

N.D.A.G. Letter to Mehrer (Nov. 29, 1985)

November 29, 1985

Mr. Owen K. Mehrer
Stark County State's Attorney
Stark County Courthouse
P.O. Box 130
Dickinson, ND 58601

Dear Mr. Mehrer:

Thank you for your letter of November 13, 1985, concerning the procedure to be followed by a sheriff in the sale of property following an execution where said property is subject to a prior lien. According to your letter, the practice apparently has been for the sheriff to pay off the prior lienors using proceeds collected from the sheriff's sale. If there is money left over following payment to the lienors, that money is then turned over to the judgment creditor. Your letter questions the accuracy and validity of this practice.

The North Dakota statutes on the execution of a judgment and on the sheriff's sale under execution do not provide for the sheriff to determine the priority and validity of prior or subsequent liens upon property which is sold under execution. Instead, our statutes indicate that a purchaser at a sheriff's sale is substituted for the judgment debtor and takes only those interests and legal rights in the property purchased as were possessed by the judgment debtor. N.D.C.C. §§ 28-23-11, 28-21-09.

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Indeed, the North Dakota Supreme Court in Moore v. Lium, 80 N.W.2d 657 (N.D. 1957), acknowledged the statutes and indicated that purchasers at sheriff's sales must take notice of the title for which they bid for there is no implied warranty of title provided at such sales.

If therefore, the plaintiffs at the time of the execution sale, under their mortgages had a prior lien upon the property sold the validity of their lien was not affected by the execution sale. . . .

It must follow therefore that the title acquired by the Northwestern Equipment Company of Minot at the execution sale was subject to any existing prior valid liens upon the property purchased. Id. at 660.

In light of the established statutory and case law on the subject of purchasers at sheriff's sales taking subject to prior liens and given the lack of statutory authority provided to sheriffs to take it upon themselves to determine whether a particular lien should be satisfied prior to the proceeds being distributed to the judgment creditor at a sheriff's sale, it would be the better practice for the sheriffs to distribute the money collected from sheriff's sales to judgment creditors. The purchaser will then have to contend with the issue of whether their title to the property involved is affected by the existence of any liens.

For your further information, we have consulted with Burleigh County Deputy Sheriff Jerry Schafer who has handled many classes at the training center with respect to executions and the roles of a sheriff. Deputy Sheriff Schafer indicated that there has been no instruction indicating sheriffs may distribute monies collected at a sheriff's sale to secured creditors prior to the distribution of the proceeds to the judgment creditor. Indeed, Deputy Sheriff Schafer relates his advice to the various sheriffs as being where prior liens are determined to be in existence, such information should be immediately relayed to the judgment creditor so that they may know of potential problems if they wish to proceed with the execution.

Sincerely,

Nicholas J. Spaeth

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