

Office of the Attorney General
State of North Dakota

Opinion No. 86-32

Date Issued: October 17, 1986

Requested by: Charles Whitman
Assistant Burleigh County State's Attorney

--QUESTION PRESENTED--

Whether a real estate mortgage held by the Bank of North Dakota is superior to a tax deed acquired by a county if the Bank of North Dakota perfected the mortgage before the effective date of the tax lien.

--ATTORNEY GENERAL'S OPINION--

It is my opinion that a real estate mortgage held by the Bank of North Dakota is superior to a tax deed acquired by a county if the Bank of North Dakota perfected the mortgage before the effective date of the tax lien.

--ANALYSIS--

N.D.C.C. § 57-02-40(1) provides that '[t]axes upon real property are a perpetual paramount lien thereon against all persons, except the United States and this state.' See also Fischer v. Hoyer, 121 N.W.2d 788, 793 (N.D. 1963) (real estate taxes subsequently levied constitute prior lien to mortgage lien). The Bank of North Dakota functions as the state in its sovereign capacity when it acquires a mortgage on real estate. N.D.C.C. § 6-09-26 provides, in part, that '[t]itle to property pertaining to the operation of the Bank shall be obtained and conveyed in the name of 'The State of North Dakota, doing business as The Bank of North Dakota.'" N.D.C.C. § 6-09-26 further provides in part that '[w]ritten instruments shall be executed in the name of the state of North Dakota.' Cf. State v. Griggs Co., 10 N.W.2d 245 (N.D. 1943) (mortgage lien given to state as security for investment of permanent school fund superior to liens for real estate taxes levied after recording of mortgage).

The Legislature has not classified the liens of the state so as to make one class inferior to another. Pursuant to N.D.C.C. § 57-02-40, a tax lien is not given preference over any other lien held by the state. Thus, the priority of such liens is governed by the general law applicable to liens.

The general rule as to priority of liens is that different liens upon the same property have priority according to the time of their

creation. In State v. Divide County, 283 N.W. 184 (N.D. 1938), our Supreme Court applied this rule in determining the priority of a mortgage lien and a tax lien. The court stated the following:

The mortgage lien attached when created and as the taxes were levied thereafter, the lien for the taxes attached subsequently. Both are liens of the State. The tax liens are not by virtue of themselves paramount to the mortgage lien of the State, and because of the rule of priority they cannot have equality of enforcement.

283 N.W. at 188.

Therefore, it is my opinion that a real estate mortgage held by the Bank of North Dakota is superior to a tax deed acquired by a county if the Bank of North Dakota perfected the mortgage before the effective date of the tax lien.

--EFFECT--

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until the question is decided by the courts.

Nicholas J. Spaeth

Attorney General