax particularly as the taxpayer is not foreclosed from redemption until the tax title is actually taken.

Therefore it is my opinion:

(1) Contracts, regardless of the nature thereof, for the purchase of lands from counties entered into by persons since entering military service, draw interest at the contract rate, if such rate is not over 6%, and the counties have no authority to accept installment payments without the payment of interest.

(2) Contracts entered into between the counties and persons now in military service for the purchase of real estate may only be cancelled by court actions and the courts may order the repayment of installments paid, or may stay proceedings upon its own motion, and shall stay such proceedings upon the motion of the person in service or someone on his behalf, unless the court determines that the military status of such person does not affect his ability to pay.

(3) Persons not in military service who are joint principals on a county purchase contract with a person now in military service are not protected by the Soldiers' and Sailors' Civil Relief Act of 1940 and amendments of 1942, but the county in terminating such interests must not interfere with the rights of the person in military service.

(4) That all tax proceedings, including the taking of tax titles for the collection of taxes owing by persons in military service on real or personal property, must be by court action and in any event the person in military service has six months after he is discharged (not longer, however, than six months after the termination of the Soldiers' and Sailors' Civil Relief Act) within which to redeem or commence action to

redeem property taken for payment
of taxes.

Sincerely yours,
R. V. BOTTOMLY
Attorney General