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Mortgages - Lien and Priority - Revival of Junior Liens

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within the statute.[39] It has been contended that the requirement of conviction is not feasible because; (1) the slayer may have committed suicide before he could be convicted, and (2) the statute is sometimes held not to apply to a conviction in a court outside the state.[40]

In conclusion, it is urged that, in the absence of a controlling statute, the application of the constructive trust doctrine best serves to determine the rights of the parties. It is further urged that the most equitable method of applying the constructive trust doctrine consists in allowing the survivor to retain a one-half interest for his life free of trust; putting the other half in constructive trust for the heirs of the decedent, and allowing the whole of the estate to descend to the heirs of the decedent upon the death of the slayer. The most direct remedy would be by legislation, preferably of the type enacted in Pennsylvania, where the same result would be effected as enunciated directly above.

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MORTGAGES — LIEN AND PRIORITY — REVIVAL OF JUNIOR LIENS. — One of the more notable rarities within the field of property law is the doctrine of the revival of a junior mortgage upon subsequent reacquistion of the property by the mortgagor. The ramifications are readily apparent when one considers the importance of the revival of junior mortgages in connection with examination of abstracts of title, let alone the rights of junior mortgagees, or of subsequent purchasers from mortgagors who have reacquired foreclosed property. A review of the divergent theories and attending aspects formulated through past decisions will reveal a highly interesting state of affairs.

It is recognized that a purchaser at a foreclosure sale, or at a sale authorized by a mortgage,[1] takes a title free of all junior

39. See note 27 *supra*. The Minnesota statute provides that no felonious killer ". . . shall inherit from such person or receive any interest in the estate of the decedent, or take by devise or bequest from him. . .", whereas the words "or otherwise" in the North Dakota statute broaden the scope of those not entitled to take.

40. Harrison v. Moncravie, 264 Fed. 776 (8th Cir. 1920) (wife convicted of killing husband in Kansas allowed to inherit his land in Oklahoma; Kansas statute *not* applied).

1. Scott v. Paisley, 271 U.S. 632 (1926) (statutory power of sale which required no notice by "security" deed holder to subsequent purchaser was held constitutional); Carrington v. Citizens Bank of Waynesboro, 140 Ga. 798, 80 S.E. 12 (1913) (deed to secure payment of loan contained a power of sale); Grove & Fultz v. Loan Co., 17 N.D. 352, 116 N.W. 345 (1908) (foreclosure sale by advertisement under power of sale in mortgage could not be set aside because mortgage was usurious); Reilly v. Phillips, 45 S.D. 604, 57 N.W. 780 (1894) (the court quotes 2 Perry, Trusts §602 saying, "It is a universal rule that a power (of sale) inserted in a mortgage . . . is a power coupled with an interest, it cannot be revoked by any act of the . . . grantee of the power."

encumbrances on the property if the encumbrancers are properly notified of the action.[2] But if a fraudulent or collusive intent motivates the foreclosure sale, the junior lien is not removed, it is advanced to a first lien,[3] or is merely subordinate to a purchase money mortgage.[4] The notable exception to the rule stated above occurs where the mortagor is the "purchaser" at the foreclosure sale under the senior mortgage. The majority of the courts hold that reacquisition of the property is of no avail and that junior encumbrances will reattach.[5] However, the unanimity expressed by the courts as to result is not founded upon similar theoretical aspects.

Implied Payment Theory

In deciding that the mortgagor,[6] or a grantee who assumes the mortgage,[7] may not set up the title acquired at the foreclosure sale as against the lienor, the courts, under the implied payment theory, have taken the view that the mortagor was bound by the covenants in the second mortgage. Furthermore, in fairness he should not be allowed to profit from his own

2. *E.g.* Mechanics State Bank v. Kramer Service, 184 Miss. 895, 186 So. 644 (1939) (foreclosure invalid as to holder of junior trust deed who was not made a party to foreclosure suit); Norfolk Building Ass'n v. Stern, 113 N.J. 385, 167 Atl. 32 (1933) (mortgagee made subsequent grantee party defendant due to interest in restrictive covenant); Krick v. Zemel, 99 N.J. 191, 122 Atl. 739 (1923) (purchaser at foreclosure sale under prior mortgage was superior to subsequent deed of easement to use for common wall); Wiltsie, Mortgage Foreclosure §778 (5th ed. 1939).

