



STATE OF KANSAS

## Office of the Attorney General

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**Curt T. Schneider**  
Attorney General

March 21, 1977

ATTORNEY GENERAL OPINION NO. 77-124

Delma Walcher  
Register of Deeds  
Sumner County Courthouse  
Wellington, Kansas 67152

RE: Taxation - Mortgage Registration Fees - Assignment  
of Purchase Contract Rights

SYNOPSIS: X sells his land to Y under an executory long term purchase contract, which is never recorded and no mortgage registration fee paid. X and Y then make a financial arrangement with Z bank by which all payments under said contract will be paid to the bank. Z bank then prepares a "financing statement", listing only the contract and its assignment to Z bank, and demands that it be recorded against the land records without payment of the mortgage registration tax. The request should be denied. Under the Uniform Commercial Code "Financing Statements" pertain to personal property collateral offered as security, not real estate. In some instances, however, growing crops, timber, minerals, and "goods" which are or are about to become affixed to real estate are used as collateral and provision is made to file such financing statements in the land records where such property is located. There is no showing here that Z bank has any collateral other than the land contract. By the requested recording Z bank wants to put the public on notice of the bank's "interest" in specific land by reference to an unrecorded sale contract, and to do this the registration tax must be determined and paid.

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Dear Ms. Walcher:

You mailed us photocopies of two financing statements which have been presented to you by two local banks, one of which you have already filed, and the second you question as to whether or not a mortgage registration fee should be assessed and collected.

Both are on the Financing Statement Form UCC-1, as approved by the Secretary of State. Both give a legal description of specific real estate. Both name four people, which appear to be two sets of husbands and wives. From these instruments it appears that there has been a sale of the described real estate between the two married couples, under a sale agreement which will run longer than ninety days, and then the sale contract is assigned to the bank. These land sale contracts have never been recorded and no mortgage registration fee paid. You say that the banks now insist that this financing statement be recorded in the real estate books and be shown against the title of the real estate described. The banks want to give public notice that they now own the right to receive all payments on these two purchase contracts, and they want that right to show up on any abstract in case another sale of the land might be attempted, or other lien holders intervene.

In our opinion the banks are filing an instrument which will give public notice that the banks hold a lien against the described real estate to secure that the banks will faithfully be paid the full purchase price stated in the sale contract with the real estate as security. K.S.A. 79-3101 applies the "Mortgage Registration Fee" law to "every instrument by which a lien is created or imposed on real estate". It also extends the law to all executory contracts for the sale of land where the vendee is entitled to possession and the legal title of the land is held as security for payment of the purchase price, the complete performance of which is delayed for a period greater than ninety days.

As Register of Deeds, you should refuse to record such instruments against the specific lands described, until you are shown by the banks the exact land purchase contracts referred to therein, and which have been assigned by agreement of the parties to the banks. If, upon examination, you determine that the banks have been assigned such an "executory land sales contract", then ascertain the amount of the obligation owed and collect the usual registration fee before recording it.

If the purchase contract itself, if offered for recording, would be subject to the fee, then this instrument which records that contract by reference must be subject to the same fee. What cannot be done directly cannot be done indirectly. The net result of the two instruments is the same. Anyone examining the abstract of the specified land would immediately note that a sale contract for the land has been assigned to the bank, and would immediately call the bank to find out just what the lien was. We believe that such a recorded "financing statement" is an effective public notice that the banks hold an "interest" in that land.

As for the one financing statement which you have already filed, you should ask the bank for the amount of indebtedness. It would appear to be the full purchase price, because this statement gives the information that the sale contract was dated March 10, 1976, and runs for 15 years. The statement was recorded on March 23, 1976. The fee would be on the full amount of the debt or obligation owed by the buyers as set out in that contract, and it should be collected.

There has occurred here an unusual use of the Uniform Commercial Code. UCC Article 9, concerning "Secured Transactions, Sales of Accounts, Contract Rights and Chattel paper," applies to this particular form UCC-1, here used. No personal property whatever is indicated in the statements to be involved, no fixtures, no crops, no minerals, no personal property being used in the construction of fixtures.

The Official UCC Comment which follows K.S.A. 84-9-101 says: "This Article sets out a comprehensive scheme for the regulation of security interests IN PERSONAL PROPERTY FIXTURES. It supersedes existing legislation dealing with such security devices as chattel mortgages, conditional sales, trust receipts, factor's liens and assignment of accounts receivable." (Emphasis Supplied.)

K.S.A. 1976 Supp. 84-9-102 says: (1) Except as otherwise provided in section 84-9-104 on excluded transactions, this article applies (a) to any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper or accounts;" Then it says: "(2)....This article does not apply to statutory liens except as provided in section 84-9-310." But later on it adds: "(3) The application of this article to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this article does not apply." (Emphasis supplied).

