



STATE OF KANSAS

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August 4, 1980

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ATTORNEY GENERAL OPINION NO. 80- 175

The Honorable David F. Louis
State Representative, Eighteenth District
10716 West 52nd Circle
Shawnee, Kansas 66203

Re: Taxation--Mortgage Registration Fee--Applicability

Synopsis: Quitclaim deeds, which contain a reference to a lien on real property created by a court-approved separation agreement, are not "mortgages of real property," as defined in K.S.A. 79-3101, nor are they given as security for a debt. Such deeds, therefore, are not subject to the mortgage registration fee. However, contracts between a homeowners association and members thereof which provide for the payment of annual membership dues, and which further provide that if said annual dues are not paid, the amount thereof shall constitute a lien upon the member's real property, are "mortgages of real property" within the meaning of this statute. Thus, such contracts cannot be filed of record without payment of the mortgage registration fee. Attorney General Opinion No. 79-4 is hereby withdrawn. Cited herein: K.S.A. 58-2221, 79-3101.

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Dear Representative Louis:

You advise us that the Register of Deeds of Johnson County, Kansas, is requiring payment of the mortgage registration fee before recording the following types of instruments:

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- (1) quitclaim deeds which contain a reference to a lien created by a court-approved separation agreement. (You give as an example: "Subject to a lien in favor of John Doe, more particularly described in a Separation Agreement dated March 12, 1980, and filed in the District Court of Johnson County, Kansas, Case No. 12345"); and
- (2) contracts between homeowners associations and members thereof which provide for the annual payment of membership dues, and which further provide that if said annual dues are not paid, the amount thereof shall constitute a lien upon the member's real property.

You request our opinion of whether the mortgage registration fee should be collected on these instruments.

Such documents are tendered for filing in the Register of Deeds' Office pursuant to K.S.A. 58-2221, which in pertinent part, provides:

"Every instrument in writing . . . whereby any real estate may be affected, proved or acknowledged, and certified in the manner hereinbefore prescribed, may be recorded in the office of the register of deeds of the county in which such real estate is situated"

K.S.A. 79-3101, which is the definition section of the Mortgage Registration Fee Act, reads in part:

"The words 'real property' and 'real estate' as used in this act . . . shall include all property a conveyance or mortgage of which is entitled to record as real property or interest therein under the laws of this state. The words 'mortgage of real property' shall include every instrument by which a lien is created or imposed upon real property, notwithstanding that the debt secured thereby may also be secured by a lien upon personal property. . . ."

The Kansas Supreme Court has held "[t]he mortgage registration fee act [K.S.A. 79-3101 et seq.] applies only to mortgages of real property." (Emphasis added.) Assembly of God v. Sangster, 178 Kan. 678, 679 (1955). "It was not intended that the act should apply to other than mortgages of real property."

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National Bank of Tulsa v. Warren, 177 Kan. 281, 285 (1955). The Court also has ruled that, while no particular form of instrument is necessary or particular words are required in order to create a mortgage contract, for there to be a "mortgage of real property," as defined in K.S.A. 79-3101, it is necessary 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, supra, at Syl. Para.3.

In regard to quitclaim deeds which reference separation agreements, it is obvious the quitclaim deed is not the instrument by which a lien is created or imposed upon real property. The lien is created by a court-approved separation agreement. Thus, such quitclaim deeds are not "mortgages of real property." Such deeds do not create or impose a lien on real property. In addition, such quitclaim deeds are not given as security for a debt. The grantor in such deeds owes no debt to the grantee. It is the grantee who owes the grantor.

Based upon both of the foregoing reasons, we are of the opinion the Johnson County Register of Deeds is in error in requiring payment of the mortgage registration fee prior to recording quitclaim deeds which merely reference a lien on real property created or imposed by a court-approved separation agreement. Such instruments are not "mortgages of real property," nor are they given as security for a debt.

The homeowners association contracts to which you refer, however, are, in our judgment, mortgages of real property. By the express terms of such contracts, a lien on the association member's real property is given as security for payment of the annual membership dues. In our judgment, such annual dues are a debt within the ambit of K.S.A. 79-3101.

In Kansas City Life Ins. Co. v. Banaka, 150 Kan. 334 (1939), the Court, in determining that a particular deed of trust executed by the insurance company was, in fact, a mortgage of real property, said:

"Plaintiff argues that in reality there is no debt secured by this deed of trust, and therefore it is not a mortgage. The point is not well taken. A valid mortgage may be made to secure future advances as well as for an existing liability. (Union State Bank v. Chapman, 124 Kan. 315, 259 Pac. 681, 41 C.J. 462.) Also, a valid mortgage may be given to indemnify against a contingency which in fact may never happen. (Garden City Nat'l Bank v. Gann, 121 Kan. 159, 246 Pac. 971.) It need not be founded on a present debt. It

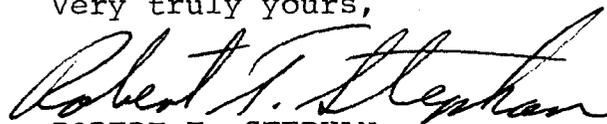
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may be given to secure the performance of obligations. (41 C.J. 459, 19 R.C.L. 294.)"
Id. at 337.

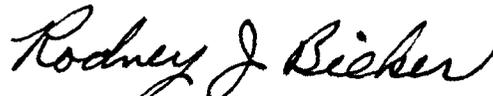
In that case, the deed of trust was given to secure payment of potential claims by persons owning insurance policies issued by the company. (See 150 Kan. at 337.) The Court held the fee was payable before the deed of trust could be filed of record.

In Attorney General Opinion No. 79-4, issued on January 4, 1979, to the Johnson County Counselor, Attorney General Schneider concluded that such homeowners association contracts are not subject to the mortgage registration fee. Said opinion is founded on the premise that the annual dues payable by association members are "unaccrued" and "undetermined, and are undeterminable, at the time of recording." Banaka, supra, was not cited in that opinion. However, that case expressly states that a mortgage need not be founded on a present debt, and that a mortgage may be given to indemnify against a contingency which in fact may never happen. In addition, to say that the amount of the annual dues are "undetermined and are undeterminable, at the time of recording," overlooks the fact the amount of said dues is expressly stated in the contract between the homeowners association and the member thereof. For these reasons, Attorney General Opinion No. 79-4 is hereby withdrawn. In our judgment, contracts such as were involved in that opinion and which are one of the subjects of this opinion are mortgages of real property, are given as security for payment of a debt, and do create or impose a lien upon real property. Consequently, such contracts may not be recorded without payment of the mortgage registration fee.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Rodney J. Bleker
Assistant Attorney General

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