3. Elkind v. Pinkerton, 294 Mass. 502, 2 N.E.2d 456 (1936) (second mortgagee was entitled to have equity of redemption sold where mortgagor allowed first mortgagee to foreclose so that daughter could purchase property free of second mortgage); Stiger v. Mahone, 24 N.J.Eq. 426 (1874) (second mortgage was advanced to a first lien where grantee who assumed both mortgages and contrived with grantor to have first mortgage foreclosed and then purchased the property at a price equal to the first mortgage); *cf.* Kennedy v. Borie, 166 Pa. 360, 31 Atl. 98 (1895) (court overruled demurrer by defendants to bill by second mortgagee to have defendants' property subjected to lien of second mortgage where assuming grantee had purchased property at foreclosure sale, induced by grantor and grantee for the purpose of defeating lien of second mortgagee).

4. Federal Land Bank of Columbia v. Bank of Lenox, 192 Ga. 543, 16 S.E.2d 9, 17 (1941) "The foregoing rules . . . long settled in this State and recognized . . . in other jurisdictions, that a mortgage or deed to land securing its purchase money, and executed as part of the same transaction in which the purchaser acquires title, will exclude or take precedence over any prior lien against the property. . . ."

5. Martin v. Raleigh State Bank, 146 Miss. 1, 111 So. 448 (1927) (second trust deed reattached where first trust deed foreclosed and mortgagor subsequently reacquired property); Ayer v. Philadelphia & Boston Face Brick Co., 127 Mass. 57, 31 N.E. 717 (1892) (court allowed second mortgagee to foreclose on property reacquired by mortgagor after foreclosure of first mortgage); Sandwich Manufacturing Co. v. Zellmer, 48 Minn. 408, 51 N.W. 379 (1892) (second mortgage was revived against wife and her grantee where she joined in second mortgage and acquired property after foreclosure of first mortgage). *Contra:* Murray v. Newsom, 111 Fla. 193, 149 So. 387 (1933) (second mortgage did not revive when mortgagor reacquired property after foreclosure on first mortgage); Zandri v. Tendler, 123 Conn. 117, 193 Atl. 598, (1937) (mortgagor was not estopped by covenant of warranty in second mortgage from asserting his title against the second mortgagee).

6. *Ibid.*

7. Beitel v. Dobbin, 44 S.W. 299 (Tex. Civ. App. 1898) (second mortgagee superior to assuming grantee who purchased at sale under first mortgage); *cf.* Kerr v. Erickson, 24 S.W.2d 21 (Tex. Civ. App. 1930) (second mortgage revived where grantee assumed prior mortgage and gave second mortgage for purchase price and subsequently acquired property after foreclosure by first mortgage).

wrong, which was his failure to pay the first mortgage and his subsequent purchase of the mortgaged property free and clear of the junior lien.[8] In conclusion, the courts will treat his purchase of the foreclosed property as delayed payment of a matured senior lien, nothing more.[9] This doctrine has not been applied where the mortgaged property was purchased at the foreclosure sale by a third party and subsequently sold to the mortgagor. In this instance, the courts conclude that the second lien ceases to exist since the foreclosure sale is treated as a sale of an entirely distinct title to the third party.[10]

The implied payment theory has been disfavored in recent years, as typified by the criticism raised in *Jester v. Bickers.*[11] In this case the mortgagor purchased at the foreclosure sale. The court stated that the remedy afforded the junior lienor is his right to bid at the sale of the property foreclosed by the senior lien. Failure to do so extinguishes his rights in the property.

Warranty to Defend Title Theory

In applying this theory the mortgagor is estopped to assert his title, reacquired after the foreclosure sale, against the junior lienor because the mortgagor warranted that he would defend the title to the premises against all lawful claims and therefore agreed to defend it against the first mortgage.[12] But does the warranty to defend title theory apply where a provision in the second mortgage, contained within the covenant against encumbrances, specifically exempts the senior mortgage? The decisions

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8. See note 3 *supra.*

9. Hilton v. Bissil, 1 Sandford Ch. 407 (N.Y. 1844), where the court states: "In effect, the defendant used the money which he was bound to apply to the payment . . . (second) mortgage for the purpose of buying the land under that mortgage. And instead of leaving the premises subject to the . . . (second) mortgage as the first lien, which would have been the effect of an honest application of his money. . . ."; 3 Jones, Mortgages §1887, (7th ed. 1915), "But if the mortgagor has given a subsequent mortgage upon the same property, his purchase will not defeat this . . . he can not set up the title acquired by such last purchase as against the junior mortgage, but his purchase will be considered a payment of the prior mortgage."

