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RECORDER, COUNTY—TORRENS ACT—LIEN CERTIFICATE — SECTION 1359-4 GC — LEGAL DESCRIPTION OF LANDS SOUGHT TO BE CHARGED — RECORDER SHOULD NOTE CERTIFICATE UPON REGISTERED CERTIFICATE OF TITLE OF PARCELS—SECTION 8572-89 GC—FEE PROVIDED IN SECTION 1359-4 GC.

SYLLABUS:

The county recorder, upon receipt of a lien certificate submitted to him under the provisions of Section 1359-4, General Code, in instances in which such certificate contains a legal description of the lands sought to be charged, should note such certificate in the case of lands registered under the Torrens law upon the registered certificate of title of the parcels concerned, as provided in Section 8572-89, General Code; and the fee of the county recorder for such services is that provided in Section 1359-4, General Code.

Columbus, Ohio, July 31, 1953

Hon. Frank T. Cullitan, Prosecuting Attorney
Cuyahoga County, Cleveland, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"The recorder of this county has received from the Division of Aid for the Aged four certificates of lien together with a tender of a fee of twenty-five cents for each certificate. It seems that the real property involved has been torrenized and the recorder has advised the Division of Aid for the Aged that inasmuch as such certificates do not conform with the provisions of the Torrens law the respective liens are not memorialized on the torrens registry and as a consequence the Division of Aid for the Aged does not have good liens on such property.

"The lien certificates have been filed in the recorder's office in his general records but we have grave doubts as to whether or not effective liens have been imposed upon the respective parcels of torrenized lands and we respectfully submit for your legal opinion the following questions:

"1. Is the county recorder required under the facts stated to note the certificates of lien on the torrens registry pertaining to each of said parcels?

"2. Should not the Division of Aid for the Aged submit its trust deeds or mortgages in the form required by the Torrens law together with a fee prescribed by the Torrens law to the County Recorder?

"3. What, if any, steps should the County Recorder take other than filing the said lien certificates in his general records (apart from the torrens registry) in order to protect the interests of the Division of Aid for the Aged?

"As there may be intervening rights by judgment or other lien holders before the trust or mortgage deeds to the Division of Aid for the Aged are placed on the torrens registry for each of the respective parcels may we have your opinion at the earliest possible date."

Provision for the attachment of a lien on real property of recipients of aid to the aged, and for the legal effect of such language, is found in Section 1359-4, General Code, which reads in part as follows:

“Aid paid to any recipient under sections of this act shall become and constitute a lien as hereafter provided and shall remain a lien until it is satisfied.

“When aid is granted to any person under this act the name and residence of the recipient and his or her spouse, the date when aid is granted, the legal description of all real estate owned by the recipient and his or her spouse, and such other information as the division of aid for the aged shall require, shall be entered upon a certificate, signed by the recipient and his or her spouse the form of which shall be prescribed by the division. The division shall cause such certificate, or a certified copy thereof, to be filed, recorded and indexed in the real estate mortgage records in the office of the county recorder in every county in the state in which real property of the recipient or his or her spouse may be situated, or in which he may reside. From and after the time of filing of such certificate in the office of the county recorder the lien herein imposed shall attach to any and all real property of the recipient or his or her spouse presently owned or subsequently acquired, including point tenancy interests, in any county in which such certificate is filed for any and all amounts of aid which thereafter may be paid, and shall remain such lien until it is satisfied.

“Upon the filing of such certificate in the office of the county recorder all persons shall thereby be charged with due notice of the lien and the rights of the division thereunder.

“The several recorders shall keep a record of every certificate so filed showing its date, the time of filing, the name and residence of the recipient or his or her spouse, and any releases, waivers or satisfaction of the lien. The fee for filing and recording each such certificate shall be twenty-five cents, which amount shall be payable by the recipient.” * * *

As pointed out in my opinion No. 939, Opinions of the Attorney General for 1951, p. 789, the county recorder is required to keep five sets of records, as follows :

1. A record of deeds.
2. A record of mortgages.
3. A record of powers of attorney.
4. A record of plats.
5. A record of leases.

In that opinion I concluded, as indicated in the third paragraph of the syllabus :

- “3. The certificate of lien or certified copy thereof provided

for by section 1359-4, General Code, must be indexed and recorded in the set of records designated real estate mortgage records.”

