



ROBERT T. STEPHAN
Attorney General
2nd Floor, KANSAS JUDICIAL CENTER
TOPEKA, KANSAS 66612

*This opinion is overruled
in Attorney General Opinion
No. 80-196.*

STATE OF

Office of the Attorney General

1st Floor, State Capitol Bldg. (913)

Curt T. Schneider
Attorney General

J

ATTORNEY GENERAL OPINION NO. 78- 229

Mr. Daniel A. Young
County Counselor
7 West 11th Street
Lawrence, Kansas 66044

RE: Mortgage Registration Tax - UCC Financing
Statement - Regular UCC Chattel Filing -
Executory Land Sale Contract Proceeds Listed
As Collateral With Land Identified - Proper
Way To Record Assignment Of Rights Under
Land Sale Contract. K.S.A. 58-2221; 79-3101;
79-3102; 19-1205; 19-1209; K.S.A. 1977 Supp.
84-9-102(1)(a); 84-9-104(j); 84-9-105(h);
84-9-313; 84-9-401; 402 and 403.

SYNOPSIS: Every instrument, by which a lien is created
or imposed on real estate, when recorded in
any public notice file of the Register of
Deeds, is subject to payment of the Mortgage
Registration Tax. An executory contract
for the sale of land, which cannot be com-
pletely performed within 90 days, is such
a lien when placed on record. Where a fi-
nancing statement, offered for recording in
the regular UCC Chattel file, lists as col-
lateral the "proceeds from the sale of the
house" located at a specific street address,
and gives the names of the sellers as debtors,
public notice will be given to all abstractors
and researchers of title that this house has
been sold. Such a contract of land sale,
and its assignment, can be recorded only as
provided by law, and, upon recording, the
Mortgage Registration Tax must be imposed.

*

*

*

Mr. Daniel A. Young
July 14, 1978
Page Two

Dear Mr. Young:

You request a formal opinion as to whether a financing statement, which you attach, can be filed in the regular UCC file for secured interests in personal property in the office of the Register of Deeds without payment of the Mortgage Registration Tax as imposed by K.S.A. 79-3101 et seq.?

This statement lists as collateral "Assignment by . . . (same names as debtors to a bank) of the proceeds from the sale of the house located at (giving the exact street address)." It definitely lists the debtors in the financing statement as being the sellers in the sale of the house. No Mortgage Registration Tax has ever been paid on such contract.

UCC financing statements, which list only personal property as collateral, are indexed under the name of the debtors. K.S.A. 1977 Supp. 84-9-403(4). Here the owners are the debtors, and the collateral for their debt is the proceeds which they will receive from a sale contract of their specific land.

It is usual for abstractors or other researchers of land titles to search every index in the office of the Register of Deeds, just as in the office of the Clerk of the District Court, looking for the name of the landowner claiming title. Any transaction or proceedings which may possibly affect such landowner, and his title to the specific land, will be reported.

Every Register of Deeds must have a land record index in which any transaction pertaining to land is listed alphabetically in the name of the owner, or grantor. K.S.A. 19-1205. In many counties there is a numerical index of land transactions, listed under the legal description of the land. K.S.A. 19-1209.

The UCC applies only to transactions intended to create a security interest in personal property, or in fixtures as defined. It is not applicable to the creation of a real estate mortgage. K.S.A. 1977 Supp. 84-9-102(1)(a). Note #4 to this section states "This Article leaves to other law the question of the effects on rights under the mortgage . . . or of recording or nonrecording of an assignment of the mortgagee's interest."

Mr. Daniel A. Young
July 14, 1978
Page Three

As if to remove all doubt on this point, the UCC then adds: "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 . . ." K.S.A. 1977 Supp. 84-9-104(j) (Note #2). "Paragraph j takes most real estate transactions out of Article 9." Vernons, Vol. 9, page 187, on Kansas UCC. Fixtures is the exception.