10. Commercial-Germania Trust & Savings Bank v. Russell, 148 La. 334, 86 So. 831 (1920), court states: "From that moment (the foreclosure sale) this (second) mortgage ceased to exist, and thereafter had no more existence than if having never existed."

11. 72 S.W.2d 1103 (Tex. Civ. App. 1934).

12. Merchants National Bank v. Miller, 59 N.D. 273, 278, 229 N.W. 357, 359 (1930) "While the mortgagor did not warrant the land free from incumbrances, nevertheless he agreed with the plaintiff that he would defend his title to the premises against all lawful claims, and therefore he agreed to defend it against the first mortgage."; Baird v. Chamberlain, 60 N.D. 784, 236 N.W. 724 (1931) (second mortgage revived when mortgagor re-purchased property after foreclosure and after mortgagor went through bankruptcy).

are in conflict. In *Bricker v. Bricker*,[13] an Ohio case, the court held that the act of excepting the prior mortgage manifested an intent not to defend the title against the first mortgage. An opposite view is enunciated in the North Dakota case of *Merchants National Bank v. Miller*,[14] which exemplifies the more logical result,[15] since the covenant of warranty to defend title is not of the same nature and import as the covenant against encumbrances.[16] Therefore the former covenant is in no way derogated by the limitations expressed within the latter covenant.[17]

Irrespective of the views adopted in evaluating the relation of the covenant of warranty to defend title to the warranty against encumbrances, the fact still remains that invariably the second mortgagee realizes that he is receiving a second mortgage and expects it to remain a junior lien. It has been argued that if, in applying the doctrine of estoppel, under the covenant of warranty to defend title theory; the second mortgagee becomes the senior encumbrancer, he is thereby unjustly enriched beyond his own expectations.[18] The answer to this contention has been that it is reasonable to assume that the second mortgagee extended capital in reliance on the idea that the prior encumbrance would be removed before default.[19]

Contractual Security Theory

The contractual security theory is considered the soundest because the judicial reasoning effectuates the agreement and

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13. 11 Ohio St. 240 (1860) "It is obvious from the nature and extent of the covenant of warranty, it would include incumbrances . . . but . . . where there is a special provision . . . or a qualified covenant in relation to incumbrances, the same being part of the deed, the whole must be taken together, and so construed as to give the entire instrument effect in all its provisions, and to make it consistant."; 1 Jones, Mortgages §679, (6th ed. 1904).

14. 59 N.D. 273, 229 N.W. 357 (1930).

15. Sandwich Manufacturing Co. v. Zellmer, 48 Minn. 408, 51 N.W. 379, 381 (1892) ". . . the better opinion . . . is that the covenant of warranty is not limited by the preceding restricted covenant against incumbrances."

16. Sommers v. Wagner, 21 N.D. 531, 536, 131 N.W. 797, 798 (1911) "A covenant against encumbrances and a covenant of warranty . . . are separate and independent covenants of different import, and directed to different objects, and there is no presumption that language qualifying one . . . was intended . . . or included in the other. The exception of the mortgage from the covenant against encumbrances does not thereby except such mortgage from the covenant of warranty in the deed."

17. See note 15 *supra*.

18. White, *Revival of Mortgages*, 10 Cin. L. Rev. 217, 242 (1936), in which the author states: ". . . since (mortgagee) practically always knows that his mortgage is a junior lien, and he expects it to remain such. To move him into first place is to give him an unexpected 'windfall'."

19. Ayer v. Philadelphia & Boston Face Brick Co., 157 Mass, 57, 31 N.E. 717, 718 (1892) ". . . the present instrument is a mortgage, and it may be thought natural that a debtor should covenant to keep his security good against paramount liens."

intention of the parties.[20] In essence it is this: in executing the covenant of warranty contained within the second mortgage. the mortgagor has pledged the property as security for the debt. Although the foreclosure of the senior mortgage prevents the mortgagor from producing the security, the contract obligation is not terminated. It is merely postponed until the mortgagor can fulfill it. This subsequent ability to perform is created through reacquisition of the foreclosed property.

