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War Legislation Affecting Titles to Real Estate

BY ROYAL C. RUBRIGHT*

It is the purpose of this article to examine the application of certain federal statutes relating to the war and their effect on titles to real estate in Colorado.

At the time of World War I, various acts were adopted which offered protection to soldiers in that war. The statutes adopted in connection with this war have amplified and expanded the protection.

I shall make no attempt to discuss the rent control statutes or regulations but limit my remarks principally to the effect of the SOLDIERS' AND SAILORS' CIVIL RELIEF ACT, which was adopted October 17, 1940,[1] and the amendment to the act adopted October 6, 1942.[2] These acts were preceded by the NATIONAL GUARD ACT and the SELECTIVE TRAINING AND SERVICE ACT of 1940,[3] about which more can be found in the articles appearing in DICTA hereinafter referred to.

There are four articles which have appeared in DICTA to which your attention is directed and which will be helpful in analyzing the statutes:

Soldiers' and Sailors' Civil Relief Act, Its Provisions and Effect, L. A. HELLERSTEIN, October, 1940.[4]

Soldiers' and Sailors' Relief Act of 1940, L. A. HELLERSTEIN, November, 1940.[5]

The Soldiers' and Sailors' Civil Relief Act of 1940, as Related to Proceedings Affecting Titles to Real Estate, PERCY S. MORRIS, December, 1940.[6]

Recent Amendments to Soldiers' and Sailors' Civil Relief Act, WM. HEDGES ROBINSON, JR., November, 1942.[7]

Excellent analysis of the statutes are contained in these articles and this article will make no attempt to repeat the ground there covered. I shall attempt to deal here only with the specific problems that present themselves to lawyers dealing in real estate in connection with these statutes. I shall refer for brevity to the SOLDIERS' AND SAILORS' CIVIL

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[1]54 STAT. 1178 (1940), 50 U. S. C. A. APP. §§501 ff.

[2]56 STAT. 769 (1942), 50 U. S. C. A. APP. §§501 ff.

[3]NATIONAL GUARD ACT (ARMY RESERVE AND RETIRED PERSONNEL SERVICE LAW of 1940), 54 STAT. 858 (1940), 50 U. S. C. A. APP. §§401 ff.; SELECTIVE TRAINING AND SERVICE ACT of 1940, 54 STAT. 885, 50 U. S. C. A. APP. §§301 ff.

[4]17 DICTA 245.

[5]17 DICTA 273.

[6]17 DICTA 301.

[7]19 DICTA 269.

RELIEF ACT of 1940 and the amendment of October 6, 1942, simply as "the Federal Act."

I.

Section 205 of the Federal Act as amended[8] provides substantially: That the period of military service shall not be included in computing the period limited for the bringing of an action by or against any man in military service. This presents three problems currently:

If a mechanic's lien is filed by an individual or a co-partnership, then instead of being required to institute a foreclosure suit within six months, the time is extended. *Clark vs. Mechanics American National Bank,* 282 Fed. (C.C.A. 8th, 1922) 589. It would therefore follow that any such lien filed in Colorado prior to February 27, 1940, must be released of record, and we may no longer rely on the six-months statute of limitation requiring the filing of a suit to foreclose a mechanic's lien.

The effect of the Federal Act on judgments. Standard No. 23 adopted by the standards committee of the Denver Bar Association takes the position that the Federal Act extends the lien of a transcript of judgment, therefore, the lien of any judgment recorded after October 6, 1936, is extended, in the absence of definite evidence of record that the holder of the judgment lien was not in military service.

The next problem involves mortgages and trust deeds. Standard No. 24 adopted by the real estate title standards committee of the Denver Bar Association takes the position that an unextended trust deed or mortgage which has remained of record and is more than fifteen years past due, cannot be passed because of the effect of the Federal Act. The Federal Act therefore has the effect of nullifying this fifteen-year statute of limitations.

II.

