



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN  
ATTORNEY GENERAL

October 18, 1979

MAIN PHONE: (913) 296-2215  
CONSUMER PROTECTION: 296-3751  
ANTITRUST: 296-5299

ATTORNEY GENERAL OPINION NO. 79-238

Mrs. Margaret L. Anderson  
Register of Deeds  
Russell County Courthouse  
Russell, Kansas 67665

Re: Taxation--Mortgage Registration Fee--Exemptions

Synopsis: The mortgage registration fee is imposed only upon "mortgages of real property," as said term is defined in K.S.A. 79-3101. An instrument by which a mortgage of real property is assigned from one lending institution to another is not a mortgage of real property and, therefore, is not subject to the mortgage registration fee.

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Dear Mrs. Anderson:

The following factual situation has prompted you to request an opinion from this office.

A husband and wife purchased a home with the proceeds of a loan obtained from the Administrator of Veterans Affairs, an officer of the United States. As a part of that loan transaction, the borrowers executed a mortgage of real property to secure the debt. Upon tender of the mortgage for filing in the office of the register of deeds, no mortgage registration fee was required or collected, since the mortgagee (Veterans' Administration) is not subject to taxes imposed by the state of Kansas. This principle, is well settled and creates no problem. See Home Owners' Loan Corp. v. Anderson, 145 Kan. 209 (1937). Thereupon, the mortgage was filed of record.

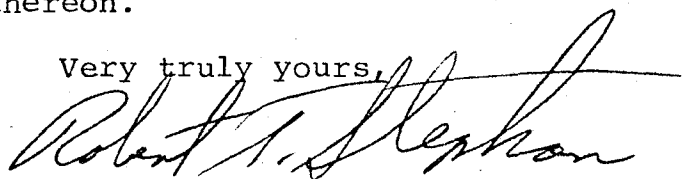
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Thereafter, the Veterans' Administration assigned the mortgage to a non-governmental entity. The assignment was recorded and no mortgage registration fee was imposed. (See Attorney General Opinion No. 61-301, a copy of which is attached hereto, confirming the propriety of such a filing without payment of the registration fee.) However, the assignee subsequently assigned the original mortgage to another non-governmental entity, a mortgage corporation, and the question presented for our consideration is whether the subsequent assignment tendered for filing with the register of deeds is subject to the mortgage registration fee.

The mortgage registration fee is imposed upon every mortgage of real property, unless such mortgage is exempt therefrom. The term "mortgage of real property" is defined in K.S.A. 79-3101, which provides in pertinent part: "The words 'mortgage of real property' shall include every instrument by which a lien is created or imposed upon real property . . . ." Thus, to constitute a mortgage of real property, the provisions of an instrument must create or impose a lien upon real estate. An assignment merely "passes all of the assignor's title and interest to the assignee, and divests the assignor of all right of control over the subject matter of the assignment." Patrons State Bank & Trust Co. v. Shapiro, 215 Kan. 856, Syl. para. 1 (1974). Rephrasing this principle, using the facts therein presented, the assignment from the non-governmental entity to the mortgage corporation merely passes all of the non-governmental entity's title and interest in the mortgage to the mortgage corporation. No lien is created or imposed thereby.

Thus, it is our opinion that the instrument tendered for filing should have been accepted without requiring that the mortgage registration fee be paid thereon.

Very truly yours,



ROBERT T. STEPHAN  
Attorney General of Kansas



Rodney J. Bieker  
Assistant Attorney General

RTS:BJS:RJB:jm

until shown to be within an exclusion. *Kansas State Teachers Ass'n v. Cushman*, 186 Kan. 489, 501, 351 P. 2d 19.

OPINION (61-301), August 25, 1961, to Mr. Robert Osborn, County Attorney, Stockton, Kan.

Re: SAME—*Mortgage Registration Fee, Assignment to Private Party of Mortgage Originally Recorded by Veterans Administration*

QUESTION: When no mortgage registration fee is charged for recording a mortgage held by the Veterans Administration, should such fee be charged for recording an assignment of the same to a private party not exempt from paying state taxes? ANSWER: No.

The statute providing for the imposition of the mortgage registration fee is G. S. 1949, 79-3102, which, in part, is as follows:

"Before any mortgage of real property, or renewal or extension of the same shall be received and filed for record . . . there shall be paid to the register of deeds of the county in which such property or any part thereof is situated, a registration fee . . ."

A companion statute, G. S. 1949, 79-3107, further provides as follows:

"Any mortgage of real property executed on and after March 1, 1925, on which the registration fee as herein provided has not been paid, shall not be filed for record by any register of deeds, and such mortgage shall not be received in evidence in any suit, action or proceeding, and no judgment, decree or order for the enforcement thereof shall be rendered, made or entered in our by any court in the state."

This mortgage registration fee has been held to be a tax (*Missouri-Pacific Railroad Co. v. Deering*, 184 Kan. 283, and cases therein cited) and therefore, not chargeable on mortgages held and recorded by a federal agency which is immune from state taxes. (*Home Owners Loan Corp. v. Anderson*, 145 Kan. 209.)

In determining what transactions come within the purview of the act, it is noted that the statute provides the fee, or tax, shall be paid before a mortgage is filed, a renewal is filed or before an extension is filed. Thus, the specific transactions subject to the fee have been enumerated by the legislature, and in such enumeration an assignment of a mortgage has not been included. The act does not require a fee to be paid whenever an assignment of a mortgage is recorded, even though additional security is given at the time of the assignment. In *Union Pacific Railroad Co. v. Stratmeyer*, 119 Kan. 8, the Court stated:

"The legislature intended to impose the tax on the indebtedness and not on the security. There was no intention to place the burden upon the holder of mortgages recorded prior to the enactment of the present law where additional security was given for an old debt but no new debt was created."

In the situation presented in the above question, the debt was exempt from taxation because it was the property of the federal government. If we hold that the debt loses this characteristic by assignment to a private individual, we will then have placed a burden upon the assignment of mortgages from a federal agency to a private individual, which has not been provided by the statute imposing the mortgage registration tax. It is submitted that if such a result is desirable, then the legislature should modify the existing statutes to clearly include this situation. The *Home Owners Loan Corp. v. Anderson*, supra, case was decided in 1937, and the legislature has had ample opportunity since then to adopt corrective legislation. In view of the fact that they have not modified the statute, it must be assumed they acquiesce in exempting assignments of mortgages from a federal agency to a private individual.

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OPINION (61-208), May 24, 1961, to Mr. Richard Mankin, County Attorney, Emporia, Kan.

*Re: SAME—Mortgage Registration Fee, Exemptions*

QUESTION: When a mortgage is submitted for recording and secures a prior indebtedness which has been increased and which prior indebtedness has been secured by a mortgage filed for record and on which a mortgage registration fee was paid, should a fee be charged on the new mortgage for the entire amount of the debt secured or only upon the increased amount of the indebtedness?

ANSWER: The fee should be charged on the entire amount of the indebtedness secured.

The statute providing for the imposition of the mortgage registration fee is G. S. 1949, 79-3102, which in part is as follows:

"Before any mortgage or real property or renewal or extension of the same shall be received and filed for record on and after the first day of March, 1925, there shall be paid to the register of deeds of the county in which such property or any part thereof is situated, a registration fee. . . ."

If the instrument submitted for recording is a mortgage of real property then the fee provided by the above statute must be paid unless the instrument falls within the exceptions set forth in said statute. A situation which is almost identical to the one set forth in the above question arose in the case reported in *First National Bank v. Lovitt*, 158 Kan. 535. In that case a new mortgage was given to