



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN  
ATTORNEY GENERAL

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

August 29, 1985

ATTORNEY GENERAL OPINION NO. 85-108

Nancy I. Reynolds  
Register of Deeds  
Brown County Courthouse  
Hiawatha, Kansas 66434

Re: Taxation--Mortgage Registration Fee--"Mortgage  
of Real Property" Construed

Synopsis: A present contract for sale, in which no debt is created and no lien is placed upon the property being sold, is not subject to the mortgage registration fee imposed by K.S.A. 79-3101 et seq. The provision for executory contracts found in K.S.A. 79-3101 applies only when complete performance of the contract is deferred for a longer period than ninety days from the execution of the contract. Cited herein: K.S.A. 79-3101.

\* \* \*

Dear Mrs. Reynolds:

As Register of Deeds for Brown County, you request our opinion concerning whether language contained in a particular warranty deed indicates the existence of a lien on the property so as to make recording of the deed subject to payment of the mortgage registration fee imposed by K.S.A. 79-3101.

The deed in question documents the conveyance of a piece of property for a sum of \$39,500.00 "except and subject to:

\$2,000.00 paid as earnest money to Citizens State Bank and the balance of \$37,500.00 to be paid on or before September 1, 1985." You indicate that the deed was to be placed in escrow until the balance was paid, and that this has already taken place (i.e. the balance has been paid and the deed transferred).

The issue is whether the above-quoted language created a mortgage on the property. In Assembly of God v. Sangster, 178 Kan. 678 (1955), the court held:

"In order to create a mortgage contract no particular form of instrument is necessary and no particular words are required. The form of an agreement by which security is given is unimportant if the purpose plainly appears. All that is necessary is that there be a debt and that the instrument creates a lien on real property as security for the payment of the debt." 178 Kan. at 678, Syl. ¶2. (Emphasis added.)

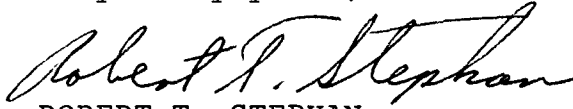
The facts presented in this situation indicate that there was no new debt created. The purchaser was simply given sixty days in which to pay the purchase price, and was not to receive title to the property until full payment was tendered. Thus, it appears that this transaction constitutes a mere contract for sale of real property, and not a lien on real property as security for the payment of the debt.

K.S.A. 79-3101 does provide that "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 . . . be treated as a mortgage of real property to secure the balance of the unpaid purchase price." (Emphasis added.) In the case at hand, however, payment was to be made within sixty days and was in fact made within that time.

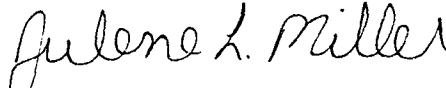
In conclusion, since the transaction in question was more like a present contract for sale (payment being concurrent with receipt of title) than an installment contract (payments being deferred over a period of time and a lien placed on the property to secure payment), there is no new debt and no lien created. This was not

an executory contract as defined by K.S.A. 79-3101. Therefore, recording of the deed is not conditional upon payment of the mortgage registration tax imposed by K.S.A. 79-3101.

Very truly yours,



ROBERT T. STEPHAN  
Attorney General of Kansas



Julene L. Miller  
Assistant Attorney General

RTS:JSS:JLM:jm