



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 90- 61

Lewis A. Heaven, Jr.
Special Counsel for Johnson County
Register of Deeds
6700 Antioch, Suite 420
P.O. Box 3867
Merriam, Kansas 66203-0867

Re: Taxation--Mortgage Registration and Intangibles;
Mortgage Registration--Amount of Fee Based on
Amount of Debt Secured

Synopsis: The mortgage registration fee to be collected upon the filing of a mortgage is based on the amount of principal debt or obligation secured by the mortgage, and is not affected by the value of the property constituting the security. Determination of the amount any given mortgage secures must be made on a case-by-case basis, construing the mortgage and underlying note to determine the intent of the parties. A mortgage given to secure repayment of a \$100,000 indebtedness and which will not be released until the entire \$100,000 is repaid and other conditions met, secures the entire \$100,000 even though it contains a statement to the contrary. Mortgage registration fees should therefore be assessed based on the \$100,000 debt. Cited herein: K.S.A. 79-3102.

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Dear Mr. Heaven:

As counsel for the Johnson county register of deeds, you request our opinion regarding the amount of mortgage registration fees to be collected upon the filing of a mortgage which has essentially the following characteristics: 1) The mortgage states that it is given to secure an indebtedness of \$100,000; 2) this indebtedness is evidenced by a specific note which is referenced in the mortgage; 3) the mortgage contains a statement to this effect: "The lien of this mortgage shall not exceed at any one time \$10,000."; 4) the mortgage provides for foreclosure on the property described therein upon the mortgagor's default in payment or other conditions of "the note" or "the indebtedness".

In a letter to the Seward county register of deeds dated November 8, 1989, this office took the position that the mortgage registration fee should be based on the amount of \$100,000 in these circumstances. Our position remains unchanged.

K.S.A. 79-3102 provides that the fee is to be based on "the principal debt or obligation which is secured by such mortgage, and upon which no prior mortgage registration fee has been paid," and that "[a]fter the payment of the registration fees . . . the mortgage and the note thereby secured shall not otherwise be taxable." (Emphasis added). The Kansas Supreme Court has held that the mortgage registration fee "is determined entirely by the sum secured, and is not at all affected by the value of the property constituting the security." Union Pacific Rld. Co. v. Stratemeyer, 119 Kan. 8, 9 (1925). "The legislature intended to impose the tax on the indebtedness and not on the security," id., at 10. See also Attorney General Opinions No. 85-23, 75-382; 61-115. Thus, the amount of the mortgage registration fee will depend on the amount of principal debt or obligation secured by the mortgage, and the fact that the real estate involved does not fully secure the debt is of no consequence.

The rules for construing mortgages are stated in Carpenter v. Riley, 234 Kan. 758, 763 (1984):

"Promissory notes and mortgages are contracts between the parties, and the rules of construction applicable to contracts apply to them. First Nat'l Bank & Trust Co. v. Lygrisse, 231

Kan. 595, 647 P.2d 1268 (1982). The primary rule is to obtain the intention of the parties. A mortgage and a note secured by it are to be deemed parts of one transaction and construed together as such; the provisions of both should be given effect, if possible. The intention of the parties is to be determined from an examination of both the mortgage and note, not from one separately, and that intention must prevail. Provisions of the mortgage relating to the indebtedness itself have the same effect as if incorporated into the note, where the note contains a provision making the mortgage a part thereof." See also, Home State Bank v. Johnson, 240 Kan. 417, 426 (1987); 55 Am.Jur.2d Mortgages §§ 155, 176 (West 1971).

Generally, "a mortgage must truly describe the debt intended to be secured." 55 Am.Jur.2d Mortgages § 152 (West 1971). "In this connection it has been said generally that the description of the obligation must be correct as far as it goes and not of a character to mislead or deceive. . . ." Id.

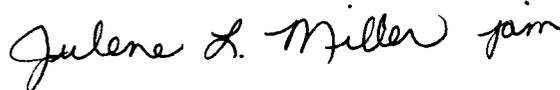
The mortgage in question states that the lien thereby created shall not exceed \$10,000 of the \$100,000 indebtedness. It does not, however, specify which \$10,000 it secures. We do not know from the terms of the mortgage instrument whether it is the first \$10,000 to be paid down which is supposed to be secured, the last \$10,000, or something in between. Further, even if we could determine the debt "secured," there is no provision for release of the mortgage after that \$10,000 is paid. The mortgage contemplates that the property is to be held as security until the entire \$100,000 debt is paid. These provisions, taken together and construed with the note evidencing the debt, lead us to conclude that, despite the one sentence in the mortgage attempting to limit the amount secured, the mortgage in reality secures the entire \$100,000 indebtedness. If the mortgage more specifically described a lesser amount to be secured and provided for its release upon repayment of that lesser amount, then mortgage registration fees would be collected only on that lesser amount. Exactly what amount any given mortgage secures must be determined on a

case-by-case basis, construing the documents involved to determine the intent of the parties.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Julene L. Miller
Deputy Attorney General

RTS:JLM:jm