

00-073

MOTOR VEHICLES: TITLING AND REGISTRATION OF MOTOR VEHICLES.

Sheriff is not required to notify Department of Motor Vehicles of levy on motor vehicle pursuant to writ of fieri facias that is not accompanied by his actual seizure of vehicle. Lien resulting from fieri facias will not appear on certificate of title to such vehicle; transfer of title to bona fide purchaser is free and clear of any lien. Vehicle levied on but not seized by sheriff and sold by debtor may not be sold at sheriff's auction.

The Honorable Paul J. Lanteigne

Sheriff for the City of Virginia Beach

May 15, 2001

You request interpretation of § 46.2-644 of the *Code of Virginia*, a portion of Article 2, Chapter 6 of Title 46.2,¹ relating to notification to the Department of Motor Vehicles (the "Department") of the levy and seizure of a vehicle, pursuant to a writ of fieri facias.²

You advise that you understand § 46.2-644 to require the sheriff to notify the Department both when the sheriff physically seizes a vehicle and when the sheriff releases a seized vehicle. You advise further that your office notifies the Department when you levy on a vehicle. In this situation, possession of the vehicle remains with the debtor. You relate that the Department has advised that notification is necessary only when the sheriff has physical possession of the vehicle. Therefore, you first ask whether the sheriff is required to notify the Department when the vehicle has not been physically seized.

Section 46.2-644 provides:

A levy made by virtue of an execution, fieri facias, or other court order, on a motor vehicle, trailer, or semitrailer for which a certificate of title has been issued by the Department, shall constitute a lien, subsequent to security interests previously recorded by the Department and subsequent to security interests in inventory held for sale and perfected as otherwise permitted by law, when the officer making the levy reports to the Department on forms provided by the Department, that the levy has been made and that the motor vehicle, trailer, or semitrailer levied on has been seized by him. If the lien is thereafter satisfied or should the motor vehicle, trailer, or semitrailer thus levied on and seized thereafter be released by the officer, he shall immediately report that fact to the Department. Any owner who, after the levy and seizure by an officer and before the officer reports the levy and seizure to the Department, shall fraudulently assign or transfer his title to or interest in a motor vehicle, trailer, or semitrailer or cause its certificate of title to be

assigned or transferred or cause a security interest to be shown on its certificate of title shall be guilty of a Class 1 misdemeanor.

There are several rules of statutory construction applicable to your inquiry. The use of the word "shall" in a statute ordinarily implies that its provisions are mandatory.³ Furthermore, neither § 46.2-644 nor any other provision in Chapter 6 of Title 46.2 contains any definition of the terms "levy" or "seize" as those terms are used in § 46.2-644. In the absence of any such definition, the terms must be given their common, ordinary meaning.⁴ "Levy," as used in § 46.2-644, means "[t]he imposition of a fine or tax; the fine or tax so imposed."⁵ "Seize" means "[t]o forcibly take possession (of ... property); ... [t]o be in possession (of property)."⁶

For a levy to constitute a lien on the title of a motor vehicle by virtue of a sheriff's execution of a writ of fieri facias on such vehicle, § 46.2-644 specifically requires that the sheriff make levy on *and* take possession of the motor vehicle.⁷ The sheriff must also report the levy and seizure of the vehicle to the Department on forms provided by the Department for that purpose.⁸ I find no language in § 46.2-644, however, that requires the sheriff to notify the Department when he has not physically taken possession of the vehicle. Therefore, I must conclude that § 46.2-644 does not require the sheriff to notify the Department of a levy made on a vehicle pursuant to a writ of fieri facias that is not accompanied by physical seizure of the vehicle.

You next ask whether a vehicle that has been levied on but not seized by the sheriff and therefore not reported to the Department, and which is sold by the debtor after levy but prior to sheriff's auction, is a vehicle that the sheriff may sell at auction.

In the case of *Toyota Motor Credit Corp. v. C.L. Hyman Auto Wholesale, Inc.*, the Supreme Court of Virginia notes that the General Assembly enacted the motor vehicle titling statutes in Article 2, Chapter 6 of Title 42.1, which includes § 46.2-644, "to protect the public by providing for the issuance of certificates of title as evidence of ownership of motor vehicles and to provide potential buyers and creditors with a single place where information about the status of motor vehicles could be found."⁹ The Court also observes:

These statutes ... eliminated any requirement that a lien against a motor vehicle be recorded in the county or city where the purchaser or debtor resides or in any other manner available for recording a security interest in personal property, but imposed the new condition that a security interest in a motor vehicle would not be perfected "as to third parties" unless shown on the certificate of title.^[10]

The Court explains that

§ 46.2-638 specifically provides that a certificate of title showing a security interest "shall be adequate notice to the Commonwealth, creditors, and purchasers that a security interest in the motor vehicle exists." We have recognized that the converse is also true.

[W]hen a certificate of title is issued which fails to show a lien or encumbrance, it is notice to the world that the

property is free from any lien or encumbrance, and if transferred to a *bona fide* purchaser the latter would obtain a good title.

