

OPINION
47-44

June 25, 1947 (OPINION)

COUNTIES

RE: Clerk's Fees for Recording Papers Not Filed in an Action

Re: Sections 11-1704, subss. 1 and 10, 35-0313, and 59-0401,
1943 Revised Code

Your letter of June 18, 1947, relating to clerk of court fees under the above sections, at hand.

Since there is no specific provision in section 11-1704 for recording of papers in connection with the proceedings for discharge of mortgages under section 35-0313, it is my opinion that subsection 10 of section 11-1704 would apply. This reads as follows:

"For recording and indexing any paper not filed in an action or proceeding, for the first four folios (100 words), fifty cents, and for each additional folio, ten cents."

The proceedings under section 35-0313 are not what are commonly known as actions or special proceedings, and I believe section 11-1704, subsection 10, applies to this kind of a proceeding.

Chapter 59-04 provides something in the nature of a special proceeding, although not one of the ordinary statutory special proceedings, such as injunction, mandamus, or prohibition. However, it clearly indicates an action or proceeding. It gives the district court jurisdiction to control the administration of trusts when properly petitioned. It is my opinion, therefore, that this kind of a proceeding, that is as authorized by chapter 59-04, would justify the clerk in charging the same fees as he would charge for an action.

Many people think that proceedings under section 35-0313, which is discharge of a mortgage from record, affects a cancellation of the mortgage. This, however, is not the case. See *Magnuson v. Breher*, 69 N.D. 197, 284 N.W. 853.

I trust that this answers your question.

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