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Fraud - No Constructive Notice in Fraud Cases

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at the time of the original transaction was that title was to vest in the Bank of California, National Association when credit with right to withdraw was given to Richardson and Richardson.

CORDULA M. SCHOMMER.

Fraud—No Constructive Notice in Fraud Cases.—*Schoedel* v. *State Bank of Newburg,* 245 Wis. 74, 13 N. W. (2d) 534 (1944), was an action commenced on May 10, 1937, by the plaintiff against the defendant bank to recover damages arising out of the alleged false and fraudulent representation by defendant that a certain mortgage sold to plaintiff by defendant on March 16, 1931, was a first mortgage on the real estate therein described.

According to the allegations of the complaint the mortgage sold was in fact a second mortgage junior to a first mortgage recorded April 15, 1929, but the plaintiff knew nothing of this first mortgage until May 10, 1937, when the summons and complaint in a suit to foreclose the first mortgage was served upon him. The defendant demurred to the complaint on the ground that the action was not commenced within six years of accrual of the cause of action under Section 330.19 (7) of the Wisconsin Statutes, providing that in an action for relief on ground of fraud, the cause of action is not deemed to have accrued until the discovery, by the aggrieved party, of facts constituting the fraud. The trial court overruled the demurrer and the defendant appealed contending that the plaintiff as assignee of the mortgage, was charged with notice of the recorded facts establishing the legal position of his mortgage and that the plaintiff, having constructive notice of matters of record which disclosed the falsity of the representations, must be deemed to have discovered the fraud at the time when he purchased the mortgage on March 16, 1931, and that therefore his present action was too late.

The Supreme Court affirmed the holding that under the above statute plaintiff's cause of action did not accrue until actual discovery of the fraud on May 10, 1937, and that the doctrine of constructive notice was inapplicable under the statute.

The decision is an application of the general doctrine of justifiable reliance in business transactions upon representation of fact to recorded facts. The matter is well put in the Restatement of Torts:[1] "The recipient in a business transaction of a fraudulent misrepresentation of fact is justified in relying upon its truth, although he might have ascertained the falsity of the representation had he made an investigation."

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[1] Restatement of Torts, Sec. 540.

Comment b. "The rule stated in this section is applicable even though the fact which is falsely represented is required to be recorded and is recorded."

A recent Wisconsin case following the rule as laid down by the American Law Institute in the Restatement of Tort is *Frank* v. *State ex rel. of Meirers.*[2] In this case the court held that a misrepresentation that premises are presently unincumbered and eligible for a first mortgage is a representation of fact and will support a prosecution for obtaining money under false pretenses even though resort to offices of record would disclose the true title of the property.

The authorities are not in agreement on the issue as raised in the principal case. Some holding that recorded instruments are constructive notice for the purpose of the Statute of Limitation.[3]

Those authorities which have, at times laid this down as a principle have experienced some difficulty in adhering to it, because it is a rule of thumb, rather than a live principle of law, and it takes no account of the numerous forms in which fraud may appear and its varied devices and circumstances of concealment.

The decision in the principal case is sound as pointed out by the court, if a person to whom the representation is made that the property is unincumbered or that the mortgage is a first mortgage is deemed to have discovered the fraud by reason of the record, then he must be deemed to have discovered it at the time the representations were made and there would be no occasion for dealing with the Statute of Limitation at all. Again as said in the Restatement of Torts,' "The recording acts are not intended as a protection to those who made fraudulent representations. Their purpose is to afford a protection to persons who buy a recorded title against those who having obtained a paper title

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[2] Frank v. State *ex rel.* of Meirers, 244 Wis. 658, 12 N.W. (2d) 923 (1944).

[3] 137 A.L.R. 268.
33 A.L.R. 853.
Annotated Cases 1917 A. 269.
Bainbridge v. *Stoner,* 16 Cal. (2d) 423, 106 Pac. (2d) 423, (1940). Here in a suit by the minority stockholders to recover property belonging to the corporation on the ground that a director fraudulently acquired its title was barred by a three year statute of limitation. It was held that a judgment rendered in a previous case against the corporation and in favor of the director (defendant) was constructive notice to the plaintiff, here, of the director's alleged fraud.
Isaiah Walker Jr. v. *Harvey Soule,* 138 Mass. (1884). In tort action to recover money paid to Defendant administrator, for conveyance of certain property which was already disposed of and which conveyance was properly recorded, the Court held: The only false representations were as to the contents of public records, which the plaintiff had full opportunity to examine.
Heap v. *Heap,* 258 Mich. 250, 242 N.W. 252 (1932). In a bill for an accounting of an estate, in which petitioner, widow of the intestate, claims fraud of the administrator, in estate's interest in a partnership, the Court held: the general rule to be that the running of limitation will not be postponed if defrauded person may discover fraud from the public record, but when a fiduciary relationship is involved, no necessity exists for an examination of the records.

have failed to record it. The purpose of such statutes can be perfectly accomplished without giving them a collateral result which protects fraud feasers from liability." WILLIAM EVANS.

Municipal Corporations—Liability for Extras Furnished Without Compliance with Statutory Mode of Contracting.—In *Probst* v. *City of Menasha,* 45 Wis. 90, 13 N.W. (2d) 504 (1944) the defendant city made contract with plaintiff contractor for the construction and repair of sidewalk, which contract obligated the contractor to furnish sufficient filling to bring subgrade to proper level. The contract was entered into in compliance with Sec. 62.15[1] laying down the mode of entering into municipal contracts for public works. However, at the direction of the city engineer the contractor furnished extra filling of sand, and a committee of the common council which worked with the city engineer knew of the directions. It was held that the city could make itself liable on contract only in compliance with statutory provisions; that neither the city engineer nor the street committee had authority to modify the terms of the contract between the contractor and the city, and that the city did not become liable for the extra filling on principle of unjust enrichment.

In *L. G. Arnold Inc.* v. *City of Hudson,*[2] the plaintiff sought to recover for additional work under an amended contract without additional compensation being included. In denying recovery the court said,

> We have found no decision of this court in which it has been held that a city may incur municipal liability by estoppel where the applicable mandatory statutes have not been complied with. The whole tenor of our decisions has been to require municipal corporations implicitly to obey the law in regard to letting of contracts or to incurring municipal liability and to deny to claimants against municipalities recoveries unless the law relating to the making of municipal contracts has been fully complied with.

Bechtold and another v. *City of Wauwatosa and others,*[3] a taxpayers action to enjoin the city from paying on a contract entered into with the Federal Paving Corporation held that a municipality has no power to make contracts for public improvements unless it proceeds in the manner prescribed by law and that a contract entered into without com-

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[1] WIS. STAT. (1915), Sec. 62.15(1). All public work the estimated cost of which shall exceed $500 shall be let by contract to the lowest responsible bidder; all other public work shall be let as the council may direct. The council may also by a vote of 2/3 of all the members elect provide by ordinance that any class of public work or any part thereof may be done directly by the city without submitting the same for bids.

[2] L. G. Arnold Inc. v. City of Hudson, 215 Wis. 5, 254 N.W. 108 (1934).

[3] Bechtold, and another v. City of Wauwatosa, and others, 228 Wis. 544, 227 N.W. 657 (1938).