



STATE OF KANSAS

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September 17, 1986

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ATTORNEY GENERAL OPINION NO. 86- 131

Sheila Maxwell
Stafford County Attorney
109 North Main
St. John, Kansas 67576

Re: Taxation--Mortgage Registration and Intangibles;
Mortgage Registration--Instruments Subject Thereto

Synopsis: An instrument which purports to assign a leasehold interest in consideration for a reserved production payment is a mortgage of real property for purposes of recording such instrument in the office of the register of deeds and paying mortgage registration fees pursuant to K.S.A. 1985 Supp. 79-3102. Cited herein: K.S.A. 58-2221; 79-3101; K.S.A. 1985 Supp. 79-3102.

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Dear Ms. Maxwell:

As county attorney for Stafford County, you submit to this office an instrument entitled "Assignment, Bill of Sale and Conveyance," and ask if mortgage registration fees should be paid before this instrument is recorded.

The instrument purports to convey "[t]he entire estates, interests, rights and privileges . . . in and to the mineral interests, royalty interests, leases, pooling and other orders, pooling declarations, licenses and permits described in Exhibit 'A' . . ." The interest described in "Exhibit 'A'" which is of relevance to Stafford county (and this opinion) is an oil and gas lease covering lands located in

Stafford county. The instrument states that this conveyance is "for and in consideration of Ten Dollars (\$10.00) and other good and valuable consideration," and further that the assignee's interest is subject to "a production payment . . . in the amount of Four Million, Two Hundred Twenty-Five Thousand Dollars (\$4,225,000)." The sum of these two amounts is deemed to represent the value of the interests conveyed.

K.S.A. 1985 Supp. 79-3102(a) provides:

"Before any mortgage of real property, or renewal or extension of such a mortgage, is received and filed for record, there shall be paid to the register of deeds in the county in which such property or any part thereof is situated a registration fee of \$.25 for each \$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."

K.S.A. 79-3101 defines "mortgage of real property" as including "every instrument by which a lien is created or imposed upon real property, notwithstanding that the debt secured thereby may also be secured by a lien upon personal property." That statute further provides that "real property" includes "all property a conveyance or mortgage of which is entitled to record as real property or interest therein under the laws of this state."

In Attorney General Opinion No. 80-155, we discussed the application of the mortgage registration tax to leasehold interests.

"[Such] interests are considered as real property under the statutes pertaining to the recording of instruments conveying or affecting real estate. K.S.A. 58-2221. As a result, a mortgage or assignment of this type of interest is considered as affecting realty, and [if it is for security purposes is] subject to the mortgage registration fee of K.S.A. 1979 Supp. 79-3102. Ingram v. Ingram, 214 Kan. 415 (1974). This has also been held true for working interests and royalty interests. Luthi v. Evans, 1

Kan.App.2d 114, rev'd on other grounds, 223 Kan. 622 (1978)."

For purposes of filing the instrument in question with the Stafford county register of deeds, it represents an assignment of a leasehold interest and thus is considered as affecting real property. The question remaining to be answered, then, is whether this transaction creates a debt and a security interest.

As set forth above, the instrument in question provides for the assignment of leasehold interests in return for \$10.00 and production payments amounting to \$4,225,000.00. These production payments are described in the instrument as "contingent installment purchase price payments." In Attorney General Opinion No. 81-60 this office considered a similar situation in which an assignment of oil and gas leasehold interests was subject to a reservation by the assignor of a \$1,080,000.00 production payment and interest. We concluded in that opinion as follows:

"[I]t appears the transaction involved in this matter is the sale of the assignor's working interest in oil and gas leases. However, it is a sale on credit. The assignee owes the assignor \$1,080,000, together with interest at the rate of 7 1/2% per annum. The loan is secured by a reservation of production payments, which, in the aggregate, equal the indebtedness of the assignee to the assignor. In short, the assignor, through the reservation clause of this instrument, has a lien upon the production payments to secure payment of the purchase price." Attorney General Opinion No. 82-60.

We affirm this opinion and, in applying it to the current situation, conclude that the instrument in question does create a debt and a security interest in real property for purposes of the mortgage registration tax provided for in K.S.A. 1985 Supp. 79-3102.

In further support of this conclusion, we note that the instrument in question allows the assignee to dispose of the interests acquired by purchasing that portion of the production payment "burdening the Interest to be sold." This indicates that there is indeed an encumbrance on the interests

transferred. In Assembly of God v. Sangster, 178 Kan. 678 (1955), the Kansas Supreme 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. See also Garnett State Savings Bank v. Tush, 232 Kan. 447 (1983).

The Court also said:

"The word 'lien' has been variously defined as being a hold or claim which one has upon the property of another as security for a debt or charge, as a tie that binds property to a debt or claim for its satisfaction, as a right to possess and retain property until a charge attaching to it is paid or discharged, as a charge imposed upon specific property by which it is made security for the performance of an act, and as being synonymous with a charge or encumbrance upon a thing. (Mendenhall v. Burette, 58 Kan. 355, 363, 49 Pac. 93; Bisby v. Quinby, 92 Kan. 86, 140 Pac. 635; 33 Am.Jur., Liens, §2, p. 419; 53 C.J.S., Liens, §1, p. 826.)" 178 Kan. at 680.

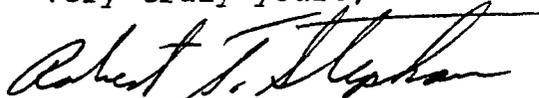
In Sangster, the Court was called upon to determine whether a "bond resolution," adopted by the board of trustees of the church, was an instrument by which a lien was created or imposed upon real property. The instrument contained a provision which stated that the property in question was not to be sold while the bonds were outstanding, unless the purchaser assumed and agreed to pay the outstanding and unpaid bonds, and that the property was not to be further encumbered. The Court in Sangster concluded as follows:

"Plaintiff [church] concedes that the instrument 'affects' real estate, for otherwise it would not be eligible for recording. [K.S.A. 58-2221.] From a careful reading of the entire document it seems clear that the manner in which real estate is 'affected' is that the bondholders are given a lien on the property. That being the case, under the statute, payment of the mortgage registration fee is a prerequisite to recording." (Emphasis by the Court; material in brackets added.) 178 Kan. at 682.

In that the instrument submitted for our opinion prohibits the assignee from selling the interest transferred without providing for payment of the production payment burdening that interest, we conclude that the instrument creates a lien on the leasehold interest for payment of the purchase price.

In conclusion, an instrument which purports to assign a leasehold interest in consideration for a reserved production payment is a mortgage of real property for purposes of recording such instrument in the office of the register of deeds and paying mortgage registration fees pursuant to K.S.A. 1985 Supp. 79-3102.

Very truly yours,



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Julene L. Miller
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