



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 86- 137

Anne Reves, Registrar
Pottawatomie County Register of Deeds
Pottawatomie County Courthouse
Westmoreland, Kansas 66549

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

Synopsis: An instrument which purports to assign a debtor's right to receive payment under a contract for the sale of real estate represents a security interest in personality and must be filed accordingly in order to perfect the creditor's security interest. The instrument may also be recorded in the office of the register of deeds in the county in which the real estate is located, as the instrument is such that "real estate may be affected thereby." K.S.A. 58-2221. Further, since the instrument is not a mortgage of real estate as defined in K.S.A. 79-3101, no mortgage registration fee may be assessed for such recording. If, however, the instrument incorporates by reference an executory contract for the sale of the real estate which has never been recorded, and thus upon which no mortgage registration fee has been paid, then a mortgage registration fee must be collected based on the amount of the indebtedness involved in the executory contract. This is so because one cannot do indirectly (record an executory contract without paying mortgage registration fees) that which one could not do directly. Cited herein: K.S.A. 58-2221; 79-3101; K.S.A. 1985 Supp. 79-3102; K.S.A. 84-9-102; K.S.A. 1985 Supp. 84-9-401.

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Dear Ms. Reves:

As Register of Deeds for Pottawatomie County, you request our opinion regarding a certain instrument presented for recording in your office. The instrument is an assignment of the assignor's "right, title, interest and equity in and to a contract for the sale of certain real estate" as consideration for a \$20,000.00 loan. We refer to this instrument hereinafter as "the assignment," or "the instrument in question." The contract pledged as security in the instrument in question is an executory contract under which the assignor sold real estate to a third party on credit. That executory contract was never recorded, and thus no registration fee was paid thereon, but it is, of necessity, referenced in the instrument now sought to be recorded.

You indicate in your request letter that the assignee in the instrument in question, Citizens State Bank and Trust Company (the bank), understands that the instrument represents a security interest in personalty, i.e. the executory contract (K.S.A. 84-9-102(3) and official comment 4) and thus should be filed centrally with the Secretary of State's office. K.S.A. 1985 Supp. 84-9-401(1)(c). However, the bank further requests that you file the Form UCC-1 Financing Statement in your UCC files and index and record the assignment in your real estate files. The bank cites In re Southworth 34 U.C.C. Rep. 1372 (D.Kan. 1982) and Barkley Clark, The Law of Secured Transactions Under the Uniform Commercial Code, §1-36 (Supp. 1984) as authority for the proposition that a creditor which holds an assignment of the debtor's right to receive payment under a contract for deed to real estate should file a financing statement pursuant to Article 9 of the Code, and "should also perfect an interest represented by an assignment of the contract seller's reversionary interest in the land itself by a local real estate recording." Clark, supra.

The Bank has agreed to pay a mortgage registration fee for the recording of the assignment based on the \$20,000.00 debt secured by the assignment. You question whether the underlying executory contract must be presented for collection of the mortgage registration fee pursuant to K.S.A. 79-3102, and if it is appropriate to collect the fee on the assignment as well.

In Attorney General Opinion No. 77-202, this office was presented with a situation very similar to that currently before us. An executory contract for the sale of real estate between X (the seller/assignor) and Y (the purchaser) was

assigned by X to Z Savings Association (the assignee) as security for a debt. Opinion No. 77-202 discussed the situation and concluded as follows:

"K.S.A. 79-3101 makes the recording of [an] executory contract for the sale of real estate, the complete performance of which is deferred for a longer period than ninety days, subject to the mortgage registration fee. The assignment [in question] incorporates by reference all the necessary details of the original contract. The recording of the assignment would in effect be the recording of the original contract of sale.

"Your letter indicates Z is insisting that all he has is an assignment of the right to receive payments on the contract, not the contract itself. This is questionable. If all that Z has is an assignment of accounts receivable, then Z should file a financing statement listing as collateral an [instrument and file accordingly].

. . . .

"But Z does not do this. Z wants the assignment of record in the land records to show against the real estate described in the purchase contract. Why? It is because Z wants to protect rights under that contract to repossess the land in case of default, just as X might have done. Z wants to put this on record as a lien against that land, so it will be prior to any subsequent claimant or intervening lien holder. Whatever the reason, Z is undertaking to place a lien on real estate in Wallace County by recording an assignment of a purchase contract which says that Z succeeds to the rights of X the seller. Had X offered the contract for recording, the tax would have been assessed. Z, as successor to X, cannot do indirectly what X could not do directly. If this executory contract is to be made a matter of record, the

recorder, whomever he may be, must pay the registration tax." See also Attorney General Opinions No. 81-180; 82-107.

Thus, it was concluded that an executory contract used as security for a subsequent mortgage must have mortgage registration fees paid on it before the subsequent mortgage could be recorded.