The second problem created by the Federal Act is the additional work necessary to foreclose a deed of trust through the public trustee. Section 302 (3) of the Federal Act as amended[9] provides substantially: That no foreclosure under power of sale (public trustee's foreclosure) shall be made during military service unless upon an order of sale previously granted by the court and a return and approval by the court. The 1942 amendment provides criminal penalty, fine and imprisonment for an attempt to foreclose without such court order.

As a result of this statute, Rule 120 of the RULES OF CIVIL PROCEDURE was adopted and provides a short and simplified method of

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[8]54 STAT. 1181 (1940), as amended Oct. 6, 1942, c. 581, §5, 56 STAT. 770, 50 U. S. C. A. APP. §525.

[9]54 STAT. 1182 (1940), as amended Oct. 6, 1942, c. 581, §§9 (b, c), 10, 56 STAT. 771, 772, 50 U. S. C. A. APP. §532.

obtaining the court order required by the Federal Act. It should be pointed out that even though the attorney may have personal knowledge that the mortgagor is not in the army, he cannot rely on it safely and neglect the court order for two reasons: first, because of the criminal penalty under the 1942 act if he is wrong and, second, because the next examining attorney would not have such knowledge. Attention should be called to two cases arising under the statutes adopted in connection with World War I.

1. *Hoffman vs. Charleston Five-Cent Savings Bank,* 231 Mass. 324, 121 N. E. 15 (1918), held the act available to one in military service even though his interest did not appear of record.

2. *Morse vs. Slater,* 233 Mass. 223, 123 N. E. 780 (1919), held: specific performance could not be had to enforce purchase of property where seller's title was based on a foreclosure not supported by a court order.

There is some question as to whether a court order is needed on trust deeds executed between October 17, 1940, and October 6, 1942. The question is a technical one, and as a practical matter, a court order should be obtained to support the foreclosure of all deeds of trust.

III.

The third problem created by the Federal Act requires additional action in court foreclosure proceedings, quiet title suits and similar actions. Section 200 of the Federal Act[10] provides substantially: That no judgment may be entered unless affidavits are filed showing either that the defendant is not in military service or that the plaintiff is unable to determine whether or not the defendant may be in service. If the plaintiff cannot determine the fact, an attorney must be appointed by the court to represent defendants who may be in military service.

There are certain practical difficulties which have arisen in connection with these proceedings:

The affidavit is often filed too early. In a New York case, *National Bank vs. Van Tassell,* 178 Misc. 776, 36 N. Y. S. (2d) 478 (1942), the court held that the affidavit should not be made until after default had occurred. Under our Colorado practice where publication is had, an affidavit should not be filed until more than thirty days after the last publication of summons.

Another matter frequently disregarded is that the preliminary order of court, permitting a judgment to be entered, should be obtained as required by Section 200 of the Federal Act.[11] In Denver, for example, there is always a minute order which amounts to a default judgment

[10] 54 STAT. 1180 (1940), 50 U. S. C. A. APP. §520.
[11] *Ibid.*, n. 10.

in addition to the written decree which the court signs. However, many of the most careful lawyers prepare a separate order directing entry of the judgment. This procedure spares the examining attorney, who is checking a proceeding outside of the county with whose procedure he is familiar, the extra trouble of ascertaining whether the minute order is sufficient to comply with the Federal Act.

The third difficulty is that affidavits still refer to persons "in military service of the United States." Section 104 of the Act[12] extends the benefit of the act to persons serving with the allied nations and Section 106[13] grants protection to a person from the date he has been ordered to report for induction. The better practice would therefore seem to require that the affidavit shall state that none of the defendants "are in military service pursuant to the Soldiers' and Sailors' Civil Relief Act of 1940 and amendments thereto."