K.S.A. 1976 Supp. 84-9-104 provides: This article does not apply .... (j) except to the extent that provision is made for fixtures in section 84-9-313, to the creation or transfer of an interest in or lien on real estate, including a lease or rents thereunder...." (Emphasis supplied.)

K.S.A. 1976 Supp. 84-9-313 provides: (1) In this section and in the provisions of page 4 of this article referring to fixture filing, unless the context otherwise provides (a) goods are "fixtures" when affixing them to real estate so associates them with the real estate that, in the absence of any agreement or understanding with his vendor as to the goods, a purchaser of the real estate with knowledge of interests of others of record, would reasonably consider the goods to have been purchased as part of the real estate; (b) a "fixture filing" is the filing in the office where a mortgage on the real estate would be filed or recorded of a financing statement covering goods which are or are to become fixtures and conforming to the requirements of subsection (5) of section 84-9-402." (Emphasis supplied.)

K.S.A. 1976 Supp. 84-9-402(5) provides: "(5) A financing covering timber to be cut or covering minerals or the like (including oil and gas) or accounts subject to subsection (5) of section 84-9-103, or a financing statement filed as a fixture filing (Section 849313) where the debtor is not a transmitting utility, must show that it covers this type of collateral, must contain a legal description of the real estate concerned and the name of the record owner of the real estate concerned." (Emphasis supplied.)

K.S.A. 1976 Supp. 84-9-105 provides: "(f) Goods includes all things which are movable at the time the security interest attaches or which are fixtures (section 84-9-313) but does not include money, documents, intangibles, contract rights or other things in action. Goods also include the unborn young of animals and growing crops." (Emphasis supplied.)

K.S.A. 1976 Supp. 84-9-402(3) sets out the requirements of the financing statement form. It is the exact form of the financing statements which the banks have presented to you for filing. The requirement of this form is that the collateral must be described and listed by type or items. If the collateral is crops, timber, minerals, or goods which are or are to become fixtures, THEN, besides listing such collateral, the financing statement must further include the legal description of the real estate and the name of the record owner.

The very wording of the financing statement, in the small print at the top of the form as "1(b)" follows this requirement But no personal property, no "goods", no "fixtures" are listed. The only listed "collateral" is the banks' right to the proceeds of a contract or certificate of purchase. If this be a pledge of collateral, then it must be a pledge of "personal property". A "contractual right", an "account receivable", an "intangible" has been put up to secure to the banks a payment. That being the case, these

financing statements must be filed by the Register of Deeds along with other financing statements describing personal property as collateral, not in the real estate records under a pretense that the collateral put up for security are those mentioned in the above statute.

Any confusion, that might exist on this question, is removed by Note #4 of the Official UCC Comment, following K.S.A. 1976 Supp. 84-9-102:

"4. An illustration of subsection (3) is as follows:

The owner of Blackacre borrows \$10,000 from his neighbor, and secures his note by a mortgage on Blackacre. This Article is not applicable to the creation of the real estate mortgage. Nor is it applicable to a sale of the note by the mortgagee, even though the mortgage continues to secure the note. However, when the mortgagee pledges the note to secure his own obligation to X, this Article applies to the security interest thus created, which is a security interest in an instrument even though the instrument is secured by a real estate mortgage. This Article leaves to other law the question of the effect on rights under the mortgage of delivery or non-delivery of the mortgage or of recording or nonrecording of an assignment of the mortgagee's interest. See Section 9-104(j). But under Section 3-304(5) recording of the assignment does not of itself prevent X from holding the note in due course."

It is clear that "This article is not applicable to the creation of a real estate mortgage. Nor is it applicable to a sale of the note by the mortgagee, even though the mortgage continues to secure the note."

It is further clear that "This article leaves to other law the question of the effect of ... recording or nonrecording of an assignment of the mortgagee's interest."

We conclude that the subject UCC Financing Statements should be filed by the Register of Deeds as one of a pledge of personal property as collateral, because the statements do not list any "goods" or "fixtures" which justify a "fixture filing". We further conclude that what the banks are really trying to do is to put of record an assignment of

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rights to the proceeds of contracts for the sale of real estate, which contracts have not themselves been filed and the mortgage registration fee paid on them. In our opinion, the banks cannot by a financing statement, filed in the real estate books for specific lands, make the assignment of record without complying with K.S.A. 79-3101 et seq. The UCC leaves this law intact.

Very truly yours,



CURT T. SCHNEIDER  
Attorney General

CTS:CJM:gw