



STATE OF KANSAS

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June 29, 1981

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ATTORNEY GENERAL OPINION NO. 81- 145

Mrs. Jean O'Brien  
Shawnee County Register of Deeds  
Room 108, County Courthouse  
Topeka, Kansas 66603

Re: Taxation--Mortgage Registration--"Mortgage of Real Property" Construed

Synopsis: An instrument, which secures payment of a debt and which "affects" real property by giving the lender a lien upon the real property, is a "mortgage of real property," as defined in K.S.A. 79-3101. Therefore, before such an instrument may be received and filed for record, a mortgage registration fee must be paid. Cited herein: K.S.A. 58-2221, 79-3101 and K.S.A. 1980 Supp. 79-3102.

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Dear Mrs. O'Brien:

On your behalf, First Deputy Register of Deeds, Joan L. Sherrer, has submitted to this office an instrument entitled "Assignment of Rents and Agreement not to Sell or Encumber Real Property," and has asked if the mortgage registration fee should be paid, before this instrument is recorded.

The instrument states that it is given "[i]n consideration and as security for a loan" made by a local bank for the improvement of certain real property, the legal description of which is given. The instrument also states the loan is evidenced by a promissory note, dated April 24, 1981, and recites the amount of the loan. The instrument then specifies:

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"2. Borrower hereby assigns to Lender all moneys due or to become due to Borrower as rental or otherwise for or on account of such real property, reserving unto Borrower the right to collect and retain any such moneys prior to Borrower's default under the terms of the loan described above;

"3. Borrower will not create or permit any lien or any encumbrance (other than those presently existing) to exist on said real property and will not transfer, sell, assign or in any manner dispose of said real property or any interest therein without the prior written consent of Lender . . . ."

K.S.A. 58-2221, in relevant part, provides:

"Every instrument in writing that conveys real property . . . or whereby any real estate may be affected . . . may be recorded in the office of the register of deeds of the county in which such real estate is situated . . . ."

If an instrument does not convey or affect real estate, it is not eligible for recording. Assembly of God v. Sangster, 178 Kan. 678, 682 (1955).

The mortgage registration fee is imposed pursuant to K.S.A. 1980 Supp. 79-3102, which, in pertinent part, provides:

"Before any mortgage of real property, or renewal or extension of the same shall be 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 twenty-five cents (25¢) for each one hundred dollars (\$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." (Emphasis added.)

For the purposes of the foregoing requirements, K.S.A. 79-3101 defines the words "mortgage of real property" thusly:

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"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."  
(Emphasis added.)

In light of the above quoted definition, we believe the question raised by your inquiry is whether the instrument involved herein is an "instrument by which a lien is created or imposed upon real property."

In Assembly of God v. Sangster, supra, the Kansas Supreme Court was called upon to determine whether a "bond resolution," adopted by the Board of Trustees of the church, which contained provisions similar to those provided in the instrument you ask us to examine, was an instrument by which a lien was created or imposed upon real property.

In concluding that the bond resolution was subject to the mortgage registration fee, the Court held:

"In order to create a mortgage contract no particular form of instrument is necessary and no particular words are required. The form of an agreement by which security is given is unimportant if the purpose plainly appears. 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." 178 Kan. at 678, Syl. ¶2.

The Court also said:

"The word 'lien' has been variously defined as being a hold or claim which one has upon the property of another as security for a debt or charge, as a tie that binds property to a debt or claim for its satisfaction, as a right to possess and retain property until a charge attaching to it is paid or discharged, as a charge imposed upon specific property by which it is made security for the performance of an act, and as being synonymous with a charge or encumbrance upon a thing. (Mendenhall v. Burette, 58 Kan. 355, 363, 49 Pac. 93; Bisby v. Quinby, 92 Kan. 86, 140 Pac. 635; 33 Am.Jur., Liens, §2, p. 419; 53 C.J.S., Liens, §1, p. 826.)" 178 Kan. at 680.

