

4280.

OLD AGE PENSION—DIVISION OF AID FOR AGED UNAUTHORIZED TO EXECUTE WAIVER OF PRIORITY IN FAVOR OF PROSPECTIVE SUBSEQUENT MORTGAGEE.

*SYLLABUS:*

*The Division of Aid for the Aged is not authorized to execute a waiver of priority in favor of a prospective subsequent mortgagee who wishes to encumber the property transferred to the Division of Aid for the Aged "in trust" after such transfer to such Division has been made.*

COLUMBUS, OHIO, May 22, 1935.

HON. H. J. BERRODIN, *Chief, Division of Aid for the Aged, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication which reads as follows:

"Will you please give us an informal written opinion on the question of whether the Chief of the Division of Aid for the Aged is authorized under the law to execute a waiver of priority in favor of a subsequent mortgagee who encumbers property transferred to this Division in trust after such transfer to this Division was made.

To be specific: we have received several requests from the Home Owners' Loan Corporation to execute waivers of priority in favor of the H.O.L.C. for loans granted by it after the property had been transferred in trust to this Division. We have executed several such waivers, our policy being to cooperate with the H.O.L.C. in every way possible. In fact, in the cases already cited, the Division of Aid for the Aged is holding a larger equity in the property after the execution of the H.O.L.C. mortgage than before; but we have always stated that we believe that the Division should do all in its power to permit the owners of property who are receiving aid to refund their mortgages and taxes in the way that the H.O.L.C. has done for so many people.

Now the question has been raised as to the authority of the Division to execute such waivers."

Section 1359-2, General Code, of the Old Age Pension Law, provides in part:

"No person shall be entitled to aid under this act unless he fulfills the following conditions:

\* \* \* \* \*

(g) His income from any and all sources does not exceed \$300.00 per year;

\* \* \* \* \*

(i) The net value, less all encumbrances and liens, of all real and personal property of such person does not exceed \$3000.00; or, if married, the net value of the combined property of husband and wife does not exceed \$4000.00; \* \* \* ."

Section 1359-6, General Code, provides in part:

"If an applicant for or recipient of aid, or his or her spouse, is the owner of any interest in real or personal property, excepting household goods, cloth-

ing and other personal effects, *it may be required, as a condition precedent to the payment of aid or further aid, that he convey and transfer such property to the Division of Aid for the Aged (hereinafter created) in trust, subject to permission to the recipient of aid and his or her spouse to use or reside upon such property for life; and upon death of either, leaving wife or husband who is entitled to aid, the survivor likewise to be permitted to use or reside upon the said property for life; \* \* \**

All property conveyed to the Division in trust upon the death of the person or persons entitled to use or reside upon such property as above provided, shall be sold by the Division at public sale, and the proceeds applied in the following order; first, the costs of sale; second, all valid taxes and assessments which are a lien upon said property; third, repay to the Treasurer of State all amounts paid under this act to the person who conveyed or transferred the property to the Division, and all such amounts paid to his or her spouse, with interest at four per centum per annum; fourth, all other valid debts in order according to law; and the balance, if any, to be distributed to the heirs or other persons by law entitled thereto.

Provided, however, that upon request of a recipient of aid, or, after his death, of his surviving spouse, an heir, or other person lawfully entitled thereto, *and when reimbursed to the full amount of aid paid and interest as aforesaid the Division shall reconvey or transfer the property to said person, surviving spouse, or/and heirs or other persons lawfully entitled thereto.*" (Italics the writer's)

Section 1359-7, General Code, provides in part:

"Upon the death of a person, the total amount of aid paid to him under this act and to his or her spouse, with interest thereon at four per centum per annum *shall be a debt of the estate of such deceased person;* and it shall be the duty of the Division to present claims to the administrator or executor, if any, to bring suits and to take any other proper action to secure reimbursement from the estate and property of such deceased person. \* \* \*" (Italics the writer's.)

In my Opinion No. 3607, rendered December 10, 1934, now to be found in the reported Opinions of the Attorney General for 1934, Vol. III, page 1725, it was held as disclosed by the third branch of the syllabus:

"3. Under a so-called 'trust deed' given by an applicant for aid for the aged, who is the owner of real estate or an interest therein, to the Division of Aid for the Aged, in the Department of Public Welfare of the State of Ohio, in pursuance of Section 1359-6, General Code, a vested interest in the real estate therein described, remains in the grantor, and such instrument, as to the rights of third persons, is a mortgage, and is required to be recorded as such. *National Bank of Columbia vs. Tennessee Iron & R. Company, 62 O. S. 564.*"

I am unable to find any statutory authority for the Division of Aid for the Aged, after such a trust deed of real estate has been accepted by them by virtue of the authority contained in Section 1359-6, General Code, quoted in part supra, to execute a waiver of priority of lien in favor of a prospective subsequent mortgagee who plans

to encumber the property after the conveyance of such property "in trust" to the Division of Aid for the Aged. The Division of Aid for the Aged, like other state boards and public officers, has those powers, and those only expressly given to it by statute or those necessarily implied from such express statutory powers. *State ex rel. vs. Commissioners*, 6 N. P. (N. S.) 281, 20 O. D. (N. P.) 879; affirmed *Ireton vs. State ex rel.*, 12 C. C. (N. S.) 202; 21 O. C. D. 212; 412, affirmed without opinion in *Ireton vs. State*, 81 O. S. 562; *State ex rel. vs. Kraft*, 19 O. A. R. 454, 456; *Peter vs. Parkinson, Treas.* 83 O. S. 36, 49; *Jones, Auditor, vs. Commissioners of Lucas County*, 53 O. S. 189; *Elder vs. Smith, Auditor et al.*, 103 O. S. 369, 370; *State ex rel. Copeland vs. State Medical Board*, 103 O. S. 369, 370; *Civil Service Commission vs. State, ex rel.*, 127 O. S. 261.

Consequently in view of this well established rule of public law it is my opinion that the Division of Aid for the Aged is not authorized to execute a waiver of priority in favor of a prospective subsequent mortgagee who wishes to encumber the property transferred to the Division of Aid for the Aged "in trust" after such transfer to such Division has been made.

Another method of accomplishing the same result as a waiver of the lien would be the reconveyance of the property to the pensioner, then the placing of the subsequent mortgage lien on the realty and then a subsequent conveyance by the recipient of the Old Age Pension to the Division of Aid for the Aged. However, it should be noted that by virtue of Section 1359-6, General Code, quoted in part supra, that after a transfer of the realty has been made to the Division of Aid for the Aged that a reconveyance to the recipient of the Old Age Pension may only be made "when the Division of Aid for the Aged is reimbursed to the full amount of aid paid and interest." By reason of the rule of construction "expressio unium exclusio alterius est" it would appear that such reconveyance to the pensioner in order to accomplish the purpose desired by the prospective subsequent mortgagee in the case outlined in your inquiry would not be authorized.

Respectfully,  
JOHN W. BRICKER,  
*Attorney General.*

4281.

CONSERVATION—MONIES DERIVED FROM SALE OF HUNTING AND FISHING LICENSES MAY NOT BE USED FOR PUBLICATION OF MAGAZINE ON CONSERVATION.

SYLLABUS:

*The Conservation Council is not authorized to expend monies derived from the sale of fishing and hunting licenses, for the publishing of a magazine covering subjects relating to fish and game protection, preservation and propagation.*

COLUMBUS, OHIO, May 23, 1935.

HON. L. WOODDELL, *Commissioner, Division of Conservation, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication, which reads as follows: