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Liability of Abstractors of Title

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Liability of Abstractors of Title

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CORNELL UNIVERSITY
SCHOOL OF LAW
1895
LIABILITY OF ABSTRACTORS OF TITLE.

I. Who are abstractors of title? An abstractor of titles must be distinguished from an examiner of titles. The first deals with facts; the latter with the legal effect of facts. The first undertakes that he will ascertain the necessary facts affecting title; the latter that he will give a professional opinion as to the bearing of the facts so ascertained upon the title in question. These two functions may be undertaken by the same person, but in modern practice, especially in portions of this country where transfers of realty are frequent, they are usually separated, the first being performed by a private individual or company, or in some states by a public officer, and the latter by an attorney at law.

An abstractor of title may be defined as a person who undertakes for a compensation, to furnish a history of the title to a given tract of real estate, by specifying the nature, parties, dates of execution of entry or of recording, and other material facts, together with the place of record, of every instrument appearing upon the public records which affects the title to such realty either by way of conveyance, devise, decree, judgment, incumbrance or lien. Evidently the undertaking is very considerable, and involves important consequences.

There are two main ways in which the question as to the liability of an abstractor of titles may arise. First, the liability may be sought to be enforced by the person with whom the abstractor made the contract of service. Second, the liability may be sought to be enforced by some third person who has relied on the abstract, although not a party to the contract of service. The subject will, therefore, be discussed under each of these heads.

II. Public abstractors of title. In many states it is made the duty of certain public officers to furnish abstracts of title when applied to for that purpose. It becomes necessary, therefore, to inquire whether such officers stand upon the same footing as private persons who undertake a like service by private contract.
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It appears to be settled that no distinction is to be drawn between the liability arising from contract, and that which arises from official misfeasance. The officer who assumes the duty of search, and receives pay therefore, by the party who requests the performance, is in the same position as a private person undertaking the work; and, "The transaction, to all intents and purposes, becomes a personal contract, as much so as though it was wholly voluntary, and not statutory."

The duties of a voluntary abstractor are purely contractual, and to recover a party must put himself in privity by showing that some duty exists in his favor by reason of a contract. On the other hand the plaintiff's right to recover against a public abstractor, rests on some duty to him, which he must establish in order to recover. Mr. Throop, in speaking of the general rules respecting an officer's liability to a private action, says: "It is a condition, lying at the very foundation of a private action against a public officer, to recover damages for a wrongful act or omission, that it must rest on some duty, owing to the plaintiff by the officer, which has been violated, whereby the plaintiff sustained damages."

III. Liability under the Contract. An abstractor of title holds himself out as a skilled person, and is bound like others engaging in skilled occupations to two main undertakings,—first, that he has the necessary skill, and, second, that he will exercise it. Accordingly such a person who undertakes to search the public record, to examine the title to real estate, and make an outline history thereof, for compensation, impliedly agrees that he possesses the required knowledge and skill, and that he will use that degree of skill and care which is proportioned to the risk of the undertaking; and is liable if he fails in either respect.

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1 Owen v. Western Saving Fund, 97 Penn. St., 47.
2 Throop on Public Officers, § 707.
In the words of Judge Story: "He must be understood to have engaged to use a degree of diligence and attention and skill, adequate to the due performance of his undertaking. And if he has not the proper skill, or if, having it, he omits to use it, . . . he will be responsible for the damages sustained thereby by his employer. . . . It is the party's own fault, if he undertakes without having sufficient skill, or if he applies less than the occasion requires." But one who gives an abstract is not bound to perfect accuracy nor perfect care. Good faith and reasonable care and skill is all that is required.

The examiner of title cannot in anyway limit his liability by an obscure clause in the certificate, without specially calling the attention of the other party to it. If he discovers that he cannot furnish a complete and reliable abstract, it is his duty to give the other party notice of the fact, that the latter may apply elsewhere; otherwise such other party will have a right to rely on the abstractor's competency and fidelity.

The court said in Dodd v. Williams: "What is a lien on real estate may be a difficult question in some cases to decide; but an examiner of title is bound to know the state of the law on the subject, at least sufficiently to put him on guard; and, where there may be a reasonable doubt as to whether such or such a recorded instrument is a lien, if he wishes to resolve the doubt he does so at his peril."

It would seem, however, that he may always escape the peril by noting the doubtful instrument on the abstract, and leaving the other party, or his attorney, to decide upon its legal effect. But, query, whether he could recover compensation for the entry, where, as is often the case, compensation is based on the number of entries, if the entry is clearly one having no effect on the title.

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1 Story on Bail., (9 Ed.) § 431. 2 Weeks on Att'y., § 312; N. p. 626.
3 Savings Bank v. Ward, 100 U. S., 195; Dodd v. Williams, 3 Mo. App., 278; Rankin v. Schaeffer, 4 Mo. App., 108; Sherman & Redfield on Neg. § 574.
4 Chase v. Heaney, 70 Ill., 268.
5 3 Mo. App., 278.
The agreement of an abstractor does not amount to an indemnity. In *Rankin v. Schaeffer*, Judge Blackwell says: "The examiner of titles does not warrant; he is not liable, except for negligence or want of necessary skill and knowledge. The contract made by him when he receives a fee and examines a title is not one of indemnity, but a contract that he will faithfully do his work and the contract is broken, and an action lies for the breach of it, so soon as he, through his negligence or ignorance of his business, delivers a false certificate of title." Accordingly there is no element of guaranty involved in such employment. He does not warrant or guarantee the correctness of his work any more than a physician or a mechanic does.

The courts can generally say as a matter of law, that if the defendant enters into the contract to search the records, and fails to discover an encumbrance upon the title, or having found it, omits to mention it in his certificate, that he is negligent. Patience and care are the main qualities required. There is no professional opinion or discretion to be exercised on the part of the abstractor; he has only to furnish the facts from the register's office, without concern for their legal effect.

The defendant in every case will be liable for the actual damages sustained by the plaintiff by reason of his relying on the false certificate. An action accrues to the plaintiff at the instant he parts with his money on the faith of the faulty abstract, and the statute of limitations then begins to run.

IV. **Liability of abstractor to third parties.** The more difficult question remains whether the abstractor is liable to a third person, not a party to the contract, who relies on the abstract furnished to the con-

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1 *Mo. App.*, 108.
3 Chase v. Heaney, 70 Ill., 268; Clark v. Marshall, 34 Mo., 429; Dodd v. Williams, 3 Mo. App., 278.
4 Dickle v. Abstract Co., 89 Tenn., 431.
tracting party. In solving this question we are compelled to examine analogous cases in the law of negligence, where third parties have suffered damages from the breach of contract between the defendant and some other person. The cases resolve themselves into three classes: (1.) where the defendant assumed a contractual obligation toward X, and performed it so negligently as to injure the plaintiff; (2.) where the defendant undertook such a duty, and performed it with wilful intent to injure the plaintiff; (3.) where the defendant undertook such a duty with reference to an article inherently dangerous. The first class involves ordinary negligence; the second, deceit; the third the unnamed wrong of negligently or recklessly dealing with eminently dangerous things.

(1.) The principle is involved in Winterbottom v. Wright. The facts were these. The defendant had contracted with the Postmaster General to provide a mail coach to convey mail bags along a certain line of road. Damage was suffered by the driver of the coach which broke down from defects in its construction. It was decided that the facts laid no ground of action—the reason of the decision being, that the contract was made with the Postmaster General alone, and that the defendant owed no duty to any body else. The argument was put thus: "Here the defendant entered into a contract with a public officer to supply an article which, if imperfectly constructed, was necessarily dangerous, and which, from its nature and the use for which it was destined, was necessarily to be driven by a coachman. . . . But if we were to hold the plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe course is to con-

2 Langridge v. Levy, 2 M. and W., 519.
3 Thomas v. Winchester, 6 N. Y., 397; Schubert v. J. R. Clark Co. 49 Minn., 331.
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fine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty."

A more clearly analogous case where the principle was involved is *Kahl v. Love.* A tax collector accepted a check for taxes on certain lands, and gave a receipt therefor. Such receipt was exhibited to a purchaser of the lot to show its discharge from the taxes at the time of the sale. The check being unpaid, the city enforced the tax against the property in the hands of the purchaser. On these facts it was held that such purchaser could not maintain a suit against the collector for the loss sustained by him. The court said: "The strongest light in which this case can be regarded in favor of the plaintiff is to assume that there is some evidence from which a jury might properly infer that the defendant, when he gave the receipt, was aware that such vouchers were sometimes used . . . as testimonials that the taxes upon them were paid up. It is not every one who suffers a loss from the negligence of another that can maintain a suit on such ground. The limit of the doctrine of actionable negligence is, that the person occasioning the loss must owe a duty, arising from contract or otherwise, to the person sustaining such loss. Such a restriction upon the right to sue for a want of care in the exercise of employment or the transactions of business, is plainly necessary to restrain the remedy from being pushed to an impracticable extent."

