



STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

August 30, 1978

ATTORNEY GENERAL OPINION NO. 78- 278

Glenn I. Kerbs
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Ford County Courthouse
Dodge City, Kansas 67801

RE: Taxation - Mortgage Registration Tax - Option
To Purchase Land - Disclosure of Option Agree-
ment. K.S.A. 79-3101 et seq.

SYNOPSIS: An option to purchase land may be an executory contract subject to the mortgage registration tax when offered for recording. Such tax cannot be avoided by recording an affidavit or executed memorandum, which incorporates by reference the existence of an option of purchase, but which discloses none of the details of such purchase agreement. The Register of Deeds must require a complete disclosure of the purchase agreement referred to, and, if such disclosure is not made, refuse to record such affidavit or memorandum.

* * * *

Dear Mr. Kerbs:

You submit a "Memorandum of Purchase Option", giving the legal description of certain land, which the named owners give a named buyer "the exclusive and irrevocable option" to buy in the manner provided in the "Option to Purchase" agreement. The buyer wants to record this "Memorandum" but refuses to disclose the option agreement. You ask if your Register of Deeds, in demanding that the agreement itself be produced so that she can see the purchase price

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and the terms of payment before she records the memorandum, is properly exercising her authority? You also ask for other opinions of this office which recognize such authority to demand disclosure.

Although designated as an "Option to Purchase", such an instrument may in fact be a contract to purchase. Davis v. Roseberry, 95 Kan. 411, 415, 148 Pac. 629, 3 A.L.R. 564, 32 AL3 333n (1915); Marquez v. Cave, 134 Kan. 374, 376, 5 P.2d 1081, 12 KLR 489, 55 AL3 165n (1931); Stevens v. Farwell, 155 Kan. 491, 496, 126 P.2d 489 (1942).

The most pertinent case, demonstrating that an instrument, titled as an "option" when it was in reality a contract to purchase, must comply with the mortgage registration law, is Ditzen v. Given, 139 Kan. 506, 32 P. 2d 448, (1934). This case has been followed in Farrell v. The Federal Land Bank of Wichita, 175 Kan. 786, 789, 267 P.2d 497 (1954).

In Ditzen, enforcement of the "option" agreement was denied because the mortgage registration tax was not paid when the instrument was recorded. The facts are that the Register of Deeds should not have recorded it in the first place without collecting the tax. K.S.A. 79-3102 and 79-3107 forbid such recording without payment of tax.

K.S.A. 79-3101 imposes a tax on the recording of a multitude of instruments in these words:

"The words 'mortgage of real property' shall include every instrument by which a lien is created or imposed on real property, ... 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 the possession of such real estate, by the terms of which the grantor holds legal title as security for the unpaid purchase money, shall for the purpose of this act be treated as a mortgage of real property to secure the payment of the unpaid purchase price."
(Emphasis added)

Our office has had occasion to issue a number of opinions detailing the authority of the Register of Deeds to demand disclosure of the contents of additional instruments when such is necessary for proper imposition of the Mortgage Registration tax. In Opinion 75-440 we held that a Register of Deeds had the right to inspect such additional instruments as she deems necessary for her to fill out the form

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required by K.S.A. 79-3104. In Opinion 76-37 an assignment of a real estate purchase contract was attempted to be recorded when the contract itself was never recorded or the tax paid. The assignment gave the names of the sellers and buyer and described the real estate, but did not mention the contract purchase price. We held that the Register of Deeds must have complete knowledge of the contract instrument in order to carry out her duties. In Opinion 76-167 an instrument was offered for recording, which was titled "Affidavit of Equitable Interest" describing specific land. We held that such an instrument was as potent as a lien, because any researcher of title would never buy or loan with such a cloud of title on record, and the lienholder could not enjoy such public notice while avoiding the registration tax. Our most recent opinion along this line is No. 78-229 where a lender attempted to record with the Register of Deeds a UCC financing statement which listed as collateral the proceeds from a land purchase contract upon which a mortgage registration tax had not been paid. The names of the sellers and buyer were listed and the land described, the date of the contract was stated, but the amount of the purchase price was omitted. We held that the UCC file was maintained to give public notice of a lien on personal property, not specific real estate, that K.S.A. 79-3102 covers instruments "filed for record" in any public notice file in the office of the Register of Deeds, and that the Register of Deeds should demand production of the contract itself, before recording the financing statement, so that the proper tax could be assessed. Copies of these opinions are attached.

We believe that this "Memorandum of Purchase Option" may be just another attempt to avoid the Mortgage Registration Tax. What cannot be done directly must not be permitted to be done indirectly. To administer the law properly, the Register of Deeds must examine the option contract itself, not a "memorandum" of it.

There is no tax assessed upon the recording of a pure option to buy land, which has been described as the simple "right to buy at a fixed price within a certain time. Nor will the tax be assessed on a rental lease which contains a provision that the renter shall have the right to buy the property and apply the rents on the purchase price. Fourth National Bank v. Hill, 181 Kan. 683, 693, 314 P.2d 312 (1957).

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It is the intention of the parties "as shown from the four corners of the instrument" which determines the character of the contract. (HILL at page 700)

An option to buy land for an indefinite term is a "nudum pactum". It is meaningless because it violates the law against perpetuities. Yet, this "memorandum" here presented mentions no time limit for the option. To record it, would cloud the title of the described land indefinitely. This is a prime reason to request inspection of the actual document. It is evidence of the existence of a bilateral contract.

Also, the fact that both the sellers and the buyer signed the "memorandum" is evidence of a bilateral contract. If the optionee also signed the purchase agreement along with the owners, he did so because there were reciprocal promises.

The size of the payment for the "option", as well as the right to use such sum as a down payment toward the purchase price, indicates a contract to purchase land, rather than an option.

If the optionee has the right to take possession immediately, while the optionor retains title pending payment in full, it is a contract and not an option, under K.S.A. 79-3101. If in addition to possession, a deed is placed in escrow to be delivered upon payment in full of the agreed purchase price, it is an executory contract and not an option. McGregor v. Ireland, 86 Kan. 426, 428, 121 Pac. 358 (1912).

This line of Kansas decisions above cited is followed in the text of 91 C.J.S. VENDOR AND PURCHASER, Section 5 Option Distinguished from Sale or Contract of Sale, pages 840-845.

In our opinion, the "Memorandum of Purchase Option" should not be recorded without payment of the Mortgage Registration Tax, because it is an instrument which will place a lien on specific land. K.S.A. 79-3101. This tax cannot be computed without an examination of the referenced "Option to Purchase". In the event that this "Option to Purchase" is in fact a pure option to buy for a fixed price within a certain time, then, if the "memorandum" is amended to state such fixed time, it may be recorded without the payment of Mortgage Registration Tax, but the Register of Deeds should keep in her fee files,

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for audit purposes, either a copy of the Option to Purchase,
or notations explaining her reasons for not collecting the
usual tax.

Very truly yours,



CURT T. SCHNEIDER
Attorney General

CTS:gw