

Opinion No. 55-6337

December 9, 1955

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. C. C. Chase, Jr., District Attorney, Third Judicial District, Las Cruces, New Mexico

You have asked the opinion of this office on the question:

Is the property in a lease issued by the Land Commissioner for the State of New Mexico subject to levy and sale under execution?

Generally, any person may have execution against the "goods, chattels and lands of the defendant against whom the judgment, order or decree shall be rendered: . . ." § 24-1-2, N.M.S.A., 1953.

The interest in a lease of State lands has been held by our Supreme Court to be personal property. *Hart v. Walker*, 40 N.M. 1, 52 P. 2d 123; *Swayze v. Bartlett*, 58 N.M. 504, 273 P. 2d 367.

We see no reason why the property in such a lease should be treated, as respects execution, in a manner different than any other ordinary interest in personal property, with one qualification hereinafter mentioned.

This conclusion is based on a consideration of the following statutes and authorities.

Section 7-8-42, N.M.S.A., 1953, provides:

"Any such assignment not filed in the office of the commissioner of public lands and approved by him shall be void as to subsequent assignees, whether for collateral security or otherwise, and as to holders of subsequent relinquishments, without notice, **as to judgment or attaching creditors**, from the date of the entry of such judgment or levy of such attachment, as to trustees in bankruptcy, from the date of the adjudication in bankruptcy, as to receivers, from the date of filing of the order of appointment, and as to assignees for the benefit of creditors, from the date of the recording of the assignment." (Emphasis Supplied)

In this statute is seen the clear intent of the Legislature that such an interest be subject to the ordinary processes and remedies of which a judgment creditor may avail himself. From the date of entry of judgment, an assignment of a State lease by the lessee to some third party is as to the judgment creditor void. This section establishes the respective priorities of ordinary assignees and holders of relinquishments, on the one hand, and judgment creditors, attaching creditors, trustees in bankruptcy, receivers and assignees for the benefit of creditors on the other. And what is the purpose of giving a

judgment creditor, among others, a superior priority in certain instances? The answer is obvious. It is for the purpose of allowing him to employ the ordinary processes available to a judgment creditor for subjecting the property of a judgment debtor to a satisfaction of the judgment. To give the judgment creditor a priority, as this statute does, and then to stop short and hold that levy and sale under execution is not permitted, is to render the statute meaningless.

The next question: What of the Land Commissioner's necessary consent to an assignment and his prerogative to approve and determine the qualifications of a lessee of State lands where sale under execution is accomplished? See §§ 7-8-38 and 7-8-40, N.M.S.A., 1953, and *Swayze v. Bartlett*, supra.

A strong parallel is found between this situation and that in the case of *Melish Consol. Placer Oil Mining Ass'n. in Red River v. Burk-Senator Oil Co. et al.*, 163 Okla. 20, 20 P. 2d 879, where it was held that

"The retention by the Secretary of the Interior of the right of approval of the transfer of a lease executed under the provisions of chapter 249, 42 U.S. Stat. 1448 (30 USCA §§ 230-236), does not prevent the levy of a general execution pursuant to a judgment declaring a lien in an equity case for the purpose of carrying such judgment into effect, against the owner of an interest in said lease, and does not prevent the court from confirming a sale thereof subject to said right of approval by the Secretary of the Interior."

Thus, reading § 7-8-38 (consent by Commissioner), § 7-8-40 (approval by Commissioner) and § 7-8-42 (priority of judgment creditors and others) together, we come to the conclusion arrived at by the Oklahoma Court in *Melish v. Burk-Senator*, supra. A sale of the lease interest may be had subject to the approval of the Land Commissioner of the purchaser as a lessee.

In practice the following procedure is recommended. The transfer to purchaser of the lease pursuant to such execution sale should be filed with the Land Commissioner and upon approval of purchaser as a lessee, the Commissioner should issue a new lease to the purchaser at sale in the same manner as provided for a purchaser under foreclosure of assignments of State leased lands under § 7-8-43, N.M.S.A., 1953.

I trust the above answers your inquiry satisfactorily.

By Santiago E. Campos

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