

**OPINION
45-192**

May 21, 1945 (OPINION)

MORTGAGES

RE: Discharged by District Judge

This will acknowledge your letter of May 16, in which you inquire as to the fee that the clerk of the district court should require for filing and indexing an order for the discharge of a real estate mortgage granted by the district court under section 35-0313, of the North Dakota Revised Code of 1943.

If the application or petition for the discharge of a real estate mortgage under this statute is in the form of an action, undoubtedly the clerk of the district court must charge the five dollar fee for the docketing of the same under section 11-1704 (North Dakota Revised Code of 1943). However, there is no provisions under the terms of section 35-0313 that the application or petition or whatever form may be adopted to procure the order, be filed as an action in the office of the clerk of the district court. Nor is there any provision in that statute for filing and indexing any paper connected with the order discharging a mortgage in the office of the clerk of the district court. But it appears to us that the petition or application for the order to discharge a mortgage under the terms of section 35-0313 is either in the nature of a civil action or should not be filed in the office of the clerk of court at all, hence, it does not come within the terms of subsection 5 of section 11-1704.

Some attorneys, including myself, have for many years prepared an application or petition requestion an order discharging a mortgage, and sent the same to the district judge, who used the same as a basis for the issuance of the order discharging the mortgage under the terms of the statute and then simply filed the order as a miscellaneous document in the office of the register of deeds or recorded the petition or application for the discharge of the mortgage and the order as well. The recording of the application or petition for the order to discharge real estate mortgage and the order is much cheaper than filing it as an action, then procuring a certified copy of the order discharging the mortgage from the clerk of the district court, and then recording it in the office of the register of deeds.

It appears to this office that all that is required is that the order be procured. The law in no way evidences any intent to burden the applicant with the requirement of filing papers as an action in the office of the clerk of the district court. Even though the petition or application were lost or never filed, the order of the district judge would be sufficient, as it is presumed that he would not issue the same except upon a proper application showing the facts which would authorize the court to sign such order under the terms of section 35-0313.

NELS G. JOHNSON

Attorney General