Another minor matter is: Who shall make the affidavit? Section 200 provides that "* * * the plaintiff * * * shall file in the court an affidavit * * *." Frequently this affidavit is executed by the attorney for the plaintiff. It seems a strange construction to contend that the attorney may make the affidavit and then require the plaintiff to actually file it in court. It is therefore reasonable to suppose that it is better practice for the plaintiff personally to sign the military affidavit.

Two real estate title standards adopted by the Denver Bar Association dispense with the appointment of an attorney in two classes of actions. Standard No. 34 prescribes that appointment of an attorney is not required in statutory proceedings for determination of interests. Standard No. 35 dispenses with the appointment of an attorney in all estate and probate proceedings. (This presumably would cover probate of the will, proceedings for the sale of real estate and determination of heirship.)

IV.

If one can guess about future developments, the most serious effect of the Federal Act will be the extension of periods of redemption. Section 5 of the 1942 amendment[14] provides "nor shall any part of such period (of military service) which occurs after the date of enactment of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942 be included in computing any period now or hereafter provided by any law for the redemption of real property sold or forfeited to enforce any obligation, tax or assessment."

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[12]Oct. 17, 1940, c. 888, §104 as added Oct. 6, 1942, c. 581, §4, 56 STAT. 770, 50 U. S. C. A. APP. §514.

[13]Oct. 17, 1940, c. 888, §106, as added Oct. 6, 1942, c. 581, §4, 56 STAT. 770, 50 U. S. C. A. APP. §516.

[14]*Supra*, n. 8.

This statute would seem to indicate that a public trustee's deed or sheriff's deed issued after October 6, 1942, does not bar the right of redemption of any person who had such a right of redemption, i. e., any mortgagor, owner of the property at the time the foreclosure occurred or subsequent encumbrancer who may have entered military service during the period of redemption; therefore, such person could redeem at the time his military service terminated by tendering the amount of the foreclosure plus interest at six per cent per annum. It will be seen, therefore, that the Federal Act makes the public trustee's or sheriff's deed of no more effect than a certificate of purchase.

The record title on a foreclosure does not indicate whether or not a person entitled to redeem was in military service at the time the trustee's deed issued; therefore, the examining attorney cannot determine from the record title itself this very vital question. The only solution I can think of concerning this problem is to get the borrower or other person entitled to redeem, into court, by subpoena if necessary, at a time subsequent to the issuance of the public trustee's or sheriff's deed. If foreclosure is had through court, this probably could be done by a supplemental order confirming the sale. In case of a public trustee's foreclosure, since we are required to obtain a court order by the Federal Act, and pursuant to Rule 120 of the Rules of Civil Procedure, and they require a return of the sale for approval by the court, it seems reasonable that the court should be able to make an order confirming the sale after the deed is issued. The testimony so produced should be specific in finding that the persons entitled to redeem were not in military service.

Because the Federal Act provides that a person who has received an order to report for induction shall be given the benefits of the act from the date he receives such order, and because it will be seen that the existence of such an order is clearly within the personal knowledge of the individual who receives it, that testimony should be by the person himself. Whatever decree or finding is entered should indicate clearly that the individual was present in court and that he testified that he was not in service and had not then received a notice to report for induction, or that he was not in the enlisted reserve corps and had not been ordered to report for duty.

I believe that all of this specific information is necessary since we are dealing, not with the jurisdiction of the court to order a foreclosure but are attempting to establish as a part of the record title that no person having any right to redeem is in military service. If this fact is not established of record, we would have a situation something like this:

Consider a case where foreclosure is had for $3,000; the property has appreciated in value and the lender is attempting to sell it for $4,000. If it should develop that any person entitled to redeem was in military service at the time deed issued he could redeem the property by paying

the cost of foreclosure plus interest at six per cent and be entitled to the property. A prospective purchaser considering that fact would undoubtedly refuse to purchase at $4,000, with the result that the lender would have difficulty in disposing of the property for anything above the cost of foreclosure. As a practical matter this would result in the title being unmarketable for any amount in excess of the cost of foreclosure plus interest at the rate of six per cent to the time when the sale is completed.

