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June 5, 1984

ATTORNEY GENERAL OPINION NO. 84- 48

David Belling
Miami County Attorney
P.O. Box 245
Paola, Kansas 66071

Re: Personal and Real Property -- Conveyances of Land --
Recordation of Instruments Affecting Real Estate

Synopsis: A register of deeds is required to file of record a written instrument whereby real estate may be affected. Such filing can properly be refused only if the instrument contains apparent errors, or is not proved or acknowledged and certified in the manner prescribed by law, or the register of deeds has been directed by a court not to file the instrument. A register of deeds also may refuse to file instruments that clearly do not affect real estate, or where the law requires some act, such as payment of the mortgage registration fee, before the instrument may be received and filed of record. Cited herein: K.S.A. 58-2211, 58-2221; Affirming Attorney General Opinion No. 82-164.

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Dear Mr. Belling:

As Miami County Attorney and on behalf of the Miami County Register of Deeds you seek an opinion as to the appropriate response to a document presented to the Register of Deeds for filing which is entitled "Land Patent." You indicate that you and the Register of Deeds are uncertain as to whether such a document should be filed as requested.

You have enclosed a copy of the instrument in question. It is captioned "Land Patent (The Title Deed By The Government)", and describes a parcel of property in Miami County. Attached to the document is a copy of an official United States Government land patent which apparently describes the same property (the copy is illegible). A land patent is simply the instrument by which the United States government passes its title to portions of the public domain. See St. Louis Smelting Co., v. Kemp, 104 U.S. 636, 26 L.Ed. 875 (1882). The document attached to the land patent purports to grant "allodium title" (apparently derived from the government patent) to the persons who executed the document, who are described therein as "common law agents."

The word "allodium" as defined by Webster's Third International Dictionary refers to a form of estate found in Anglo-Saxon England during the 11th Century in which absolute possession and control of the estate were vested in the owner as opposed to an estate burdened with feudal duties. Thus, "allodium" refers simply to land which is the absolute property of the owner and not subject to "rent, service or acknowledgement to a superior." See also Black's Law Dictionary, Fourth Ed. (1957). The word "allodial" refers to free ownership as opposed to feudal ownership and has little significance in modern United States property law. Feudal tenures do not and cannot exist in U.S. jurisdictions, thus all property in the U.S. is held allodially, that is, not subject to feudal duties or obligations.¹ See 28 Am.Jur.2d Estates, §4.

Thus, it is not clear what purpose these documents can have, particularly with reference to property which is owned by the persons who execute the document. The apparent purpose is to provide some ill-defined protection to the property, in that the document declares that property with title derived from the government land patent is "impervious to collateral attach (sic) by the City, County, State, or Federal Governments."

While the legal effect of such documents is questionable at best, the Register of Deeds should not be placed in the position of deciding that issue. We have enclosed a copy of Attorney General

¹ See the recent decision by the United States Supreme Court in Hawaii Housing Authority v. Midkiff, Case No. 83-141, in which the Hawaii Legislature dealt with some of the after-effects of a feudal landholding system, in which much of the land in Hawaii was owned by only a few people. However, as this case contained facts based on Polynesian property law, it does not affect the law of this jurisdiction with regard to Anglo-Saxon feudal concepts.

Opinion No. 82-164 which provides some guidance to a Register of Deeds faced with a similarly questionable document titled "common law lien." That opinion concluded that a register of deeds is required to file of record a written instrument whereby real estate may be affected. A register of deeds may properly refuse a filing only if an instrument contains apparent errors, or is not proved or acknowledged and certified in the manner prescribed by law, or the register of deeds has been directed by a court not to file the instrument. In the case of "common law liens" the opinion noted that while such instruments may well be spurious and legally unfounded, "we are constrained to conclude that the Register of Deeds should not be placed in the position of having to determine which instrument should be recorded and which should not, absent judicial instruction." This conclusion is based on the language of K.S.A. 58-2221 which provides in part:

"Provided, It shall be the duty of the register of deeds to file the same for record immediately, and in those counties where a numerical index is maintained in his or her office the register of deeds shall compare such instrument, before copying the same in the record, with the last record of transfer in his or her office of the property and if the register of deeds finds such instrument contains apparent errors, he or she shall not record the same until he or she shall have notified the grantee where such notice is reasonably possible."

Thus, except in the case of "apparent errors" or a court order to the contrary, a register of deeds is obligated to file or record every written instrument whereby real estate may be affected if the instrument is proved and acknowledged and certified in the manner prescribed by law. See K.S.A. 58-2211 et seq. The instrument you have referred to us is clearly a "written instrument" affecting real estate. In the cases where the property affected by the "land patent" is already owned by the person or persons who execute the document it should be filed. While it is likely that the instrument has no legal effect, it does purport to affect real estate and should be filed under the terms of K.S.A. 58-2221. In such a case the claim of "allodium title" by the owners of the property is merely redundant.

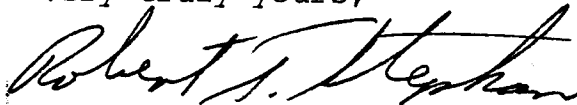
A far more difficult question is presented if such an instrument should be presented for filing by one person on property owned by another. In such a case the only apparent purpose of seeking to file such a document is to harass the legitimate owners of the property. It may be argued that an instrument which purports to grant "allodium title" to one person when the records in the register of deeds office clearly show that the property belongs to another contains "apparent errors." Unfortunately,

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K.S.A. 58-2221 provides in such cases only that the register of deeds not record such instruments until he or she shall have notified the grantee "where such notice is reasonably possible." In the case of a document like the one presented to this office, it is not clear who is the "grantee." It does not appear that the apparent error language of K.S.A. 58-2221 is broad enough to cover this situation. Thus we conclude, as did the cover letter to Opinion No. 82-164 (which is also enclosed), that where apparently spurious instruments are brought to a register of deeds, the proper remedy cannot come from a refusal to file. The party or parties filing such documents may be subject to legal action and money damages, but such relief must come from the courts.

Until a court has ruled on the effect of documents such as the one you present, or until the legislature grants registers of deeds the power to refuse to file such questionable documents, the question of what to do with them is a most difficult one. In the meantime we conclude that the result reached in Attorney General Opinion No. 82-164 regarding "common law liens" is equally applicable to documents to documents entitled "Land Patent." Thus, a register of deeds is required to file of record a written instrument whereby real estate may be affected. Such instrument can properly be refused only if the instrument contains apparent errors, or is not proved or acknowledged and certified in the manner prescribed by law. A register of deeds may also refuse to file instruments that clearly do not affect real estate, or where the law requires some act, such as payment of the mortgage registration fee, before the instrument may be received and filed of record.

Very truly yours,



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Mary F. Carson
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RTS:JSS:MFC:crw
encl.