



STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

August 25, 1976

ATTORNEY GENERAL OPINION NO. 76-269

Mr. James L. Sweet
Saline County Attorney
City-County Building
Salina, Kansas 67401

RE: Taxation--Mortgage Registration--Second Mortgage

Synopsis: A second mortgage, taken by the guarantor of the payment of the first mortgage note, recorded on the same real estate for the same amount of indebtedness on the same date, is actually an additional security for the payment of the one indebtedness. The mortgage registration fee can be collected but once on a single indebtedness.

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Dear County Attorney Sweet:

You enclose photocopies of two mortgages, each for the same amount, taking as security the same real estate, and recorded in your county Register of Deeds on the same date on successive pages of the same book. The mortgagee of the first mortgage, an insurance company, actually loaned the money and was the payee of a note. The mortgagee of the second mortgage advanced no money, but did give a guarantee to the first mortgagee that the mortgagors would faithfully perform the payments on said note. Upon recording both instruments, there was charged and collected a mortgage registration fee or tax of identical sums of money: \$1,487.50. You ask if this double charge is proper under the statutes.

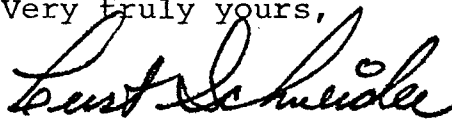
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In our opinion, it is the intent of the legislature to impose the registration fee on the indebtedness, and not the security. Union Pac. Rld. Co. v. Stratemeyer, 119 Kan. 8, (1925). The fee shall be collected only once on a single indebtedness. Fourth National Bank v. Hill, 181 Kan. 683, 689 (1957). The fee is a tax in lieu of all other taxation, and ad valorem tax collection procedures apply to it. Meadowlark Hill, Inc. v. Kearns, 211 Kan. 35 (1973). There has been a double taxation here. The second mortgage was given only as additional security for payment of a single debt.

You further ask if the fee should have been taxed but once, how can this error now be rectified.

Mortgage registration fees are credited to the county general fund. K.S.A. 79-3104. Ordinarily, the Board of County Commissioners has the authority to grant refunds for over-payment of taxes by reason of clerical error or irregularity, K.S.A. 1975 Supp. 79-1701a, but this authority expires on August 1 of the year succeeding the year of over-payment. The double payment here was made on June 26, 1975. The Board of Tax Appeals now is the only authority which can order this refund under K.S.A. 1975 Supp. 79-1702.

Very truly yours,



CURT T. SCHNEIDER
Attorney General

CTS/CJM/cgm