Incidental Application of the Revival Theory

While it is recognized that a purchase money mortgage negotiated *after* foreclosure by the reacquiring mortgagor is given priority over the revived junior lien,[21] the same preference is not accorded all purchase money mortgages created *before* foreclosure. Oftentimes the grantee of the mortgagor, in purchasing the land, will "assume" the sole existing encumbrance and will give a purchase money mortgage, which constitutes a junior lien. If the grantee should reacquire the land after foreclosure, the purchase money mortgage will reattach under the revival theory.[22] An opposite result is declared where the grantee purchases "subject to" the existing mortgage.[23] The distinction is that in the latter case there is no duty imposed upon the grantee to pay the first mortgage. It is also noteworthy that a second mortgage will revive against the co-signor of said second mortgage, if and when, he acquires the property.[24] There has evolved a decided split of authority in determining whether unsatisfied tax liens revive when the delinquent owner reacquires the property from

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20. Federal Land Bank of Columbia v. Bank of Lenox, 192 Ga. 543, 16 S.E.2d 9 (1941) (second mortgage revived when mortgagor repurchased property sold under prior security deed); Jensen v. Duke, 71 Cal.App. 210, 234 Pac. 876 (1925) ". . . she again acquired title . . . and the title thus acquired, inures to the mortgagee as security for the debt in like manner as if acquired before the execution . . . of the mortgage"; *cf.* Barberi v. Rothchild, 7 Cal. 537, 61 P.2d 760 (1936) (grantor gave two trust deeds and property sold under first trust deed, then grantor repurchased property after bankruptcy; court said grantor held for benefit of one holding under second trust deed); Note, Ind. L.J. 429, 434 (1936).

21. See note 4 *supra.*

22. See note 7 *supra.*

23. Slaughter v. Morris, 291 S.W. 961, 963 (Tex. Civ. App. 1926) ". . . the rule that a purchaser of property incumbered with a mortgage or deed of trust lien is estopped to deny the validity of such instrument applies only where the instrument assumed is described in the deed of conveyance, and the assumption or agreement to assume is made in the nature of a contract and for a valuable consideration."

24. Martin v. Yager, 30 N.D. 577, 582, 153 N.W. 286, 287 (1915) "In the mortgage before us the wife not merely agreed to pay the debt . . ., but she made express covenants of quite enjoyment. . . . We can see no reason why in a court of equity . . . these covenants should not be held to be binding."

a purchaser at the tax sale.[25] But it would seem consonant with a sound tax program to afford the state the remedies given to the individual under the revival theory.[26]

General Objections to Revival Theory

The soundest objection to the revival of the junior lien theory is its contrariety to the modern theory of foreclosure. Under a modern foreclosure sale all incidents of title possessed by the mortgagor, mortgagee, and all other persons who are properly notified of the foreclosure proceedings, are transferred to the purchaser.[27] In purchasing at a foreclosure sale, the buyer fully anticipates that he will be able to convey a clear title to anyone who may purchase. Accordingly his market is necessarily limited if he cannot convey a clear title to the mortgagor, for there is a possibility that in the future the mortgagor will be actively seeking the property.[28] The revival theory also conflicts with the general rule that a mortgage debt is extinguished upon expiration of the period of redemption, which initially commenced with the foreclosure of the senior mortgage. In compliance with the above stated rule, the reacquistion of the property by the mortgagor should be considered as a purchase rather than repayment of the debt.[29]

Revival Theory in North Dakota

Merchants National Bank v. Miller[30] has established the precedent which has steadfastly remained the law in North Da-

25. McDonald v. Duckworth, 197 Okla. 576, 173 P.2d 436, 439 (1946) "When state has sold the property to a bona fide purchaser in good faith, without collusion, nor as the agent of the person obligated to pay the tax, a deed executed in pursuance thereof transfers a full and complete fee simple title to the purchaser. Such purchaser may thereafter convey full and complete merchantable title to anyone, including the former owner, except that such title would inure to the benefit of such third parties such as mortgagees . . . and such other persons to whom the original obligor owed a personal obligation to pay or protect." *Contra*: State v. Marburger, 353 Mo. 187, 182 S.W.2d 163, 166 (1944) ". . . payment of taxes through purchase by the owner at the tax sale, or payment through redemption by the owner, should relieve the title of the property of the lien affecting it to the extent the paymnt discharged the obligation."

26. For logical discussion of the problem, combined with a criticism of McDonald v. Duckworth, note 25, *supra*, see 60 Harv. L. Rev. 658 (1947).

