



STATE OF KANSAS

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September 20, 1982

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ATTORNEY GENERAL OPINION NO. 82-207

Gary L. Flory
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P. O. Box 1103
McPherson, Kansas 67460

Re: Taxation -- Mortgage Registration Fee -- Exemptions Therefrom

Synopsis: The affidavit of equitable interest provided for in K.S.A. 1981 Supp. 79-3102(5) must be given by the purchaser of real property under an executory contract for the sale of real property. The affidavit cannot be given by the seller or some other person who is not the purchaser. Cited herein: K.S.A. 79-3101, K.S.A. 1981 Supp. 79-3102.

* * *

Dear Mr. Flory:

On behalf of the McPherson County Register of Deeds, you seek our opinion concerning the provisions of the fifth exemption clause of K.S.A. 1981 Supp. 79-3102. Specifically, you inquire whether the affidavit of equitable interest provided for in said exemption clause must be given by the purchaser of real property under an executory contract for the sale of real property.

Resolution of your inquiry necessitates a consideration of K.S.A. 79-3101, as well as K.S.A. 1981 Supp. 79-3102. The former statute, in relevant part, provides:

"An executory contract for the sale of real estate . . . 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 the 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 balance of the unpaid purchase price." (Emphasis added.)

K.S.A. 1981 Supp. 79-3102, in part relevant to your inquiry, provides:

"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 of twenty-five cents (25¢) for each one hundred dollars (\$100) and major fraction thereof, of the principal debt or obligation which is secured by such mortgage, and upon which no prior registration fee has been paid. . . . No registration fee whatsoever shall be paid, collected or required for or on any mortgage or other instrument . . . (5) given in the form of an affidavit of equitable interest solely for the purpose of providing notification by the purchaser of real property of his or her interest therein." (Emphasis added.)

The Kansas Supreme Court has determined that the "fee" imposed under the above-quoted statutory provisions, in fact, is a tax. See Missouri Pacific Railroad Co. v. Deering, 184 Kan. 283, 286 (1959). Moreover, the Court also has determined that the tax is imposed upon the mortgagee (lender) and not upon the mortgagor (borrower). See Missouri Pacific Railroad Co. v. Deering, *supra*, and the case cited therein at 287-288. Finally, in regard to the exemption provisions of K.S.A. 1981 Supp. 79-3102, the Court repeatedly has stated: "Where the language of a statute is relied upon as creating an exemption from taxation, it must be strictly construed and the party claiming the exemption must bring himself clearly within the exemption." Meadowlake Hills, Inc. v. Kearns, 211 Kan. 35, Syl. ¶2 (1973). See also First Nat'l Bank v. Lovitt, 158 Kan. 535, Syl. ¶1 (1944).

The rule of strict construction simply means that ordinary words are to be given their ordinary meaning, and a statute subject to strict construction should not be read to add that which is not readily found within it or to read out what, as a matter of ordinary English language, is in it. See State v. Finley, 199 Kan. 615, 619 (1967) and the cases cited therein.

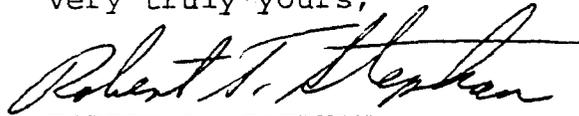
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K.S.A. 1981 Supp. 79-3102 provides that no registration fee shall be required for any "instrument . . . given in the form of an affidavit of equitable interest solely for the purpose of providing notification by the purchaser of real property of his or her interest therein." (Emphasis added.) In our judgment, it is clear that these provisions waive payment of the mortgage registration fee, only if the instrument offered for filing is given: (1) in the form of an affidavit of equitable interest; and (2) solely for the purpose of providing notification by the purchaser of real property of his or her interest therein.

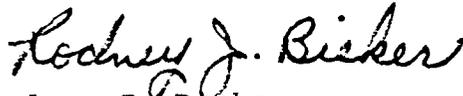
If an affidavit is given by someone other than the purchaser of real property, the instrument, although in the form of an affidavit, does not provide notification by the purchaser of real property of his or her interest in the real property. Moreover, while such an affidavit would provide notification of the purchaser's interest in real property, this is not what is required by this statute. This statute does not merely provide an exemption from the registration fee for any instrument providing notification "of" a purchaser's interest in real property. The statute dictates the person who is required to provide the notification. It requires that the notification be given "by" the purchaser of real property. It logically follows, therefore, that the affidavit, by which the notice is provided, must be given by the purchaser.

Hence, we are of the opinion that the affidavit of equitable interest provided for in K.S.A. 1981 Supp. 79-3102(5) must be given by the purchaser of real property under an executory contract for the sale of real property. The affidavit cannot be given by the seller or some other person who is not the purchaser.

Very truly yours,



ROBERT T. STEPHAN
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Rodney J. Breker
Assistant Attorney General

RTS:BJS:RJB:hle