K.S.A. 84-9-313 defines "goods" which are or are to become fixtures. Note #8 to this section points out that real estate lending is typically long-term, whereas chattel financing has a short term character. The two are not intended to be commingled.

An executory contract for the sale of land, which cannot be completely performed in ninety days, is a "mortgage" K.S.A. 79-3101, and cannot be recorded in the office of the Register of Deeds without payment in full of the Mortgage Registration Tax. K.S.A. 79-3102. This law makes no reference to any particular file or record. It merely states "filed for record".

The lender, here, seeks to record in a public notice file of the Register of Deeds the existence of an executory contract for the sale of specific land, and the assignment of proceeds under that contract. The actual assignment, whether on the original contract of sale or in a separate document, is not before us. But whatever it may be, we believe that the actual financing statement offered here for recording gives public notice of rights in a land sale contract and cannot be recorded without the Mortgage Registration Tax being paid.

It is further our opinion that, if there is to be a recording of this contract of land sale and the assignment of rights under it, it should be recorded in the regular land records in the office of the Register of Deeds, and not in the regular UCC chattel file.

We wish to reaffirm our opinion No. 78-156, dated May 3, 1978, copy of which is attached. Because of the factual differences, and the issues which you raise, we have prepared this additional review.

Mr. Daniel A. Young
July 14, 1978
Page Four

There are just two instances, listed in the Uniform Commercial Code, where the description of land is provided: growing crops and fixtures. The form for the filing in such instances is set out in K.S.A. 1977 Supp. 84-9-402(3).

The form now before us does not conform to the current statute nor the current form approved by the Secretary of State, a copy of which is attached. The form here was an earlier form used only when the filing was in the regular UCC chattel file of the Register of Deeds, and the collateral was strictly personal or chattel property.

Growing crops are considered personal property, not an interest in the real estate on which they grow. The only reason for listing the real estate is to give public notice of the location of the crops. Where crops are listed as collateral in a financing statement, the filing must be in the regular UCC chattel file of the Register of Deeds, and indexed in the name of the debtor. Where the debtor lives in one county and the crops are in another county, filing must be made in the chattel file of both counties. Crops are not fixtures. K.S.A. 1977 Supp. 84-9-401 (a) (Note No. 3).

Had the current form been used in this instance, it would have been obvious that, to be filed in the regular chattel file, the only place to "Describe real estate" would be under growing crops. But the collateral here is clearly not "growing crops".

You also ask if a street address is a sufficient description of real estate: For a filing in the regular UCC chattel file, it is. But for a fixture filing it would be insufficient. K.S.A. 1977 Supp. 84-9-110; 84-9-402 (Note No. 1). In 9 Vernon's Uniform Commercial Code 219, under "Kansas Code Comment", it is stated:

"Although the description may be meager or even erroneous, if the information given will enable a third person by reasonable investigation to ascertain the property included in the mortgage, the description will be held sufficient. Security State Bank v. Jones, 1926, 121 Kan. 396, 247 P. 862."

Mr. Daniel A. Young
July 14, 1978
Page Five

There is another UCC exclusion which seems relevant. It is in K.S.A. 84-9-104(f): "This article does not apply . . . (f) to a sale of accounts . . . or a transfer of a right to payment under a contract to an assignee who is also to do the performance under the contract . . ." When the schedule of payments under the contract is completed, is there any escrowed deed which the bank must deliver to the buyer? What if the buyer defaults in the payments, does the bank under its assignment sue to cancel the contract and repossess the house?

We must again reassert our opinion that the UCC was never intended to be used to provide a secured interest in a real estate sale contract. Local laws govern all transfers of interests in land. Every instrument in writing whereby real estate may be affected must be recorded as provided by law to be effective as against third parties. K.S.A. 58-2221. Public notice of the existence of an executory contract for the sale of land may not be recorded in the office of the Register of Deeds without payment of the Mortgage Registration Tax. K.S.A. 79-3101 - 79-3102.

Very truly yours,



CURT T. SCHNEIDER
Attorney General

CTS:CJM:dh
Enclosure