27. Ferguson v. Cloon, 89 Kan. 294, 131 Pac. 145 (1913) (plaintiff was divested of all interest as mortgagee and as holder of reversionary interest); Hart v. Beardsley, 67 Neb. 145, 93 N.W. 423, 424 (1903) "An execution sale still vests in the purchaser the actual interest of the execution defendant in the property sold; and a foreclosure sale, in the absence of any reservation in the decree, still transfers to the purchaser every right, title and interest of all the parties to the suit."; *cf.* Licking v. Hays Lumber Co., 146 Neb. 240, 19 N.W.2d 148 (1945) (state lien for taxes held a lien on land purchased at tax sale since state not made a party to the foreclosure proceeding).

28. See 13 St. John's L.Rev. 182 (1938).

29. Zandri v. Tendler, 123 Conn. 117, 193 Atl. 598, 602 (1937) "The foreclosure of the first mortgage, no deficiency judgment being sought, followed by the cutting off of the rights of redemption of the defendants by the expiration of the law days fixed for them without action upon their part, extinguished the mortgage debt."

30. See note 14 *supra*.

kota. The facts of the *Miller* case were as follows: Miller, possessing a half interest in the land in question, gave the plaintiff a second mortgage upon his land. The first mortgage was assigned to Miller's father who subsequently foreclosed it. No redemption was made and the father received a sheriff's deed. Miller, proceeding through bankruptcy, listed in his schedule the indebtedness to the plaintiff. It was assumed, by the trial court, that a discharge was decreed. Thereafter Miller organized a "one-man corporation". The father sold the land to Miller, giving a deed with the grantee's name omitted. This omission was filled with the name of the corporation. In the action to foreclose the mortgage, both Miller and the corporation were parties defendant. Miller defaulted, and the corporation appealed from an adverse ruling in the trial court.

The Supreme Court held that the appellant corporation was estopped to assert a purchase of property reacquired by the mortgagor, since the purchaser was charged with constructive notice of the recorded unsatisfied mortgage. Furthermore the result was supported by an after-acquired property statute,[31] which the court deemed applicable to reacquistion by the mortgagor as well as to instances where the mortgagor possessed no title but later acquired it. The appellant's contention that the discharge in bankruptcy removed any liability based upon covenants within the mortgage was rejected. In answer, the court declared that a covenant of warranty to defend title is independent of a covenant against encumbrances. No restriction was imposed upon the covenant of warranty to defend title and the subsequent discharge in bankruptcy did not prejudice the obligation imposed under the covenant.

An interesting sidelight has evolved from the Court's remarks in considering the discharge in bankruptcy aspect of the case. The decision stated:

> "Even if by the listing of provable claims under the broken covenants (within the bankruptcy schedule) he could relieve himself from money judgment thereon, this does not affect his warranty of title so long as he has title either before or after the warranty is broken."

This writer believes that a permissible inference could be drawn from the application of estoppel to defeat the discharge

31. N.D. Rev. Code §35-0206 (1943): "Title acquired by the mortgagor subsequent to the execution of the mortgage inures to the mortgagee as security for the debt in like manner as if acquired before execution."

in bankruptcy to a similar application of estoppel to bar the plea of statute of limitations.[32]

CONCLUSION

The existence of the rule that a second mortgage automatically revives against a reacquiring mortgagor,[33] and a bona fide purchaser from said mortgagor,[34] has created a problem of utmost importance to the title examiner. The solution cannot be attained through a quiet title action seeking to clear the title of unsatisfied liens. Nor will equity cancel a real estate mortgage, which secures a valid unpaid debt, at the suit of the mortgagor, or a bona fide purchaser,[35] when the only basis for the action is that the statute of limitations has run.[36] It is therefore imperative that the title examiner first ascertain whether the unsatisfied junior mortgage, under a foreclosed prior lien, contained a general exception to all covenants of prior lien, in which case there is no problem of revival.[37] Secondly, whether the mortgagor,[38] a purchaser who assumed the mortgage,[39] the wife, or any other person who may have joined in the mortgage,[40] has ever reacquired the property. The revival of the junior mortgage usually operates even when personal liability for breach

32. Howell v. Dowling, 52 Cal. App. 487, 126 P.2d 630, 635 (1942) "There is no doubt that except for the fact that the . . . (second) deed of trustee was fraudulently procured, it would have reattached to the property when it was reacquired by the . . . (mortgagor) . . . And this would be true regardless of the running of the statute of limitations . . .". *But see* Cole v. Raymond 75 Mass. 217, 219 (1857) "A covenant of warranty . . . runs with the land . . . it is also a personal covenant; and if a breach occurs . . . an action will be against him to recover damages . . . it must be treated in all respects as a personal obligation; the usual incidents to the conduct of a personal action will be applied."; 4 Tiffany, Real Property §1022, (3rd ed. 1939).