In the instant case, however, we are concerned with the attachment of liens on real property, owned by recipients of aid, which has been registered under the provisions of the so-called Torrens law, i.e., Section 8572-1 et seq., General Code. This act provides in some considerable detail for a special method of registration of land titles and numerous special procedures in the transfer of titles and the conveyance of estates less than a fee simple in registered land. Some appreciation of the purpose and the general scheme of such special system of the registration of land titles and the effect of the special provisions of the Torrens Law with relation to general provisions of law, can be gained from the following passage from Judge Matthias' opinion in *Curry v. Lybarger*, 133 Ohio St., 54 (58, 59):

“* * * The purpose of the so-called Torrens system is interesting and important. It has thus been stated in 5 Thompson on Real Property, 192, Section 4154:

“The objects of the system are the creation of an indefeasible title in the registered owner, simplification in the transfer of land, certainty and facility in the proof of title by reference to a certificate issued by a government official made conclusive by law and finally the saving to the community of the cost of a new examination of title in connection with each transfer or transaction affecting the land. * * * “One of the primary and fundamental purposes of the registration of land under the Torrens system is to secure to the owner an absolute, indefeasible title, free from all incumbrances and claims whatsoever, except those mentioned in the certificate of title; and, so far as it is possible, to make the certificate issued to the owner by the court, absolute proof of such title.”’

“A very concise and pertinent statement of the purposes of the system is that of the Supreme Court of Washington in the case of *Brace v. Superior Land Co.*, 65 Wash., 681, 688, 118 P., 910, which is as follows:

“Our construction of this section is in keeping with the obvious purpose of the Torrens Act to create an absolute presumption that the certificate of registration in the registrar's office at all times speaks the last word as to the title, thus doing away with secret liens and hidden equities. This is accomplished by the simple plan of making the act of conveyance and the fact of notice by record simultaneous in performance and effect. The

Torrens system makes this simultaneous quality inevitable by making both conveyance and notice of record performable, and performable only, by the one act of registration. This is the distinctive feature, the vital principle of the Torrens system. It is the very essence of the plan. For the courts to refuse to recognize and enforce it would be to emasculate the law, and, by construction, make it not the Torrens system of land titles, but a mere change in the *form* of the record, a mere modification of the recording act.'

"The Torrens Act, therefore, cannot be treated as a mere modification of the recording act. Among other things, it specifies the procedure essential to the vesting of assessment liens upon registered lands, and in that respect the language employed is clear and mandatory. The authority to levy special assessments is conferred only by statute, and the validity of such assessments is conditioned upon compliance with the requirements of these statutory provisions. Additional requirements are prescribed by the provisions of the Torrens act and made prerequisite to a valid imposition of such lien upon registered land."

The impressment of registered land with a lien based on a mortgage or trust deed, and the procedure for recording and registration of such liens, is provided for in Sections 8572-44 and 8572-45. These sections are as follows :

Section 8572-44 :

"Whenever any registered land or estate or interest therein is intended to be charged or made security in favor of any mortgage, the mortgagor shall execute a mortgage deed in any form recognized by law ; and whenever any such land is intended to be charged with, or made security for the payment of an annuity, rent charge, sum of money, or any other charge or lien, in favor of any incumbrance or lien holder, the encumbrancee shall execute an instrument of encumbrance in any form recognized by law. Every instrument aforesaid shall contain a pertinent description of the land and an accurate statement of the estate or interest intended to be mortgaged, charged or encumbered, and when duly registered shall operate as a lien or charge upon and bind the land covered thereby for the period ending twenty-one years after the maturity of the last debt or obligation secured thereby ; and thereafter as to subsequent bona fide purchasers, mortgagees and other persons dealing with such land for value, the lien of such mortgage shall be deemed to have expired ; the mortgage creditor, however, shall have the right, at any time within one year next preceding the expiration of such period of twenty-one years, to refile in the recorder's office the mortgage or a sworn copy thereof, together with an affidavit thereon, stating the

amount remaining due thereon and the due date thereof, as extended if it be extended, and thereupon, such refileing, after registration has been duly made upon the certificate of title, shall operate as a lien or charge upon and bind the land then covered thereby only for a period of twenty-one years after the expiration of such period of twenty-one years; provided, however, that as to mortgages which are registered at the time of the effective date of this act, the constructive notice of their registration shall not be deemed to have expired in any event prior to two years from and after the effective date of this act. The recorder is hereby authorized and directed to cancel any such mortgages which have not been refiled as herein provided.

“A trust deed in the nature of a mortgage shall be deemed to be a mortgage and be subject to the same rules as a mortgage, for all purposes under this act.”

