

**OPINION  
45-192**

August 6, 1945           (OPINION)

MORTGAGES

RE: Discharge of by District Judge

This office is in receipt of your letter of July 28 in which you refer to section 35-0313, of the North Dakota Revised Code of 1943, providing for discharge of real estate mortgages which have not been renewed or extended of record within fifteen years after due date, or when no due date is shown, then within twenty years after the recording of such mortgages.

You ask that this office give consideration to the provisions of said statute, and that we give our opinion outlining a uniform method of procedure in the matter of discharging such real estate mortgages and the fees to be charged in connection therewith.

Section 35-0215, relating to the satisfaction of real estate mortgages provides, "A recorded mortgage must be discharged upon the record by the register of deeds having custody thereof and the presentation of a certificate of discharge signed by the mortgagee, his executors, administrators, guardians, trustees, assigns, personal representatives, or special administrators appointed for that purpose, properly acknowledged or proved and certified as prescribed by chapter 19 of the title property. The certificate of discharge shall contain a brief description of the mortgage and shall state that the mortgage has been paid in full or otherwise satisfied and discharged and that the officer is authorized to discharge the same of record.\*\*\*\*"

Section 35-0311 provides that a certificate of the discharge of a mortgage and proof or acknowledgement thereof must be recorded at length and a reference made in the record to the book and page where the mortgage is recorded and in the minute of the discharge, made upon the record of the mortgage, to the book and page where the discharge is recorded.

Section 47-1901, relating to instruments entitled to record, provides as follows: "Any instrument affecting the title to or possession of real property may be recorded as provided in this chapter."

Section 47-1902 enumerates instruments entitled to record without acknowledgment or further proof; however, this section does not specifically refer to discharge by an order of the judge of the district court. That, of course, can be explained by the fact that section 47-1902 was enacted much earlier than section 35-0313 since it appears as section 3563 of the Revised Code of 1895, and has been carried on down in that form until its wording was changed by the code commission, but which change does not materially affect its purport and meaning.

Section 35-0313 was enacted by the legislative assembly of 1933 as chapter 153. Since the purpose of this Act was to provide an

additional method for discharging of record real estate mortgages, we must assume that the legislature had in mind the provisions of section 35-0215 and 35-0311, and that the provisions thereof with reference to filing and recording by necessary implication would apply to the instrument of discharge provided for in section 35-0313.

Section 35-0215 relating to satisfaction and discharge of real estate mortgages provides that. "A recorded mortgage must be discharged upon the record by the register of deeds having custody thereof on the presentation of a certificate of discharge \*\*\*\*. The certificate of discharge shall state that the mortgage has been paid in full or otherwise satisfied and discharged and that the officer is authorized to discharge the same of record. \*\*\*\*"

As we have already pointed out, section 35-0311 provides that a certificate of the discharge of a mortgage must be recorded at length and the reference made in the record to the book and page where the mortgage is recorded.

In order to discharge a mortgage under the provisions of section 35-0313, an application must be made to a judge of the district court within the district in which the mortgaged real estate is situated, and the application must be made by a party interested and without notice. Upon such an application the judge makes his order of discharge.

It is clear that any instrument purporting to discharge a real estate mortgage must contain the essential facts with reference to the description of the mortgage as required by section 35-0215, and that it must be recorded at length as required by section 35-0311, and that an order of the district court made as provided in section 35-0313 by clear implication comes within the provisions of sections 35-0215 and 35-0311--that is, it must contain the necessary facts as required by section 35-0215 and it must be recorded at length in the office of register of deeds as required by section 35-0311 in like manner as any other instrument of discharge of a real estate mortgage.

It is clear that an application to the district judge, and upon which an order is issued, is not an action-it is simply an ex parte proceeding without notice and for a specific purpose, the discharge of a real estate mortgage, as provided by section 35-0313. The order having been obtained, it should be recorded in the office of register of deeds and notations made upon the record as provided by section 35-0215. The application and order should then be filed in the office of register of deeds, and indexed in the miscellaneous record so that if occasion should require, they may be examined by any person interested therein.

Another method of procedure which would serve the same purpose would be to file the original order and application in the office of the clerk of the district court, and to have a certified copy of the order filed in the office of the register of deeds; but, as we have pointed out, this is not an action and the filing would be governed by subdivision 10 of section 11-1704 which enumerates the fees to be charged by the clerk of the district court. Subdivision 10 provides, "For recording and indexing any paper not filed in an action or

proceeding, for the first four folios, fifty cents, and for each additional folio, ten cents."

If the original order, or a certified copy thereof, is filed in the office of register of deeds as we have indicated, the register of deeds would be entitled to the regular fees which he may charge for any other instrument required to be recorded in his office.

Either one of these two methods would serve the purpose of discharging a mortgage of real estate which comes within the provisions of section 35-0313. The essential part in this procedure, however, is the procuring of the necessary order signed by the district judge, which order is made upon an application containing the facts necessary under said section 35-0313, and that such order, or a duly certified copy thereof, is filed and recorded in the office of register of deeds.

NELS G. JOHNSON

Attorney General