



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

October 23, 1990

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
TELECOPIER: 296-6296

ATTORNEY GENERAL OPINION NO. 90- 117

Philip E. Winter
Lyon County Counselor
Lyon County Courthouse
Emporia, Kansas 66801

Re: Taxation--Mortgage Registration and Intangibles;
Mortgage Registration--Words and Phrases Defined;
"Mortgage of Real Property"

Synopsis: An instrument creating a lien on real property as security for an appearance or bail bond is subject to payment of mortgage registration fees. Cited herein: K.S.A. 79-201 Second; 79-201a Second; 79-3101; 79-3102.

* * *

Dear Mr. Winter:

As Lyon county counselor you request our opinion regarding payment of mortgage registration fees. You provide for our review copies of instruments which have been presented to the register of deeds for filing in the real estate records. These instruments bear various titles ("affidavit," "mortgage," etc.), but each appears to create a lien on real estate in favor of the state or a bonding company to secure an appearance bond or bail bond. You question whether mortgage registration fees should be assessed and collected before filing such instruments of record.

K.S.A.79-3102 provides in part:

"(a) 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 of 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."

The term "mortgage of real property" is defined at K.S.A. 79-3101 to include "every instrument by which a lien is created or imposed upon real property." Kansas courts have consistently held that the form of an agreement by which security is given is unimportant if the purpose plainly appears.

"[I]n order to create a mortgage contract no particular 'form' of instrument is necessary and no particular words are required. . . . 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." Assembly of God v. Sangster, 178 Kan. 678, 680 (1955) (emphasis in original). See also Garnett State Savings Bank v. Tush, 232 Kan. 447, 453 (1983); Misco Industries, Inc. v. Board of Sedgwick County Commissioners, 235 Kan. 958, 963 (1984) ("the fact that an instrument is entitled Notice does not preclude it from being a mortgage").

Thus, whether the instrument in question is entitled "mortgage" or "affidavit," or something else, is of no consequence. If there is an intent on the part of the mortgagor to pledge his or her land for the payment of a sum of money or the performance of some other act, the instrument documenting this intent is a mortgage (Misco, 235 Kan. at 964) and is subject to the mortgage registration fee unless otherwise exempted.

The instruments in question each purport to create a lien on real estate in order to secure an appearance or bail bond. A bail bond is defined generally as:

"A written undertaking, executed by the defendant or one or more sureties, that the defendant designated in such instrument will, while at liberty as a result of an order fixing bail and of the execution of a bail bond in satisfaction thereof, appear in a designated criminal action or proceeding when his attendance is required and otherwise render himself amendable to the orders and processes of the court, and that in the event he fails to do so, the signers of the bond will pay to the court the amount of money specified in the order fixing bail." Black's Law Dictionary 128 (5th ed. 1979).
(Emphasis added).

Courts have generally held that a bail bond is an obligation that is extinguishable upon performance by the defendant of such acts as he may be required to perform. See Matter of Estate of Dorfman, 486 N.E.2d 310, 315 (1985). Thus, there is an intent on the part of the mortgagor pledging property to secure an obligation; in our opinion the instrument documenting the lien is subject to mortgage registration tax.

We are aware of no exemptions from the mortgage registration fee for a bonding company filing such mortgages. The exemptions listed in K.S.A. 79-3102(d) do not speak to mortgages filed for purposes of securing bail bonds, whether the mortgagee be a bonding company or the state. Further, article 11, section 1 of the Kansas constitution does not operate to exempt such mortgages. Subsection (b) specifically states that its provisions do not apply to the taxation of mortgages. See also Von Ruden v. Miller, 231 Kan. 1, 9 (1982) (article 11, section 1 of the constitution applies only to ad valorem property taxes, and not to specific property taxes); Wheeler v. Weightman, 96 Kan. 50, 70 (1915) (the mortgage registration fee is a specific property tax). It may be argued that K.S.A. 79-201a Second exempts such mortgages when the state is the mortgagee. This provision states that all property used exclusively by the state "shall be exempt from all property or ad valorem taxes levied under the laws of the state of Kansas." As mentioned previously, the Kansas Supreme Court has held that the

mortgage registration fee is a property tax. Wheeler v. Weightman, supra. However, in Assembly of God v. Sangster, 178 Kan. 678, 682 (1955) the court noted the absence of an express exemption in K.S.A. 79-3102 for payment of mortgage registration fees by a religious corporation and held that the mortgage registration fee was required for filing a mortgage of real property of a church despite K.S.A. 79-201 Second.