Section 8572-45:

“On the filing in the recorder’s office of such mortgage, incumbrance, or other instrument intended to create a lien upon or charge against such registered land, and the production of the owner’s duplicate certificate of title, and it appearing to the recorder that the person intending to create the lien or charge set forth in such instrument, has such right, and that the person in whose favor the same is sought to be created is entitled by the terms of this act (G. C. sec. 8572-1 to 8572-118) to have the same entered as a memorial upon the register, the recorder shall enter upon the proper folium of the register, where such title is registered and also upon the owner’s duplicate certificate of title, a memorial accurately stating the purport and nature of the lien or charge created, the date of filing the instrument and its file number. The recorder shall also note upon the instrument filed with him the volume and folium of the register where the memorial is entered. The recorder shall also at any time after registration of a mortgage, upon the request of the mortgagee and the tender of the proper fee therefor, make and deliver to the mortgagee a duplicate of the owner’s registered certificate of title but having endorsed, stamped and printed thereon in large letters the words ‘Mortgagee’s Duplicate Certificate’ instead of ‘Owner’s Duplicate Certificate,’ and shall note on the registered certificate of title the fact and date of making and delivering such duplicate and to whom delivered. And in case of the loss or destruction of such mortgagee’s duplicate certificate another may be issued to him in like manner as provided in Section twenty-eight (G. C. Sec. 8572-28) in reference to the loss or destruction of an owner’s duplicate certificate.”

In Sections 8572-50 and 8572-51, General Code, provision is made for the impressment of registered lands with liens resulting from judg-

ments or decrees of courts of record and inferior courts; and in Section 8572-54 provision is made for the filing and registration of mechanics' or material man's or laborer's liens. In Section 8572-68 provision is made for the filing and registration of all claims or liens against registered lands for which express provision is not otherwise made in the act. This section is as follows:

"Any person desiring to assert any interest in or claim or lien against registered land adverse to the title of any registered owner, and not shown upon the register when no provision is by this act (G. C. secs. 8572-1 to 8572-118) made for registering the same in the recorder's office, may make affidavit thereto, setting forth his interest, right, title, claim, lien, charge or demand, and how and under whom derived, and the character and nature thereof. The affiant shall state his full name, place of residence and postoffice address and shall designate the place within the state at which all notices relating thereto may be served upon him; or if he be a non-resident of the state, the name, residence and postoffice address of some person residing within the state upon whom service may be made as his agent and by which service he will be bound the same as if made upon the claimant within the state. Upon the filing of such affidavit in the recorder's office the recorder shall enter forthwith a memorial thereof, upon the registered certificate of title, stating the exact time when said affidavit was filed and the purport and nature thereof."

At this point the specific question presented is whether or not all of these statutory requirements are applicable to liens accruing by operation of law in favor of the State of Ohio.

It is first to be remembered that "the state is not bound by the terms of a general statute, unless it be so expressly enacted." *State ex rel. Parrott v. Board of Public Works*, 36 Ohio St., 409. However, in the matter of the effectiveness of all liens asserted against registered lands, we find the following provisions in Section 8572-89, General Code.

"No statutory or other lien of *whatever kind or nature* except taxes and assessments, lawfully levied, and liens, claims or rights arising or existing under the laws or constitution of the United States prior to October 4, 1933, shall affect the title to registered land, until after the same is noted upon the registered certificate of title." (Emphasis added.)

The use of the expression "other lien of whatever kind or nature," followed by a limited list of exceptions, makes it abundantly clear that

the Legislature by this language intended to comprehend all liens of whatever kind without regard to the identity of the parties asserting them, including the state of Ohio, and I conclude that this language is sufficiently broad to constitute such an express enactment that the state is bound by it within the meaning of the rule stated in the Parrott case, *supra*.

At this point we are confronted with the question of whether the later enactment of Section 1359-4, General Code, has the effect of repealing by implication the provisions of Section 8572-89, General Code.

It is a settled rule of statutory construction that the later enactment of a general statute will not have the effect of repealing by implication any of the inconsistent provisions of a prior existing special statute unless the intention to effect such repeal is plainly evident from the provisions of such later general enactment. In the instant case I perceive no such intent in the provisions of Section 1359-4, General Code, especially when it is considered that the Legislature, in the enactment of this section, must be presumed to have been aware of the special provisions theretofore enacted in Section 8572-89, General Code.