In the situation quoted above, Z Savings Association was virtually stepping into the shoes of X, the seller under the executory contract. In the present situation, the bank has been assigned all of the seller's right, title, interest and equity in and to a contract for the sale of real estate, as set out in the contract between the seller and a third-party purchaser and evidenced by the instrument in question. The instrument names the third-party purchaser, states the date of that executory contract, and describes the real property which was sold under that contract. Thus, all relevant terms of the executory contract are referenced by the assignment now offered for recording.

The consideration for the sale of the real estate under the executory contract is not stated in the assignment, but the absence of this term does not alter our conclusion. The executory contract has been effectively incorporated by reference into the assignment, making it a matter of record as a lien on real estate and thus must be treated the same as if the original contract is offered. Since the bank has stepped into the shoes of the seller/mortgagee, it must pay the mortgage registration fee upon the executory contract. We note that in Attorney General Opinion No. 75-440 it was found that the register of deeds "has the right to inspect such additional instruments as may be necessary to establish to his or her satisfaction the full amount of consideration secured by a mortgage [in this case the executory contract] in order to assess the proper fee." Thus, the register of deeds may inspect the executory contract to determine the amount of the debt upon which the mortgage registration fee is to be based.

While we feel that mortgage registration fees must be assessed on the underlying executory contract, we do not believe that they must also be charged on the instrument which represents the assignment. As indicated previously, the assignment itself creates a security interest in personalty. The executory contract, an instrument, is the security given under the assignment. The Uniform Commercial Code (UCC) applies to any transaction intended to create a security interest in an instrument. K.S.A. 84-9-102(1)(a).

"[A] UCC financing statement, which lists as security for repayment of a debt 'the proceeds' of an executory contract for the sale of real property, does not transfer an interest in, or create a lien upon real property. Such a statement merely shows that the secured party has a security interest in an instrument, i.e., the executory contract for the sale of real property. See note #4 of the Official UCC Comment to K.S.A. 1979 Supp. 84-9-102.

"K.S.A. 1979 Supp. 84-9-102(3) specifically provides that Article 9 of the Uniform Commercial Code applies to a security interest in an instrument, even though the instrument itself is secured by a real estate mortgage. In the case of a UCC financing statement listing as security the proceeds from an executory contract for the sale of real property, the debtor is merely pledging as collateral for a loan an interest owned by it in an instrument. The UCC specifically covers such a pledge of security. K.S.A. 1979 Supp. 84-9-102(3)." Attorney General Opinion No. 80-196. See also Attorney General Opinions No. 80-29; 81-107.

Thus, an instrument which assigns the right to receive payment under a contract for the sale of real estate should be treated as a security interest in personalty for filing purposes. However, "[the] instrument is such that 'real estate may be affected' thereby, and thus, under K.S.A. 58-2221, if the instrument is proved or acknowledged, and certified in accordance with the provisions of K.S.A. 58-2211 to 58-2219, inclusive, the instrument also may be filed in the real estate records [and], since the instrument is not a mortgage of real property, . . . no mortgage registration fee is due [thereon]." Attorney General Opinion No. 82-127.


In your request letter, you indicate your feeling that mortgage registration fees should be collected for recording the assignment. You base your conclusion on Attorney General Opinion No. 83-119. The facts upon which that opinion was based, however, were materially different than those presented for consideration in this instance. In Opinion No. 83-119, the instrument sought to be recorded was one in which the

purchaser of real estate under an executory contract was granting a lien on his equitable interest in the property. It was concluded in that opinion that if the instrument gave notice of the existence of the executory contract through which the purchaser obtained his interest in the real property, a mortgage registration fee would be assessed on the loan then being made to the purchaser as well as on the principal amount of the executory contract.

In the situation currently before us, however, the instrument to be recorded is one in which the seller of real estate under an executory contract is conveying his interest in the contract, which involves the receipt of payments under the contract and the power to enforce the contract. No additional lien is placed on the property by virtue of this assignment, therefore no mortgage registration fee need be paid on the assignment.

In conclusion, an instrument which purports to assign a debtor's right to receive payment under a contract for the sale of real estate represents a security interest in personality and must be filed accordingly in order to perfect the creditor's security interest. The instrument may also be recorded in the office of the register of deeds in the county in which the real estate is located, as the instrument is such that "real estate may be affected thereby." K.S.A. 58-2221. Further, since the instrument is not a mortgage of real estate as defined in K.S.A. 79-3101, no mortgage registration fee may be assessed for such recording. If, however, the instrument incorporates by reference an executory contract for the sale of real estate which has never been recorded, and thus upon which no mortgage registration fee has been paid, then a mortgage registration fee must be collected based on the amount of the indebtedness involved in the executory contract. This is so because one cannot do indirectly (record an executory contract without paying mortgage registration fees) that which one could not do directly.

Very truly yours,


ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS


Julene L. Miller
Deputy Attorney General