



STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

June 15, 1977

ATTORNEY GENERAL OPINION NO. 77- 202

Mr. Jerry D. Fairbanks
Wallace County Attorney
Wallace County Courthouse
Post Office Box P
Sharon Springs, Kansas 67758

Re: Mortgage Registration--Executory Contract Not Filed
Of Record--Liability Of Assignee For Tax Upon Record-
ing Assignment

Synopsis: An executory contract for the sale of real estate between X and Y was assigned by X to Z Savings Association. The assignment incorporates by reference the contract of X sale, giving the description of the land, the ten year obligation of Y to pay the purchase price, and the fact that Z has by amendment of the contract been effectively substituted to all rights of X under that contract. Z now offers the assignment for recording in the county in which the land is located. Neither X or Y had offered for recording the original contract of purchase, and no mortgage registration tax paid, which would have been collected had the contract been offered for recording. The assignment incorporates by reference the executory contract and makes it a matter of record and a lien on specific real estate, and must be treated the same as if the original contract is offered.

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Dear County Attorney Fairbanks:

You present a situation where X sold real estate to Y under an executory contract whereby the contract and deed were placed

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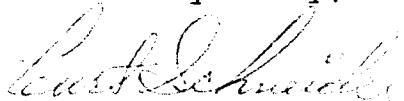
with an escrow bank and all payments by Y were to be made to such bank. Later, X assigns all his interest in the executory contract to Z Savings Institution. The assignment gives the legal description of the real estate sold, and the ten year plan of payments to be made by X to the escrow bank. The assignment specifies that the purchase contract has been amended so that Z succeeds X to all rights thereunder. The original contract and its amendment are not offered, either for recording or inspection. Z objects to paying the mortgage registration tax.

K.S.A. 79-3101 makes the recording of executory contract for the sale of real estate, the complete performance of which is deferred for a longer period than ninety days, subject to the mortgage registration fee. The assignment incorporates by reference all the necessary details of the original contract. The recording of the assignment would in effect be the recording of the original contract of sale.

Your letter indicates Z is insisting that all he has is an assignment of the right to receive payments on the contract, not the contract itself. This is questionable. If all that Z has is an assignment of accounts receivable, then Z should file a financing statement listing as collateral an intangible. Z would then file it with other financing statements under the Uniform Commercial Code in the chattle mortgage files of the Register of Deeds.

But Z does not do this. Z wants the assignment of record in the land records to show against the real estate described in the purchase contract. Why? It is because Z wants to protect rights under that contract to repossess the land in case of default, just as X might have done. Z wants to put this on record as a lien against that land, so it will be prior to any subsequent claimant or intervening lien holder. Whatever the reason, Z is undertaking to place a lien on real estate in Wallace County by recording an assignment of a purchase contract which says that Z succeeds to the rights of X the seller. Had X offered the contract for recording, the tax would have been assessed. Z, as successor to X, cannot do indirectly what X could not do directly. If this executory contract is to be made a matter of record, the recorder, whomever he may be, must pay the registration tax.

Yours very truly,



CURT T. SCHNEIDER
Attorney General

CTS:CJM:jj