



STATE OF KANSAS

## Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

**Curt T. Schneider**  
Attorney General

February 10, 1978

ATTORNEY GENERAL OPINION NO. 78- 64

Lyndus Henry  
County Counselor  
Box 31-A  
Olathe, Kansas 66061

RE: Mortgage Registration - Exemptions - Subsequent Mortgages including first mortgage debt - Necessity of same lender. K.S.A. 79-3102(3).

SYNOPSIS: To prevent the payment of mortgage registration tax twice by the same lender upon the same debt, or obligation, the Kansas legislature provided for the filing of an exemption affidavit upon the recording of a second mortgage, which includes a previously recorded mortgage "with the same lender" and upon which the fee was paid. The mortgage registration fee is in fact a property tax upon a specific intangible. It is paid but once, "and the mortgage and note thereby secured shall not otherwise be taxable." Even though the mortgagor may sell the property, the same lender may claim the exemption upon increasing the mortgage with the buyer. But if the mortgagor sells the property and there is a new lender, then the exemption is lost for the reason that there is a new debt with a new taxpayer.

\*

\*

\*

Dear Mr. Henry:

You ask if an exemption affidavit may be filed at the time of recording a second mortgage, which includes a previously recorded mortgage debt, and the mortgagor has conveyed the real estate subject to the first debt and

a) where the lender on both the first and second mortgages is the same; or

Lyndus Henry  
February 10, 1978  
Page Two

b) where the lender on the first and the second mortgages is different?

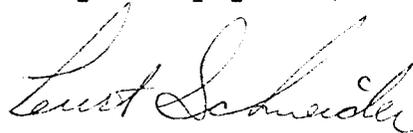
In our opinion, where the lender in both the first and second mortgages is the same, the exemption can be claimed. K.S.A. 79-3102(3) specifically mentions "with the same lender". But if the lender on the second mortgage is different from the lender on the first, then there is a new debt or obligation to the new lender and the mortgage registration fee for the full sum must be charged.

The mortgage registration fee is a tax, normally paid by the mortgagee. Meadowlark Hill, Inc. v. Kearns, 211 Kan. 35, Syl. #1, 505 P. 2d 1127 (1973). The Constitution of Kansas, Article 11, Section 1, was amended by vote of the people in November, 1924, and the following year, by companion acts, the Kansas legislature passed the Mortgage Registration Law (K.S.A. 79-3101 - 79-3107) and the Intangibles Tax Act (K.S.A. 79-3108 - 79-3125). Both are property tax laws, imposing a special formula of ad valorem taxation on "money, mortgages, notes and other evidences of debts", as authorized by this constitutional change. National Bank of Tulsa v. Warren, 177 Kan. 281, 284-285; 279 P.2d 262 (1955). The tax is not on the mortgagor or his successor in title. The tax is on an intangible belonging to the mortgagee, the lender. Assembly of God v. Songster, 178 Kan. 678, 680, 290 P.2d 1057 (1955).

The whole purpose of a mortgagee wanting to record a mortgage is to impart public notice of the existence of the lender's lien. It is a perfect time to collect intangible tax on the note and its security which belong to the lender.

The fact that the mortgagor conveys to another does not change the relationship of the lender to the debt, where the buyer assumes the mortgage. But when the mortgagor conveys to a buyer who elects to do business with another lender, then a situation arises where the new lender must either recognize the first mortgage as a priority debt, or the new lender must pay off the first mortgage. But in paying off the first mortgage, the second lender has created an entirely new debt or obligation, all of which is subject to a new tax, imposed upon a new taxpayer. In such case there is no double taxation.

Very truly yours,



CURT T. SCHNEIDER  
Attorney General