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In that case, the Court summarized the provisions of the instrument there under consideration thusly:

"The preamble to the instrument states that plaintiff desires to provide for the payment of indebtedness incurred in the construction of a church. Section II earmarks the church collections for payment of the bonds. Under Section III the proceeds from the sale of bonds are to be used exclusively for payment of obligations created in erecting and equipping a church. Section IV states that the property in question is now free and clear of all encumbrances and plaintiff binds and obligates itself that the property will not be encumbered in any manner; that no further liens or claims of any character shall be permitted to attach to the property while the bonds in question, or any of them, are outstanding, and that the property will not be sold while bonds are outstanding unless the purchaser shall assume and agree to pay such outstanding and unpaid bonds. The next section recites plaintiff's obligation to keep the property insured against loss by fire to the full amount of all bonds outstanding. Section VI provides that no bonds shall be issued other than for the purposes therein authorized while any bonds of the series in question are outstanding. Section VIII provides that suit may be filed in the event of defaults therein enumerated. The form of bond states that plaintiff has covenanted that the property will not be further mortgaged or encumbered [emphasis by the Court] while any of the bonds in question are outstanding and unpaid; that failure to pay any bond or interest coupon when due, shall, at the option of the legal owners, mature all of such bonds outstanding, and that in case a bond is placed in the hands of an attorney for collection, or in the event suit is filed, plaintiff agrees to pay a reasonable attorney's fee. Section XIII authorizes the church official to file the instrument for record in the office of the register of deeds." (Emphasis added.) 178 Kan. at 681-682.

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The Court further said:

"The question before us, therefore, resolves itself into the determination whether the instrument in question creates or imposes a 'lien' upon the described property of the church.

"In our opinion it does, and therefore the mortgage registration fee must be paid before the instrument is entitled to be recorded.

"It is quite true that the instrument is not in the 'form' of a mortgage, in the usual sense of the word, but, as already stated, the form of an agreement by which security is given is unimportant if the purpose plainly appears, and we think there can be no doubt as to the purpose of this instrument, notwithstanding the fact that on the printed form appears the self-serving typed-in statement (Section XV) that the instrument is not intended as a mortgage on the described real property of the church." (Emphasis by the Court.) 178 Kan. at 681.

The Court in Sangster concluded as follows:

"Plaintiff [church] concedes that the instrument 'affects' real estate, for otherwise it would not be eligible for recording. [K.S.A. 58-2221.] From a careful reading of the entire document it seems clear that the manner in which real estate is 'affected' is that the bondholders are given a lien on the property. That being the case, under the statute, payment of the mortgage registration fee is a prerequisite to recording." (Emphasis by the Court; material in brackets added.) 178 Kan. at 682.

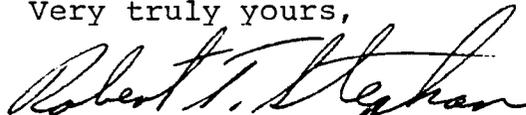
Applying the reasoning of the Court in Sangster to the facts and documents you have presented, there can be no question that the instrument is given for the purpose of securing a debt. The first paragraph of the instrument expressly states that fact. There also can be no question that, if the lender desires this instrument to be recorded in the real estate records, said lender concedes that the instrument "affects" real property. Finally, it is our opinion that, like the document involved in Sangster,

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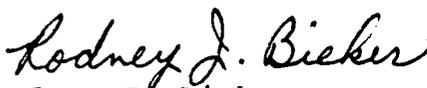
the document involved here "affects" real estate by giving the lender a lien upon the real property.

Thus, as the Court did in Sangster, we conclude the instrument under review creates or imposes a lien upon the described property and, therefore, the mortgage registration fee must be paid before the instrument is entitled to be recorded.

Very truly yours,



ROBERT T. STEPHAN  
Attorney General of Kansas



Rodney J. Bieker  
Assistant Attorney General

RTS:BJS:RJB:jm