Upon the same principle a grain inspector's liability for a false certificate, given negligently, but without fraud, does not extend to the purchaser of the grain, who bought upon the faith of the certificate, but with whom the inspector had no contract.

And where a water works company contracted to supply the city with water, and in consequence of a breach of such contract the city was unable to extinguish a fire, the company was held not liable to citizens who suffered damages thereby.

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1. 37 N. J. Law, 5.
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(2). As to the cases involving wilful deceit, the law is against the defendant. In the old case of Langridge v. Levy, where a man sold a gun which he knew to be unsafe to the father of a lad, knowing the lad would use it, the court held the defendant liable, on the ground that knowing who was to use the article he owed to such third party a duty not wilfully to imperil his safety. The case turned upon the question of fraud, and in a similar case an abstractor was held. The father in the case above, might be treated as the agent of the son. But upon the theory of agency it is necessary that the agency be clearly established to hold an abstractor.  

(3). The cases involving the dealing with dangerous articles may be shortly disposed of, since an abstract would hardly be included among such articles. Poisons and explosives constitute the articles so decided dangerous, though a step-ladder has recently been added to the list.

The first case which came before the court in regard to the liability of an abstractor to a third party upon a false certificate of search was Savings Bank v. Ward. The facts were: A., an attorney-at-law, employed and paid solely by B. to examine and report on the title of the latter to a certain lot of ground, gave over his signature this certificate, "B's title to the lot" (describing it) "is good, and the property is unincumbered." C., with whom A. had no contract or communication relied upon this certificate as true, and loaned money to B. B., before employing A., had transferred the lot in fee by a duly recorded conveyance, a fact which A., on examining the records, could have ascertained, had he exercised a reasonable degree of care. The money loaned was not paid, and B. was insolvent. The court held, that there being neither fraud, collusion or falsehood by A., nor privity of

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1 2 M. & W., 519.
3 Houseman v. Girard, 81 Pa. St., 256.
4 Schubert v. J. R. Clark Co., 49 Minn. 331.
5 100 U. S., 195.
contract between him and C., he is not liable to the latter for any loss sustained by reason of the certificate.

This case was followed under a similar statement of facts in *The Dundee Mortgage Company v. Hughes*,¹ and also in *Day v. Reynolds*² but in the latter case the defendant was a county clerk. The court said:

"There is no reason why the liability of the one should be extended to those with whom he has no dealing, any more than should that of the other." There was some disagreement among the judges in the *Savings Bank Case*, and there is also some authority for the extended liability.³ But this will be considered in another connection.

There seem to be additional reasons for limiting the liability of an abstractor to the contracting party when the certificate is secured by a person not the owner of the property, such as a one wishing to purchase or loan money.

The question is an important one, as it is the custom to pass the certificates of search of deeds, mortgages and judgments with the title papers, each subsequent purchaser taking the title upon the faith of the former searches down to the date of the certificate, and procuring new searches only for subsequent conveyances and liens. The custom is well enough so far as it treats the certificate as reasonable evidence of the condition of the title at the time it is made. But when it is sought to hold the abstractor liable for defects in such an abstract, a different question is presented. Agnew, J., says:⁴ "It is then not simply the evidence which the certificate affords, but the duty it involves. What is this duty? It is as keeper of the records, to make searches for deeds and mortgages, and other recordable instruments, at the instance of those who may apply therefor, and pay him the fee

¹ 20 Fed., 39.
² 23 Hun., 131; See also *Siewers v. Com.*, 87 Penn. St., 15; *Wood v. Ruthland*, 10 Mo. 143; *Comm. v. Harner* 6 Phila., (Pa.) 90.
³ *Dickle v. Abstract Co*, 89 Tenn., 431.
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which the law allows him for the performance of the duty. The duty is specific, to make it for him who asks for it, and pays for it, and therefore has a right to the responsibility of the officer and to rely upon it. It is he who is deceived by the officer's false search, because he alone stands in privity with him, by demanding performance of the duty and making compensation for it.'

