



STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider,
Attorney General

June 9, 1976

ATTORNEY GENERAL OPINION NO. 76- 167

Carol Bickford
Register of Deeds
Jackson County Courthouse
Holton, Kansas 66436

RE: Taxation; Mortgage Registration; Affidavit of
Equitable Interest

Synopsis: An affidavit of equitable interest against
specific real estate, which does not disclose
the nature or amount of debt that is secured,
should not be filed of record until the Register
of Deeds is given the opportunity to review the
security instrument to determine the amount of
debt being secured and whether that debt is to
be paid over a period greater than 90 days.
Such information is absolutely necessary to
determine the application of the Mortgage Re-
gistration Laws.

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Dear Register of Deeds Bickford:

You advise that you have been presented with an "affidavit of Equitable Interest" for recording to place the public on notice that someone other than the seller is claiming an interest in the subject real estate. You ask if the mortgage registration fee should be collected.

K.S.A. 79-3101 provides that the word mortgage "shall include every instrument by which a lien is created and imposed on real estate....". It then adds:

Carol Bickford
June 9, 1976
Page 2

"An executory contract for the sale of real estate, or a bond for a deed, the complete performance of which is deferred for a longer period than ninety days from its execution, under which the grantee or vendee is entitled to possession of such real estate, by the terms of which the grantor holds the legal title as security for the unpaid purchase price, shall for the purpose of this act be treated as a mortgage of real property...."

An affidavit of a lien against real estate should, therefore, not be recorded unless it describes in detail the terms of the lien contract, so that the Register of Deeds may determine if the lien is subject to and collect the Mortgage Registration Tax. If it does not contain such details, then the Register of Deeds should require disclosure of such details, and then assess the tax if one is due, before recording the affidavit. If none is due, then the affidavit may be recorded without assessment of tax.

The law requires that every instrument creating or imposing a lien on real estate shall be subject to a tax upon registration, and shall not be otherwise taxable. An affidavit that simply claims an equitable interest without giving details is just as potent a lien as if the mortgage or executory contract were recorded in toto. Anyone researching title would never buy or lend with this affidavit as a cloud, and would call the person recording the affidavit to learn the details of the debt secured. The lienholder may not enjoy the benefit of public notice, while avoiding the registration tax.

It is not necessary that the instrument setting out the amount of debt and the terms of payment be recorded, and the Register of Deeds need not require this to be done. But if any document is to be filed, such as an affidavit, which incorporates by reference such an instrument, the mortgage registration tax must be collected, if the tax is due.

Very truly yours,



CURT T. SCHNEIDER
ATTORNEY GENERAL

CTS:CJM:gw