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Guardian and Ward: Liability of Guardian for Funds Left in Bank which Becomes Insolvent: Deposit or Investment

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ment is not constructive notice to the subsequent real property mortgagee. *Brunswicke-Balke-C. Co.* v. *Franzke-Shiffman R. Co.,* 211 Wis. 659, 248 N.W. 178 (1933); *Brennan* v. *Whittaker,* 15 Ohio St. 446 (1864); contra, see *In re Atlantic Beach Corp.,* 244 Fed. 828 (S.D., Fla., 1917); see Recent Decision 17 Marq. Law Rev. 231. The Uniform Conditional Sales Act provides that the conditional vendor of the fixtures may prepare a description of the premises and a description of the transaction which he may file with the register of deeds to protect his interest against the subsequent encumbrancers or purchasers of the premises. Section 122.07, Wis. Stats., 1933.

The principal case presents a situation where a subsequent creditor takes a chattel mortgage on the equipment instead of a real property mortgage on the premises. He has constructive notice from the record that the vendor is the last person in the chain of transfer. The alleys are fixtures. Technically the vendor has "title" to the premises; he has not yet executed a conveyance to the purchaser. The creditor should not take a mortgage on the bowling alleys as security for his loan without getting the consent of vendor whose claim covers the fixtures. There is nothing in the case to suggest estoppel. The dissenting judge points out that the proprietor of the bowling place, the vendee, had once arranged to sell the alleys with the plaintiff-vendor's consent, and that he was accustomed to carry insurance on the alleys as if they were seperate from the building. Unless the defendant creditor had known of those facts and had acted in reliance upon them there ought to be no estoppel.

J. C. Q.
V. X. M.

GUARDIAN AND WARD—LIABILITY OF GUARDIAN FOR FUNDS LEFT IN BANK WHICH BECOMES INSOLVENT—DEPOSIT OR INVESTMENT—The guardian, intrusted with $1,272.80, the ward's share of the proceeds of certain real estate, placed the funds on deposit in a bank. Inasmuch as the ward was to come of age twenty months later, the guardian had no intention of making any other disposition of the funds. Eighteen days before the minor became of age the bank became insolvent. In an action to surcharge the guardian with the balance of the deposit when the bank closed, it was *Held,* the guardian is liable for the money on deposit at the time of closing. He should have made an *investment* of the funds, *In Re Hazelbakers Estate,* (Pa. 1934) 171 Atl. 619.

The placing of funds on deposit by a guardian is not an investment, *In Re Grammel,* 120 Mich. 487, 79 N.W. 706 (1899); *In Re Taylor's Estate,* 277 Pa. 518, 121 Atl. 310, 37 A.L.R. 533 (1932). But a deposit of funds in a bank at 4% interest has been held to be "invested" under the terms of a testamentary trust, *Fanning* v. *Main,* 77 Conn. 94, 58 Atl. 472 (1904); *State ex rel First Nat'l. Bank* v. *Bartley,* 39 Neb. 353, 58 N.W. 172, 23 L.R.A. 67 (1894). Depositing funds in a bank is justified only as a temporary measure while the guardian is seeking suitable investment, *In re Law's Estate,* 144 Pa. 508, 22 Atl. 831, 14 L.R.A. 103 (1891); *Corcoran* v. *Kostrometinoff,* 164 Fed. 685, 21 L.R.A. (N.S.) 399 (1908). What is a reasonable time to keep funds on deposit where the guardian is seeking for a suitable investment is held to depend on the circumstances, *Barney* v. *Saunders,* 57 U.S. 535, 14 L.Ed. 1047 (1853); *In re Grammel,* supra; *Cronk* v. *Am. Sur. Co. of N. Y.,* 208 Iowa 267, 225 N.W. 454 (1929). In the instant case the court indicated that six month might have been a reasonable time. However the length of time was not the criterion when the guardian admitted he did not intend to make any other disposition of the funds.

The legislatures have designated what type of investment may be made by guardians and those legally charged with the administration of trust funds. The statutes are specific. (See sec. 231.32, Wis. Stat., 1933). If the guardian follows the course laid down by the statutes he is protected against any future responsibility for loss arising out of the investment which he may select. In the instant case the guardian had elected a course other than that prescribed by the statutes and in so doing he lost the protection which the legislature had attempted to provide; see, 20 Pa. Stats. Ch. 801; *In re Taylor's Estate,* supra; *U. S. F. & G. Co.* v. *Taggart,* (Tex Civ. App., 1917) 194 S.W. 482. The guardian may not follow the "statutory course" and if he uses good faith and due care and prudence working for the best pecuniary interests of his ward, he will not be responsible for any loss arising out of the transaction, *Lamar* v. *Micon,* 112 U.S. 452, 5 Sup. Ct. 221, 28 L.Ed. 751 (1884); *Corcoran* v. *Kostrometinoff,* supra. *(The transaction has been an investment.)*

The strict application of the letter of the law doubtlessly places the loss on the guardian. Due care on his part in depositing the funds for a certain period is rendered ineffective where he fails to bring himself within the statute or cannot show he was seeking an investment when the loss is incurred.

C. A. R.

NEGLIGENCE—RES IPSA LOQUITOR—COMMON CARRIERS—The plaintiff, a passenger in a bus, operated by the defendant, a common carrier, was injured when the bus struck the rear of an automobile being operated by a third person. The plaintiff was thrown from her seat to the floor of the bus. The complaint set forth general allegations of negligence. At the trial the plaintiff introduced no specific facts to show fault on the part of the bus driver or any other employee of the defendant. The trial court did take notice of an Ohio statute which provided that no person should drive any motor vehicle at a greater rate of speed than would permit him to stop within the assured clear distance ahead. (Cf. sec. 85.32, .40, Wis. Stats., 1933). The trial court permitted the case to go to a jury and the jury found a verdict for the plaintiff. Judgment was entered on the verdict. *Held,* on appeal, the record failed to support the verdict. The mere happening on an injury to a passenger without a showing of a definite breach of duty by the carrier is insufficient in law to constitute a ground of actionable negligence. *Hall* v. *Custom Motor Coach, Inc.,* (Ohio, 1934) 189 N.E. 505.

It is conceded that a common carrier owes its passengers the highest degree of care consistent with the transaction of its business. *Scales* v. *Boynton Cab Co.,* 198 Wis. 293, 223 N.W. 836, 69 A.L.R. 379 (1929). The carrier's responsibility, however, is not absolute. There must be something in the record to support a finding of fault. The doctrine of *res ipsa loquitur* may be invoked to help the plaintiff-passenger in some situations where it would be difficult for him to know definitely what the carrier's employees had failed to do or to discover what they had done improperly. This is particularly true in collision cases, and the doctrine is generally applied where the collision occurs between two vehicles operated and directed by the same defendant carrier, *North Chi. St. Ry. Co.* v. *Cotton,* 140 Ill. 486, 29 N.E. 899 (1892). The carrier is expected to explain how the collision occured because his employees have been in a better position than the plaintiff to have seen what happened. In the instant case one of the vehicles was not operated by anyone employed by the defendant. This is a typical situation in the bus cases. Whether a plaintiff in such a case should be in a position to make out a prima facie case by showing merely the happening of the collision,