V.

The Federal Act has now created an extension of time of payments under certain conditions. Section 700[15] provides substantially that: By a court order during military service or afterwards, a debtor may get a stay of enforcement where a contract of purchase of real estate is payable in installments or where a mortgage on real estate is payable in installments. This extension is for a period of time equal to the remaining life of the contract plus his period of service. The borrower must, however, pay the balance of principal and accumulated interest due at the end of his service in equal installments during the combined period at the same rate of interest as provided in the contract.

The particular problem in connection with this section is the method by which it is invoked. The act itself provides that the debtor shall apply to the court for relief. As a practical matter, he will simply default and when a creditor attempts to foreclose, the court will extend the time of payment or stay enforcement as provided in this section. The courts will probably make orders for payment of taxes and insurance and perhaps interest, depending upon the financial ability of the debtor to pay. There are a few lower court decisions especially in the state of New York which indicate that the courts will generally deal with this particular problem on the facts presented in each individual case.

VI.

Section 300 of the Federal Act,[16] gives certain protection to dependents of a tenant who is called in military service. It prohibits eviction without court approval where rental is less than $80 per month, and the court may stay proceedings for not longer than three months, if it is necessary. This section, as amended, provides that a landlord may be granted relief in connection with his purchase of the property, or his mortgage, or taxes when a court order has been entered in a controversy with his tenant. You will note that there is a criminal penalty for

[15] Oct. 17, 1940, c. 888, §700, as added Oct. 6, 1942, §18, 56 STAT. 777, 50 U. S. C. A. APP. §590.

[16] 54 STAT. 1181 (1940), as amended Oct. 6, 1942, c. 581, §8, 56 STAT. 771, 50 U. S. C. A. APP. §530.

attempting to evict a dependent of a service man without complying with this statute.

VII.

The Federal Act also affects the situation where a purchaser under contract has defaulted. Section 301, as amended,[17] provides substantially: That where a purchaser under contract is in military service, the seller cannot terminate except by court order. The court may order the repayment of installments or it may order a stay of proceedings. Note also the criminal penalty provided for attempting to regain possession without a court order.

There is another related problem where a seller under contract is about to enter military service. It will readily be seen that it might be difficult or impossible to obtain a deed at the time the contract is performed and title is to be conveyed. Where there is any possibility that the seller may enter military service it would seem necessary that a deed be deposited in escrow so that it could be physically procured and delivered when the buyer has fully performed. This would avoid trouble where the seller was killed in action or was missing in action.

VIII.

There are certain practical problems which have arisen in connection with the war which are not directly caused by the Federal Act. Men in service who have not deeded their property before they were inducted are frequently called upon to sign deeds and other legal papers. By now all of you are probably aware that the legislature enacted a statute which permits acknowledgments by men in service to be made before certain commissioned officers instead of notaries public and other civil officers.[18]

IX.

Another serious problem concerns the ownership of real property in joint tenancy during war time. Now that men with families are being drafted, the armed forces are beginning to draw from the class of men who own real estate. The typical situation is that in which the husband and wife own property in joint tenancy. If the husband enters service and is reported "missing in action" a problem is immediately created. Assume that the wife cannot obtain more definite evidence of his death. Under our joint tenancy statute it would be practically impossible to perfect title to this property without court proceedings, and even they would be of doubtful validity, because if the husband were alive and lost, or a

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[17] 54 STAT. 1181 (1940), as amended Oct. 6, 1942, c. 581, §9 (a, c, d), 56 STAT. 771, 50 U. S. C. A. APP. §531.

[18] Colo. S. L. 1943, c. 85, §1, p. 217; 1943 CUM. SUPP. to 1935 C. S. A., c. 40, §23A.

prisoner of war, the surviving joint tenant could not succeed to his interest, and the record would never attest his death. It seems fairly obvious that he would be able to reopen a quiet title suit and set aside an adverse decree if such a proceeding were brought, because you will recall that the appointment of an attorney does not bind a man in military service and one would assume that the courts would be very likely to permit such a person to appear and have his day in court.

