



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

March 8, 1982

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ATTORNEY GENERAL OPINION NO. 82-60

Douglas A. Price
Allen County Attorney
County Courthouse
Iola, Kansas 66749

Re: Taxation--Mortgage Registration Fee--Instruments
Subject Thereto; Assignment of Oil and Gas Interests

Synopsis: Any instrument, by which all or any portion of the working interest in an oil or gas leasehold is assigned, and in which the assignor reserves a production payment, is a mortgage of real property within the contemplation of K.S.A. 79-3101. Consequently, the mortgage registration fee imposed under K.S.A. 1981 Supp. 79-3102 must be paid before any such instrument is received and filed for record. Cited herein: K.S.A. 79-3101, K.S.A. 1981 Supp. 79-3102.

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Dear Mr. Price:

You seek an opinion whether an instrument which was tendered for filing in the Allen County Register of Deeds' office is subject to the mortgage registration fee imposed under K.S.A. 1981 Supp. 79-3102.

The instrument is entitled "Assignment of Oil and Gas Leases," and in part provides that the Assignor

"does hereby grant, bargain, sell, assign,
transfer, convey, set over and deliver unto . . .
[the Assignee] all right, title and interest

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of whatever nature owned or claimed by the Assignor with respect to those certain oil and gas leases governing lands in Allen, Crawford and Neosho Counties, Kansas, more fully identified and described upon schedules thereof . . . attached hereto and by reference incorporated herein"

The instrument then provides that, with respect to certain leases,

"this assignment is intended to cover, and does cover and assign $3/4 \times 7/8$ working interest in and to said . . . leases. With respect to the other leases described above, this assignment is intended to cover, and does cover and assign, 100% of $7/8$ working interest in and to said leaseholds. This assignment shall also be effective to convey all of Assignor's proportionate share of the proceeds of all oil, gas and other hydrocarbons produced, saved and sold from the premises."

Finally, the instrument states:

"This assignment shall be subject to, and Assignor hereby reserves a production payment in the amount of One Million Eighty Thousand Dollars (\$1,080,000.00), together with interest at the rate of $7 \frac{1}{2}\%$ per annum, calculated monthly on the receding monthly principal balance, and payable out of one-half ($1/2$) of the gross working interest production commencing as of January 1, 1980 at 7:00 A.M., and continuing thereafter until such balance, together with all interest due thereon, has been fully paid. Assignee shall have the right, any any [sic] time subsequent to January 1, 1980, to purchase said production payment in its entirety by paying the then remaining face amount, together with any interest accrued or unpaid at the time of such purchase. Assignee further covenants, undertakes and agrees to repurchase [sic] such production payment for the remaining principal amount and interest due thereon at any time, upon demand, subsequent to January 1, 1985."

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Based upon this language, it appears the transaction involved in this matter is the sale of the assignor's working interest in oil and gas leases. However, it is a sale on credit. The assignee owes the assignor \$1,080,000, together with interest at the rate of 7 1/2% per annum. The loan is secured by a reservation of production payments, which, in the aggregate, equal the indebtedness of the assignee to the assignor. In short, the assignor, through the reservation clause of this instrument, has a lien upon the production payments to secure payment of the purchase price.

The question in this case is whether the instrument provides for a "mortgage of real property," as that term is defined in K.S.A. 79-3101.

In National Bank of Tulsa v. Warren, 177 Kan. 281 (1955), the Supreme Court held that an instrument providing for the assignment of oil and gas production payments, as security for a loan, was a "mortgage of real property" as defined in K.S.A. 79-3101. Thus, the Court concluded the mortgage registration fee was properly imposed on the instrument evidencing the assignment. The Warren case is cited with approval in Ingram v. Ingram, 214 Kan. 415 (1974), which provides an excellent review of the "confusing" state of the law in Kansas in regard to oil and gas leasehold interests.

In this case, the instrument does not prescribe the assignment of oil and gas production payments as security for a loan. It provides for the reservation of those payments. Thus, the facts in this situation are distinguishable from those of Warren. However, from the Warren case, it must be concluded that the Kansas Supreme Court held that interests created by an oil and gas lease, specifically the right to receive production payments, which right is carved out of the working interest created by an oil and gas lease, are real property for purposes of the mortgage registration fee. In Warren, supra, the Court stated:

"We have examined the authorities cited and relied upon by plaintiff where we have held an oil and gas lease to create personal property only and conveys no interest in the land. These cases are not in point here." (Emphasis added.)
177 Kan. at 285-286.

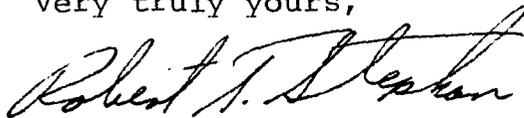
The Court concluded, therefore, that since the assignee (bank) had an assignment of the assignor's production payments, the

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bank had a lien upon real property, and had to pay the mortgage registration fee before it could record and file for record the instrument by which the assignment was made.

Thus, as the Supreme Court has concluded in Warren, supra, that the right to receive production payments is to be considered a real property interest for purposes of K.S.A. 79-3101, we must conclude that this assignor has a lien upon real property. This lien is evidenced in the instrument that has been tendered for filing with the Register of Deeds. Therefore, in our judgment, under K.S.A. 1981 Supp. 79-3102, the mortgage registration fee must be paid before this instrument may be received and filed for record.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Rodney J. Bieker
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RTS:BJS:RJB:jm