



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 87- 162

Lynette Bennington  
Register of Deeds  
Stafford County Courthouse  
209 North Broadway  
St. John, Kansas 67576

Re: Taxation--Mortgage Registration and Intangibles;  
Mortgage Registration--Instruments Subject Thereto

Synopsis: In determining whether a mortgage is entitled to K.S.A. 1986 Supp. 79-3102(d)(3) exemption, the register of deeds need not look beyond the four-corners of the affidavit to ascertain that the mortgage is held by the assigns of the original lender. Failure to record an assignment does not render the assignment void and is thus not in itself conclusive evidence that the assignment is invalid.

A register of deeds may not be held personally liable for due and uncollected mortgage registration fees pursuant to K.S.A. 28-115. Failure of the register of deeds to whom a mortgage covering property in two or more counties is first presented to collect mortgage registration fees does not preclude another interested register of deeds from collecting the amount due. Cited herein: K.S.A. 28-115; K.S.A. 1986 Supp. 58-2209; 58-2211; K.S.A. 58-2221; 58-2222; 58-2223; 58-2306; 58-2308; 58-2318; 58-2321; L. 1985, ch. 322, §1.

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Dear Ms. Bennington:

As Register of Deeds for Stafford county, you request our opinion regarding the assessment and collection of mortgage registration fees. You have provided eleven recorded instruments as factual information upon which to base our opinion.

Your first question involves three instruments which are accompanied by affidavits stating, for various reasons, that mortgage registration fees are not payable with respect to those instruments. The affidavits attached to the instruments you have marked as numbers 4 and 5 verify that all of the indebtedness secured therein is secured by other previously recorded mortgages upon which the registration fee has been paid. You direct our attention to K.S.A. 1986 Supp. 79-3102(d)(3) and question whether this exemption from mortgage registration fees applies since there are additional mortgagees listed on the mortgages now presented for recording than were on the original recorded mortgages.

K.S.A. 1986 Supp. 79-3102(d)(3) provides as follows:

"(d) No registration fee whatsoever shall be paid, collected or required for or on:

. . . .

"(3) any mortgage or other instrument upon that portion of the consideration stated in the mortgage tendered for filing which is verified by affidavit to be principal indebtedness covered or included in a previously recorded mortgage or other instrument with the same lender or their assigns upon which the registration fee herein provided for has been paid."  
(Emphasis added.)

This provision was amended in 1985 to include the underscored language. L. 1985, ch. 322, §1. Though the relationship between the original mortgagee and the additional mortgagees is not clear on the face of the instruments in question, it appears that, if this is the same indebtedness covered in those previously recorded mortgages, there has been at least a partial assignment of the original mortgagee's rights under the instruments. The instruments would thus fall within the exemption.

The affidavit attached to the instrument you have marked as number 8 claims a different exemption from mortgage registration fees. It states that the mortgage provides additional security for three listed mortgages, the mortgage registration fee having been paid on all three. This would entitle the mortgagee to the exemption found at K.S.A. 1986 Supp. 79-3102(d) (2) which does not contain the "same lender or their assigns" requirement, though the same indebtedness must be involved.

You point out that there is not an assignment of record for these instruments and indicate that this contradicts the affidavit. You question whether the register of deeds should go beyond the "four corners" of the affidavit in determining if the claimed exemption is warranted. K.S.A. 58-2306 and 58-2318 describe the method by which a mortgage of real property may be assigned or released. K.S.A. 58-2308 requires the register of deeds to record at full length instruments executed pursuant to K.S.A. 58-2306 and 58-2318. Every instrument in writing that conveys or affects real estate and which is proved or acknowledged (K.S.A. 1986 Supp. 58-2211) and certified (K.S.A. 1986 Supp. 58-2209) is authorized to be recorded in the office of the register of deeds of the county in which the real estate is situated. K.S.A. 58-2221. Such recording imparts notice of the contents of the instrument to subsequent purchasers and mortgagees. K.S.A. 58-2222. An unrecorded instrument is valid only between the parties thereto and persons who have actual notice of its contents. K.S.A. 58-2223. Failure to record an assignment has the effect of making payments by the mortgagor to the mortgagee of record valid extinguishments of the debt even though the note and mortgage have been assigned. K.S.A. 58-2321. However, the assignee has a right to recover from his assignor amounts paid to the assignor to extinguish the debt. K.S.A. 58-2321. Thus, the assignment, even though unrecorded, is still valid as between the parties, and the mortgage itself, if recorded, imparts notice to third parties of the existence of a lien unless and until the mortgage is released.

K.S.A. 58-2321 was interpreted by the Kansas Supreme Court in Anthony v. Brennan, 74 Kan. 707 (1906). The syllabus to that case reads:

"The act relating to the recording of assignments of mortgages (Laws 1899, ch. 168) does not restrict the methods by which a negotiable note and a mortgage securing it may be transferred, nor

prevent a transfer of the ownership of such paper by mere delivery."

In the opinion at page 709 it was said:

"That act does not undertake to limit the methods by which real-estate mortgages may be transferred, and it does not provide that the failure to make a record of an assignment of a mortgage shall invalidate the security of the transfer. It was intended as a protection to mortgagors, and the only penalty prescribed for not recording the transfer is that all payments made by the mortgagor to the mortgagee or to any one who appeared to be the owner shall be credited to the mortgagor, although the assignee never received such payments. This was the view taken of the statute in earlier cases." 74 Kan. 707. Sections quoted in Middlekauff v. Bell, 111 Kan. 206, 210, 211 (1922).

