



STATE OF KANSAS

*Office of the Attorney General*

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

*Curt T. Schneider*  
Attorney General

June 20, 1978

ATTORNEY GENERAL OPINION NO. 78- 207

Mr. Lyndus Henry  
Johnson County Counselor  
Box 31-A  
Olathe, Kansas 66061

RE: Mortgage Registration - Executory Contracts -  
Principal Debt - Future Cash Payments.  
K.S.A. 79-3101, 79-3102.

SYNOPSIS: Executory contracts, not to be performed within ninety days, for the sale of real estate are mortgages covered by the Mortgage Registration Act and \$.25 on every dollar of principal debt or obligation, due and owing at the time such contract is offered for recording, must be collected by the Register of Deeds before recording the instrument. Even though the first payment called for under the contract is to be paid in cash or dollars, such payment must be included in the sum taxed, if unpaid on the date of recording.

\* \* \*

Dear Mr. Henry:

You present a contract for a deed to land which provides a promise "to pay" \$35,500.00, \$6,500.00 "Dollars in hand," and then \$249.16 monthly thereafter until the amount of \$29,000.00 plus interest is paid in full. A deed is placed in escrow pending full performance of the contract, when the deed shall be delivered to the buyer.

Mr. Lyndus Henry  
Page Two  
June 20, 1978

This is clearly a "Mortgage" as defined in K.S.A. 79-3101, upon which a mortgage registration tax must be paid before it is recorded.

You say that the mortgagee, upon presenting the instrument for recording, wanted to pay tax only on \$29,000.00, not \$35,500.00. The instrument itself provides for a sale price of \$35,500.00 and the first payment which "said buyer hereby promises to pay" is \$6,500.00 "Dollars in hand". But there is nothing in the instrument to show that such payment was IN FACT made prior to or on the date the instrument was presented for recording. Nor was there presented any proof or affidavit that such payment had been made. You ruled that the mortgagee must pay the mortgage registration tax on the full \$35,500.00 and you ask if your position is correct?

In our opinion you have properly interpreted the mortgage registration tax law. The tax is due on the total debt or obligation secured by a lien on real estate on the date of recording. K.S.A. 79-3102.

The Register of Deeds cannot be called upon to speculate, or accept some person's word, that future cash payments will be made immediately. She cannot assume the responsibility that such promises are subsequently carried out. For audit purposes, she must tax the full executory contract price unless she has positive proof, either on the face of the instrument itself or by separate instruments of proof which she can keep in her file, that the principal debt or obligation at the time of recording was less than the original contract price, and that the lien imposed is for such lesser sum. The person presenting the contract for recording must present such proof.

There has long been a practice of putting into executory land sale contracts, which usually call for a down payment at the time of signing the contract, the words "receipt of which is hereby acknowledged by the seller". Such a provision is missing in the contract you present.

21A Words and Phrases 4, defining the expression "IN HAND PAID", cites Pitt, Administratrix v. Berkshire Life Ins. Co., 100 Mass. 500, 504 (1868). In that case, a life insurance policy was issued in consideration of a certain sum "in hand paid", and then annually thereafter a similar sum to be paid. The insured died BEFORE

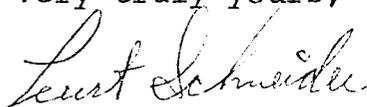
Mr. Lyndus Henry

Page three

June 20, 1978

he ACTUALLY paid the initial premium, and the estate sued on the policy claiming the policy precluded contention of non-payment. The Court held that the use of "in hand paid" was not conclusive on the question of payment, and the actual facts could be proven. So, there is no magic in the words "Dollars in hand". If payment has been made, there must be some positive proof of that payment, either by recital in the instrument itself, or by some documented proof presented to the Register of Deeds for filing.

Very truly yours,



CURT T. SCHNEIDER  
Attorney General

CTS:CJM:dh