There are two methods of solving this problem. The first and perhaps the clearest cut method is for the husband to deed the property to the wife before he enters service. The risk of her predeceasing him is simply the lesser of two evils. Where circumstances do not justify an outright conveyance, the husband should appoint his wife his attorney in fact. Under this method, if he is dead, his wife, *as surviving joint tenant,* can convey good title; on the other hand, if he is alive, the power of attorney is valid and the deed by her as attorney in fact conveys good title.

X.

The next problem is that of the use of powers of attorney in general. It is a very well settled doctrine that powers of attorney are revoked by the death of the principals. In time of war chances that a principal may be dead are increased greatly, and some lawyers are becoming reluctant to approve a transfer by an attorney in fact, because the principal may be dead—especially if the power of attorney itself indicates that the principal is in military service.

While it might be easy to obtain fairly reliable evidence that the principal was still alive at the time the deal was closed (i. e., by letters from him) so that one would feel justified in closing a deal knowing that power had not been revoked by the death of the principal, however, in the event the buyer should later want to sell or encumber the property, the lawyer representing the second purchaser or the lender may have no such knowledge and then there arises the problem of obtaining evidence of record which will show that the power of attorney had not been revoked at the time it was exercised.

In view of the requirements of making good title of record, it would seem that a ratification of some kind should be obtained from the principal. The most effective ratification, of course, would be a deed. If this requirement is adopted, it actually results in destroying the usefulness of the power of attorney. We, however, can only speculate as to what the bar will do generally as to this particular problem. The lawyer is in a peculiar position; he realizes that if the principal is still alive, the power of attorney is good; if the principal is dead, the power is revoked.

Most lawyers, I believe, will be unwilling to speculate on the status of the principal, since the very validity of the title depends upon this

fact, which is wholly outside the record. In the light of these considerations, it would seem better practice not to use powers of attorney except where the attorney in fact is also joint tenant with the principal.

I think anyone who has made a study of the federal statutes in this field must feel that if they are applied strictly and literally, they would prevent any real estate transactions at all where court proceedings of any kind have occurred since October, 1940. Practical business necessities simply will not tolerate such disruption of normal dealings.

I do not believe the attitude of the bar generally has crystallized on all these matters. The problems are just beginning to arise.

I have here attempted to collect as many as possible of the situations that have developed, to point out probable solutions and to warn of some of the pitfalls that lie ahead.

No Respect for Precedent

Editor of DICTA, Sir:

Arch White's interesting reminiscences of life as clerk of our supreme court recently contained a reference to James L. Perchard, his equally wise, genial and efficient predecessor in that office, and this reminded me of an incident in my early practice.

John R. Smith and I had tried a lengthy irrigation case in an Arkansas Valley court against that able and forceful lawyer, Charles E. Gast. We were successful below, but in due time the supreme court, speaking through Judge Gabbert, issued a painstaking opinion reversing the trial court. I had worked hard and long on the case, believed I was right, and felt disgusted with the outcome; so, when I went to the clerk's office to read the opinion, I was looking for some chance to let the court know informally what I thought. Mr. Perchard was standing at the counter and close at hand was an open door leading to a room then often used by the court for conferences. Hoping that one or more of the judges might be within earshot, I said in a loud voice:

> "I am told that this court has just handed down an iniquitous decision reversing the District Court of Bent County in case No. so-and-so."
>
> "Yes," said Jim (rather ambiguously), "it has."

Quoting from a then familiar Illinois case, I continued, in still louder tones,

> "I understand that they have entered into the temple of the law and with rude hands hewed down one of its time-honored pillars."
>
> "Oh, you mustn't let it ruffle you," soothingly replied the experienced clerk, "they often do that."

GEORGE A. H. FRASER.