If without a new privity of contract, successive liabilities can arise to others, the cause of action necessarily changes, both as to the time of its origin, and the measure of the loss sustained; and thus the statute of limitations would be postponed from time to time, and a variable standard of recovery arise with each succeeding claimant who holds the certificate. This is hard and unjust to the abstractor whose liability is thus made to continue onward without new compensation, or a fresh search.

"It cannot be the case that a right of action follows the floating certificate down the stream of title, because there is no adequate compensation for the tremendous risk; there is no privity of duty between the officer and those coming after the person procuring the search; there is a compounding of several injuries where but one can naturally exist; and because it is clearly harsh, unjust and impolitic." 

The rule should be in cases of this kind, where the certificate is procured by any other than the owner,—as a purchaser, for instance, who gets it for information,—that where he has put it to the use for which it was obtained, that is, for example, relied upon it, and made a purchase on the strength of it, it should then be considered as functus officio—having performed its office.

While the above rule is sustained by the weight of authority, it has not passed wholly unchallenged. Three judges dissented in the

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Savings Banks Case. Chief Justice Waite, writing the dissenting opinion said: "I think if a lawyer, employed to examine and certify to the recorded title of real property, gives his client a certificate which he knows or ought to know is to be used by the client in some transaction with another person as evidence of the fact certified to, he is liable to such other person relying on his certificate for any loss resulting from his failure to find on record a conveyance affecting the title, which, by the use of ordinary care and skill he might have found."

The Chief Justice thought that the circumstances were such as ought to have satisfied the defendant that the certificate was to be used by Chapman, the person who secured the certificate, in some transaction with another person. What the circumstances were do not appear.

The most favorable view for the plaintiff is that the defendant knew that the plaintiff intended to rely on the certificate. Such would be the case where the owner procuring the abstract, informed the abstractor of the use to which he intended to put it. In such a case ought the defendant to be liable? It is a difficult question to decide. But under the well established principle in both contract and tort it would seem that no liability would attach in the absence of wilful intent to deceive. The plaintiff must show some duty existing toward him, either by contract or otherwise. And the courts have never gone to the extent of saying that if A entered into a contract with B, to furnish him a certain thing which is not of itself inherently dangerous, that X could sue for the injury he may have sustained by reason of A's negligence.

A similar case of this kind was discussed by high English authority. The Lord Chancellor said: "I never had any doubt of the unsoundness of the doctrine that A employing B, a professional lawyer, to do any act for the benefit of C, A having to pay B, and there being no

intercourse of any sort between B and C,—if through the gross negligence or ignorance of B in transacting the business, C loses the benefit intended for him by A, C may maintain an action against B and recover damages for the loss sustained. If this were the law a disappointed legatee might sue the solicitor employed by a testator to make a will in favor of a stranger, whom the solicitor never saw or before heard of, if the will were void for not being properly signed and attested. There must be some privity of contract between the parties."

There are, however, some reasons, founded upon considerations of convenience at least, why an abstractor should be held liable to third persons for his negligence. Persons making abstracts hold themselves out to be competent to do the work, and it is well understood that purchasers rely upon the work as security for the state of the title, and expect the abstract to point out existing defects. The necessity and convenience of such a rule was seen in Pennsylvania, where by statute, recorders of deeds, prothonotaries, clerks of the courts and all other officers of the city of Philadelphia, whose duty it is to make certificates of search, are made liable and responsible for a period of five years for all loss and damage which may happen by reason of any false or erroneous certificate of search, made or given by them, not only to persons upon whose order the certificate is made, but also to any person claiming title through, from or under such person, or who may suffer loss by reason of the making of such certificate. But, perhaps this is a matter for the legislature and not for the courts, which must be governed by the more comprehensive principles of the common law.

To summarize, it may be said that an abstractor is not liable to a third person, not a party to the contract, unless he has wilfully falsified the abstract with intent to deceive such person.

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1 See also Longmeid v. Holliday, 20 L. J. Ex., 430; 6 Ex., 761.
2 Brightly's Purdons Digest, p. 1380, § 38.