As stated by Judge Day in *Gough Lumber Co. v. Crawford*, 124 Ohio St., 46, it is necessary "to so construe statutes and parts thereof that the same may be reconciled and held harmonious, if this can be done and their purpose be maintained." In that case the court was concerned with the operation of certain inconsistent provisions of the mechanics' lien law and the Torrens law, and the conclusion was reached that the requirements of both statutes must be met in order to impress the registered land concerned with a valid lien. In the instant case it is readily possible to reconcile the two statutes involved and to give full effect to each. In this connection it must be noted that although Section 1359-4, General Code, requires the division of aid for the aged to cause a certificate of lien or a certified copy thereof "to be filed and recorded in the real estate mortgage records in the office of the county recorder," it may be readily concluded that by reason of the necessity of giving effect to the provisions of Section 8572-89, General Code, requiring such certificate to be "noted upon the registered certificate of title," it is easily possible to construe the expression "real estate mortgage records," as used in Section 1354-4, General Code, to include the register of land titles maintained by the county recorder under the provisions of the Torrens law.

Accordingly, with respect to your first question, it is my opinion that the county recorder is required to note the certificates of lien, filed under the provisions of Section 1359-4, General Code, on the Torrens registry pertaining to such parcel of land involved.

It should be observed at this point, however, that although Section 1359-4, General Code, provides for the inclusion in a certificate of lien a "legal description of all real property owned by the recipient," it provides also that the lien "hereby imposed shall attach to * * * property * * * subsequently acquired." Quite obviously if property be acquired by a recipient subsequent to the accomplishment of such certificate, no legal description of such could be included therein. Nonetheless the statute clearly provides for the attachment of a lien in such case.

It is quite clear that the provisions of Section 8572-89, *supra*, could not be complied with in the case of certificates which contain no legal description of the registered lands concerned, since such compliance is dependent upon the possibility of identifying the parcel concerned by reference to the location in the recorder's records of the registered certificate of title pertinent thereto. I find nothing in any of the statutes here involved which would impose on the recorder the duty, in the case of registered lands "subsequently acquired" by a recipient, to search out such instances and to note the certificate of lien on the registered certificate of title thereof. Accordingly, I conclude that in the case of registered lands acquired by a recipient subsequent to the accomplishment of the lien certificate provided for in Section 1359-4, General Code, and which lien certificate contains no description thereof, there is no duty on the recorder to note such lien on the registered certificate of title as provided in Section 8572-89, General Code, and that under the provisions of such section the mere filing of a lien certificate with the recorder, as provided in Section 1359-4, General Code, would not affect the title to such registered land.

In your second question you suggest that the division of aid for the aged should be required to submit trust deeds and mortgages in the form required by the Torrens law and to pay the fee prescribed by that statute to the county recorder. Here, again, we may recall the rule in the Parrott case, *supra*, that the state is not bound by the general statute unless expressly so enacted. It will be observed that the express enactment in Section 8572-89, General Code, which we have already concluded was applicable to the state, provides that all statutory and other liens be "noted

upon the registered certificate of title." I find no such express and all-inclusive provision in the Torrens law with respect to the *form* in which liens are to be made up. That is to say, there is no express provision in the Torrens law relative to the form in which liens and other claims are to be stated which would indicate that such required formality applies in the case of the state. Such being the case, I conclude, by reason of the rule stated in the Parrott case, *supra*, that the provisions of Section 1359-4, General Code, relative to the form of the certificate of lien in cases in which such certificate contains a legal description of the land sought to be charged, are applicable even though the lands sought to be charged are registered.

In the matter of fees to be paid to the county recorder, I find in Section 8572-112 a fairly complete schedule of fees to be charged by that officer for the various services required of him in connection with registration of titles and the notation on the registered certificates of title of mortgages, leases, liens, releases, etc. Nowhere in this section, however, is there any reference made to statutory liens accruing in favor of the state nor is there any express provision in this section that such fee schedule shall be applicable in the case of claims asserted by the state. This section does, however, contain the following provision :

"The recorder shall receive the following fees: * * *

"For filing, recording and indexing any papers or instruments other than those above provided, * * * the same fees as may be allowed by law for like services."

In this situation, because the fee schedule provided in the Torrens law is not made especially applicable to the filing, etc., of liens in favor of the state, I conclude that the fee of 25¢ provided in Section 1359-4, General Code, is the only fee provided by law for the services of the county recorder in noting such lien upon the registered certificate of title in the case of registered lands.

Accordingly, in specific answer to your inquiry, it is my opinion that the county recorder, upon receipt of a lien certificate submitted to him under the provisions of Section 1359-4, General Code, in instances in which such certificate contains a legal description of the lands sought to be charged, should note such certificate in the case of lands registered under the Torrens law upon the registered certificate of title of the parcels

concerned, as provided in Section 8572-89, General Code; and the fee of the county recorder for such services is that provided in Section 1359-4, General Code.

Respectfully,

C. WILLIAM O'NEILL

Attorney General