To hold otherwise would eliminate the ability of potential buyers and lenders to rely on the information contained in certificates of title.^[11]

Reading § 46.2-644 as a whole,¹² when a sheriff has levied on *and* seized a vehicle,¹³ any sale of such vehicle by the debtor is "fraudulent," and such debtor "shall be guilty of a Class 1 misdemeanor." Section 46.2-644 does not, however, provide for any such criminal penalty when the sheriff levies by virtue of a fieri facias on a vehicle but does not physically take possession of the vehicle. "While in the construction of statutes the constant endeavor of the courts is to ascertain and give effect to the intention of the legislature, that intention must be gathered from the words used, unless a literal construction would involve a manifest absurdity."¹⁴ When the sheriff levies on but does not seize a vehicle, he is not required to report such levy to the Department. Consequently, the certificate of title on the vehicle maintained by the Department will not show a lien resulting from the fieri facias. A bona fide purchaser of such vehicle, therefore, has no notice of a lien and obtains title to the vehicle free from any such lien.

I must, therefore, conclude that a vehicle levied on but not seized and subsequently sold by the debtor may not be sold at sheriff's auction.

¹Article 2, Chapter 6 of Title 46.2 relates to the titling of vehicles.

²"Fieri facias" means "[a] writ of execution that directs a sheriff to seize and sell a defendant's property to satisfy a money judgment." Black's Law Dictionary 641 (7th ed. 1999). Generally, with regard to tangible personal property, the Supreme Court of Virginia has held that an execution by levy under a writ of fieri facias is not complete until the property is sold:

The levy does not divest the defendant of the property and transfer of title to the plaintiff, or even to the sheriff. The property still remains in the defendant, notwithstanding the levy, and only a special interest is vested in the sheriff, as a mere bailee, to enable him to keep the property safely, and defend it against wrongdoers. While subject to the levy it is in the custody of the law, and the sheriff has a naked power to sell it and pass the title from the owner to the purchaser.... Now until this last step is taken [the sale], the thing remains *in fieri*, and may, in a certain manner and under certain circumstances, be so undone as that the plaintiff may be placed in the same situation in which he was before he sued out execution

Walker v. Commonwealth, 59 Va. (18 Gratt.) 13, 43, 44 (1867).

³See *Andrews v. Shepherd*, 201 Va. 412, 414, 111 S.E.2d 279, 281 (1959) (noting that "shall" is word of command, used in connection with mandate); see also *Schmidt v. City of Richmond*, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965) (noting that "shall" generally indicates procedures are intended to be mandatory, imperative or limited); *Op. Va. Att'y Gen.*: 1997 at 16, 17; 1996 at 20, 21; 1991 at 126, 126, and opinions cited therein; *id.* at 127, 129, and opinions cited therein.

⁴See *Anderson v. Commonwealth*, 182 Va. 560, 565, 29 S.E.2d 838, 840 (1944) (noting well-recognized meaning of words "listed or assessed" in tax statutes); Op. Va. Att'y Gen.: 1997 at 202, 202; *id.* at 72, 73; 1993 at 210, 213.

⁵Black's Law Dictionary, *supra* note 2, at 919.

⁶*Id.* at 1363.

⁷A special or specific statute supersedes a general statute insofar as there is conflict. *Compare* Va. Code Ann. § 46.2-644 (Michie Repl. Vol. 1998) *with* Va. Code Ann §§ 8.01-478 to 8.01-482 (Michie Repl. Vol. 2000) (governing liens in general). See *City of Roanoke v. Land*, 137 Va. 89, 119 S.E. 59 (1923) (holding that local ordinance adopted under general charter powers that conflicts with specific statute empowering court to grant or refuse pawnbroker license to applicant is void); Op. Va. Att'y Gen.: 1987-1988 at 276, 277; 1985-1986 at 65, 68.

⁸Section 46.2-644.

⁹256 Va. 243, 246, 506 S.E.2d 14, 15 (1998) (citing *Credit Corp. v. Credit Corp.*, 164 Va. 579, 583, 180 S.E. 408, 409-10 (1935)).

¹⁰*Id.* at 246, 506 S.E.2d at 15 (citing *Bain v. Commonwealth*, 215 Va. 89, 91, 205 S.E.2d 641, 643 (1974)); *see also* Va. Code Ann. § 46.2-638 (Michie Repl. Vol. 1998).

¹¹256 Va. at 246, 506 S.E.2d at 15 (citation omitted) (quoting *Credit Corp.*, 164 Va. at 582-83, 180 S.E. at 409).

¹²See 1995 Op. Va. Att'y Gen. 116, 117 (reading statute as whole influences proper construction).

¹³The use of the conjunctive "and" in § 46.2-644 indicates that sale by a debtor of a vehicle subject to a lien is fraudulent when a sheriff not only has levied on but also has seized such vehicle. See Op. Va. Att'y Gen.: 1997 at 99, 100; 1990 at 209, 210.

¹⁴*Watkins v. Hall*, 161 Va. 924, 930, 172 S.E. 445, 447 (1934) (quoting *Floyd v. Harding*, 69 Va. (28 Gratt.) 401, 405 (1877)).

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