"However, the court avoided giving a direct answer to the question whether a church organization is required to pay the mortgage registration fee, by reasoning that since it is the mortgagee and not the mortgagor who is interested in seeing that a mortgage on real estate is recorded, and since it is he who pays the registration fee, no direct exaction was being made from the church and the fee had to be paid. Under the facts of the Assembly of God case, the mortgagee was a commercial corporation (bank). Where the mortgagee is also a religious corporation, the question is directly presented whether such a corporation is required to pay the mortgage registration fee.

"The settled rule in this state is that taxation is the rule, exemption is the exception, and one claiming an exemption must clearly disclose his right thereto. Clements v. Ljungdahl, 161 Kan. 274, 167 P.2d 603 (1946). . . . Tax structures will not be extended by implication beyond the clear import of language employed therein, or so as to include (or exclude) matters not specifically embraced. Williams v. Board of County Commissioners, 192 Kan. 548, 389 P.2d 795 (1964); Grauer v. Director of Revenue, 193 Kan. 605, 396 P.2d 260 (1964). Exemptions from taxation are regarded as in derogation of sovereign authority and therefore exist only by virtue of constitutional or statutory provisions. Thus, the right to exemption is not inherent in the person or property exempted, but is a matter of grace and not

of right, and exists only by grant. 84 C.J.S. Taxation, § 215. More correctly state, then, there is a policy to exempt religious property and activity from taxation when it can be shown that such property or activity qualifies for an exemption under the strict construction of a specific statute. Where there is no exemption provided, in line with the above principles one would presume that the legislature intended that no exemptions be allowed. The basic principle is best summed upon in Manhattan Masonic Temple Ass'n v. Rhodes, 132 Kan. 646, 296 Pac. 734 (1931):

"'Kansas is properly classified with the jurisdictions which adhere to the rule that constitutional and statutory provisions exempting property from taxation are strictly construed and all doubts resolved against the exemption.'

"Under Kansas Constitution, article 11, section 1 and K.S.A. 1968 Supp. 79-201, property used exclusively for religious purposes is exempted from taxation. Assuming the mortgage registration fee is a tax on property, we do not think the use is exclusively for religious purposes in this instance. In Sunday School Board of the Southern Baptist Convention v. McCune, 179 Kan. 1, 5, 293 P.2d 234 (1956), our supreme court said where the word 'exclusive' has been used 'it is the sense that the use made must be only, solely, and purely for the purpose stated in our constitution, and without admission to participate in any other use.' The facts of this case were that plaintiff, a nonprofit organization established for the purpose of supporting and maintaining Southern Baptist Sunday Schools, printed, purchased and distributed by sale religious literature, supplies, books, stationery and general office supplies. It had a place of business known as the Baptist Book Store in Wichita. The

merchandise property, moneys and credits were assessed by the State Commission of Revenue for ad valorem taxation. The court in upholding the tax reasoned that the primary use to be made of the merchandise property was to sell it and the secondary use was to use the gain for religious purposes. 'We cannot say the use here was exclusively for a religious purpose.' Although that case is distinguishable from the present facts, it is analogous, since the activity of a mortgagee is also in the nature of a business activity. Operating a loan corporation does not seem to be in the nature of an exclusive religious activity.

"'Nothing . . . can be said to support a contention that an educational or religious organization may engage in a business activity and because profits from operation thereof are devoted to educational and religious purposes that the . . . business [is] exempt from taxation.' Sunday School Board of the Southern Baptist Convention v. McCune, supra, at p. 8." V Opinions of the Attorney General 576, 577, 578 (1966). See also VI Opinions of the Attorney General 718 (1969).

Similarly, a mortgage which creates a lien in favor of the state and which is filed by the state to secure the payment of a bond should the defendant fail to appear in court, is simultaneously used by the defendant/mortgagor to effect his release pending his scheduled appearance. We believe the courts would find a dual use in this case, as was done recently in Board of Park Commissioners v. Sedgwick County, Kan.App.2d _____, case no. 64839 (Oct. 12, 1990). Because the state is not clearly entitled to an exemption in this case, and because taxation is the rule and exemptions are the exception, it is our opinion that mortgage registration fees must be paid by the state, as well as by

other mortgagees not otherwise exempted, upon the filing of a mortgage to secure an appearance or bail bond.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Julene L. Miller
Deputy Attorney General

RTS:JLM:jm