In Middlekauff, the court stated:

"Even the savage statute of 1897 did not declare that failure to record an assignment of a recorded mortgage should give priority to a subsequent purchaser or mortgagee. Two years later the legislature again considered what penalty should be assessed against an assignee who omitted to record his assignment. It stopped with the provision that payments made by the mortgagor to the holder of record should be credited to the mortgagor, and there is no other penalty. One who acquires a negotiable note, secured by recorded mortgage, is not, as to subsequent purchasers or mortgagees, the possessor of a mere 'secret equity,' if no assignment of the mortgage be placed on record. Record of the mortgage is notice of its existence, and the holder is not obliged to disclose his ownership by recording his assignment in order to preserve priority of lien." 111 Kan. at

212. See also Ingram v. Ingram,  
214 Kan. 415, Syl. ¶5 (1974).

Thus, one cannot assume an assignment has not occurred solely because the assignment has not been recorded.

K.S.A. 1986 Supp. 79-3102(d)(3) requires that an affidavit be submitted verifying that the principal indebtedness covered by the instrument tendered for filing is principal indebtedness included in a previously recorded mortgage upon which the mortgage registration fee has been paid. The statute does not require any proof beyond the affidavit as to the effectiveness of any assignment. In our opinion, the register of deeds need not go beyond the "four corners" of the affidavit to determine the existence of an assignment. The affiant has sworn [State v. Knight, 219 Kan. 863, 867 (1976)] that this is the same debt covered in a previously recorded mortgage upon which mortgage registration fees have been paid, and if the substance of the affidavit is later discovered false, the affiant shall suffer the consequences.

The provision which requires the register of deeds to compare each instrument with the last record of transfer in his or her office of the property described and to attempt to notify the grantee of any "apparent errors" before recording the instrument (K.S.A. 58-2221) does not require the register of deeds to conduct a complete title search of the property described in each instrument. An "apparent error" is one which is readily seen, plain or obvious. Since an assignment need not be recorded to be effective, the fact that the new instrument lists mortgagees additional to those listed in the original instrument is not an "apparent error."

You next ask whether, pursuant to K.S.A. 28-115, a register of deeds may be held personally liable for any due and uncollected mortgage registration fees. K.S.A. 28-115 provides in part:

"If the register of deeds fails to collect any of the fees provided in this section, the amount of fees at the end of each quarter shall be deducted from the register's salary. (Emphasis added.)

The mortgage registration fees are not provided in this section. The fees listed in K.S.A. 28-115 are filing fees. The mortgage registration fee is not a filing fee, it is a tax. See Meadowlark Hills, Inc. v. Kearns, 211 Kan.

35 (1973). Attorney General Opinion No. 79-145) concluded that the requirements relative to the collection of mortgage registration fees are not to be construed as controlling in regard to the collection of filing fees. We now submit that the opposite also would be true. We therefore conclude that due and uncollected mortgage registration fees could not be deducted from the register's salary pursuant to this provision. If, however, a register of deeds is acting in bad faith other statutes may come in to play. See e.g. 60-1205; 21-3902.

Your final question is this:

"When an instrument is presented for recording in several counties 'simultaneously' (by counterparts), does the recording of the instrument without collecting the mortgage registration tax by one county, exempt other counties from collecting the tax? If one county determines mortgage registration tax is due, is that county responsible for collecting the tax for all other counties under K.S.A. 79-3105?"

K.S.A. 79-3105 provides in part:

"When a mortgage covers property situated in two or more counties, the registration fee herein provided for shall be paid to the register of deeds and county treasurer as hereinbefore provided, of the county where it is first presented for record, and the county treasurer so receiving such fee shall apportion the same among the counties in which the real property is situated, in proportion to its assessed valuation, and promptly pay over such proportionate amounts to the respective county treasurers."

In Attorney General Opinion No. 83-50 we stated that a register of deeds should not accept for filing an instrument accompanied by a check purporting to represent the county's proportionate share of the mortgage registration fee. Our conclusion was based on the language of K.S.A. 79-3105 that clearly contemplates the division of the fees by the county officials rather than the mortgagee. Here we are concerned

with which county officials are to collect and apportion the fees. The statute states that the fees are to be paid to the register of deeds of the county where the mortgage is first presented for record, and the treasurer of that county is to apportion the fees. The requirement that the full amount be paid to one register is a convenience for the mortgagee as well as the registers of deeds, and assures full payment of the tax. If it were otherwise, the counties would have to contact one another before filing the instruments to assure full payment, and such could be costly to the mortgagee. It is therefore our opinion that the failure of the register of deeds of the county where the instrument is first presented for record to collect the full amount of the tax should not prevent registers of deeds of counties where the instrument is subsequently filed from charging the remaining amount before recording the instrument.

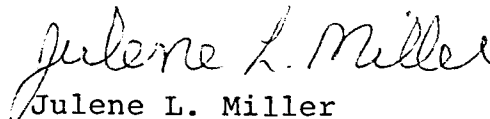
In conclusion, in determining whether a mortgage is entitled to K.S.A. 1986 Supp. 79-3102(d)(3) exemption, the register of deeds need not look beyond the four-corners of the affidavit to ascertain that the mortgage is held by the assigns of the original lender. Failure to record an assignment does not render the assignment void and is thus not in itself conclusive evidence that the assignment is invalid.

A register of deeds may not be held personally liable for due and uncollected mortgage registration fees pursuant to K.S.A. 28-115. Failure of the register of deeds to whom a mortgage covering property in two or more counties is first presented to collect mortgage registration fees does not preclude another interested register of deeds from collecting the amount due.

Very truly yours,



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Attorney General of Kansas



Julene L. Miller  
Deputy Attorney General