33. See note 5 *supra*.

34. Jensen v. Duke, 71 Cal. App. 210, 234 Pac. 876 (1925) (court allowed second mortgagee to foreclose on property in the hands of mortgagor's grantee where mortgagor had reacquired property after foreclosure of prior trust deed); Ayer v. Philadelphia & Boston Face Brick Co., 159 Mass. 84, 34 N.E. 177 (1893) (purchaser without notice of second mortgage takes no better title than mortgagor had); 52 Harv. L. Rev. 1177 (1939).

35. *Ibid.*

36. National Tailoring Co. v. Scott, 65 Wyo. 64, 196 P.2d 387 (1948) (court refused to quiet title to property where mortgage was barred by the statute of limitations but held that statute of limitations had no application to power of sale in the mortgage); Booth v. Hoskins, 75 Cal. 271, 17 Pac. 225, 227 (1888) "Common honesty requires a debtor to pay his just debts, if he is able to do so, and the courts, when called upon, always enforce such payments if they can. The fact that a debt is barred by the statute of limitations in no way releases the debtor from his moral obligation to pay it."; Tracy v. Wheeler & Scott, 15 N.D. 248, 107 N.W. 68 (1906). *Contra:* Burroughs v. Burroughs 196 Okla. 50, 162 P.2d 549 (1945).

37. Midland Realty Co. of Minnesota v. Halverson, 101 Mont. 49, 52 P.2d 159 (1935) (second mortgage did not revive where covenant of warranty in second mortgage did not warrant against first mortgage); Huzzey v. Hefferman, 143 Mass. 232, 9 N.E. 570 (1887) (second mortgage held not to revive where second mortgage contained a covenant to "warrant and defend the premises against the lawful claims and demands of all persons except those claiming under the prior mortgage"); 1 Jones, Mortgagors §679 (6th ed. 1904).

38. See note 5 *supra*.

39. See note 7 *supra*.

40. See note 24 *supra*.

of covenant is at an end. This in effect imposes a permanent incapacity to hold title against the covenantee [41] and his assigns.[42]

A situation approaching the impossible in detection arises where the wife of a mortgagor joins in the second mortgage. Later the first mortgage is foreclosed and the wife subsequently changes her name through divorce or re-marriage and then reacquires the property. The *Miller* case implies that the unsatisfied recorded junior mortgage would be constructive notice to subsequent purchasers from the wife.

Since North Dakota has unequivocally adopted the theory of revival of mortgages, the only possible solution is to except the prior mortgage specifically and distinctly from the covenants of warranty in the second mortage.[43] Although only a few cases have been litigated on this point, the possibility exists that a grantee in the chain of title may be one against whom the unsatisfied second mortgage may revive. It is incumbent that every precaution be taken in the examination of the abstract to protect the client against such a contingency.

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TRUSTS. — IMPLIED TRUSTS IN NORTH DAKOTA. — An implied trust is a trust created by operation of law [1] as distinguished from an express trust which is created by words or conduct of the settlor.[2] Into a single section [3] of the North Dakota Code are concentrated all the methods of creating implied trusts. Section 59-0106 of the code provides:

"An implied trust arises in the following cases:

1. One who wrongfully detains a thing is an implied trustee thereof for the benefit of the owner.
2. One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an implied trustee of the thing gained for the benefit of the person who would otherwise have had it;
3. Each one to whom property is transferred in vio-

41. Merchants National Bank v. Miller, 59 N.D. 273, 285, 229 N.W. 357, 362 (1930) ". . . he is estopped from claiming (discharge in bankruptcy), so far as subsequent title to the property is concerned, that the property is not affected by his solemn warranty. He is simply not heard on that proposition. If he has any bad motive in mind to relieve himself from any agreements which he is estopped from asserting, it would be better for him to say farewell to the land and never again acquire an interest therein."; 52 Harv. L. Rev. 1177 (1939).

42. Patton, Titles §125 (1938).

43. See illustrated examples note 37, *supra*.

1. N.D. Rev. Code §59-0105 (1943).
2. N.D. Rev. Code §59-0104 (1943).
3. N.D. Rev. Code §59-0106 (1943).