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## Attorney's Liability in Title Examination

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## TITLE SYMPOSIUM

### ATTORNEY'S LIABILITY IN TITLE EXAMINATION

The responsibility of an attorney in examining title to real property is almost universally enforced by a tort action.<sup>1</sup> The relation of attorney and client is contractual in nature, resulting in duties which are breached by negligence. Usually a client will simply ask the attorney to examine title to a piece of property in which he is interested, but the terms of such a contract are so general neither knows exactly what obligations have arisen or what the examination will entail. Therefore, it is natural that custom has decisively influenced the breadth of obligations assumed.

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1. One case involving nonfeasance was decided upon the theory of contract. Defendants breached the contract by failing to examine title and advising plaintiff the title in question was good. *Wlodarek v. Thrift*, 178 Md. 453, 13 A.(2d) 774 (1940).

In most of the eastern states and some southern states it is the general custom for the examining attorney or his associate to make a thorough search or examinations of all the records and write his opinion upon the basis of what that examination discloses. However, the obligations may be more definitely set out by expressly requesting examination of an abstract of title, examination of specific records, or search for certain types of instruments.

In Wyoming it is customary among most examining attorneys to examine an abstract of title<sup>2</sup> provided by the owner of the property in interest. It is apparently customary that the examiner bases his opinion solely upon that abstract, and if there is or seems to be any irregularity (such as no mention of taxes in the abstractor's certificate, omission of an entry in the abstract, a reference to some instrument which cannot be found in the abstract, or a release of a mortgage which cannot be found in the abstract) he will render his opinion subject to such defects or objections and state a requirement which will perfect each defect. He will also provide that all corrective instruments must be filed and brought forward in a supplemental abstract submitted to him for final approval, and will not ordinarily perfect the defect himself unless expressly asked to do so.<sup>3</sup> Of course, the obligation may be set out more explicitly and the attorney may agree to examine the records or some part of them. He will always state in his title opinion either that he has relied entirely upon the abstract or that he has gone to the records in determining the state of the title. However, by rendering an opinion upon the state of the title an attorney does not customarily insure or guarantee it to be as represented by his opinion. On the contrary, unless there is an express warranty, he will be liable for error in his opinion only if he is negligent in the examination.<sup>4</sup>

A somewhat sketchy body of law has grown up around liability of attorneys who examine title; however, the basic "reasonable man" doctrine of all negligence law applies. An attorney employed to examine title to real property must exercise reasonable care and skill in the matter, and failure to do so is negligence.<sup>5</sup> When good faith is shown to exist, the presence or absence of reasonable care and skill in each case will be determined by its own facts.<sup>6</sup> It is generally held that an attorney examining the records

2. Commercial abstracts are made by professional abstractors of such experience and reliability that title lawyers are content to make their examination of title from abstracts rather than from the records. Patton, Titles sec. 24 (1938).
3. If the client is a prospective purchaser, mortgagee or some other person than the owner, the procedure ordinarily then will be to return the abstract to the owner, along with all objections and requirements for his compliance. After satisfactory completion by the owner and approval by the client's attorney, the client will complete the transaction. If he, himself, is the owner, he will satisfy the requirements.
4. Harper v. Gurtman, 17 N.J. Misc. 289, 8 A. (2d) 376 (1939); Sullivan v. Stout, 120 N.J.L. 304, 199 A. 1 (1938).
5. Lawall v. Groman, 180 Pa. 532, 37 A. 98 (1897); Jacobsen v. Peterson, 91 N.J.L. 404, 103 A. 983 (1918), *aff'd mem.*, 92 N.J.L. 631, 105 A. 894 (1918); Bayerl v. Smyth, 117 N.J.L. 412, 189 A. 93 (1937); Toth v. Vazquez, 3 N.J.Super. 379, 65 A. (2d) 778 (1949).
6. Humboldt Building Ass'n Co. v. Ducker's Ex'x, 111 Ky. 759, 64 S.W. 671 (1901);

themselves must make a diligent and zealous investigation of all public records. Thus it will be negligence to fail to discover a defect in title when it appears in the trial docket,<sup>7</sup> journal<sup>8</sup> or county records;<sup>9</sup> and his duty may not end there, as he might have an obligation to search outside the records for such things as mechanics' and materialmen's liens if he knows of their possible existence.<sup>10</sup> The tendency is that in order to prove a prima facie case of negligence it is only necessary to produce evidence showing that there existed a lien or other defect to title in fee which the attorney has failed to see. He cannot rebut the inference of negligence with evidence that the lien was erroneous or irregular,<sup>11</sup> that the defective record title could have been corrected,<sup>12</sup> that the client should have collected his debt as soon as it matured,<sup>13</sup> or that the client has not proved the lien was recorded.<sup>14</sup>

Seemingly the attorney who has agreed to examine the records must use all his ability and ingenuity to discover all matters related to or affecting title to the property. In other words the reasonable man would apparently be able to make a perfect search of the records, not missing a thing, and in addition exhaustively investigate any further matter concerning the property of which he has notice. Although such a rule is almost an extension of the strict liability doctrine,<sup>15</sup> courts, nevertheless, say the attorney has failed to use reasonable care and skill. That the reasonable skill required is at such a high level could probably be explained on the basis that searching the records is a menial task which does not involve the element of personal judgment—the instruments are in the records and can be found by careful search.

An attorney may be negligent in examination of the instruments also.<sup>16</sup> It has been said, "An examining attorney will be liable if his client suffers on account of his failure to understand and apply those

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Great American Indemnity Co. v. Dabney, 128 S.W. (2d) 496 (1939); 7 Corpus Juris Secundum sec. 141.

7. *Gilman v. Hovey*, 26 Mo. 280 (1858); *Pinkston v. Arrington*, 98 Ala. 489, 13 So. 561 (1893) (Examination of old trial dockets for cases disposed of but not recorded).
8. In the absence of evidence to the contrary it will be presumed that judgments were properly recorded. *Chase v. Heaney*, 70 Ill. 268 (1873).
9. *Wlodarek v. Thrift*, 178 Md. 453, 13 A. (2d) 774 (1940); *Chavis v. Martin*, 211 Ark. 80, 199 S.W. (2d) 598 (1947).
10. *Humboldt Building Ass'n Co. v. Ducker's Ex'x*, 26 Ky. 931, 82 S.W. 969 (1904) (Examiner knew of recent construction on the property.)
11. *Gilman v. Hovey*, 26 Mo. 280 (1858).
12. *Trimboli v. Kinkel*, 226 N.Y. 147, 123 N.E. 205, 5 A.L.R. 1385 (1919) (Title was perfected by adverse possession.)
13. *Gilman v. Hovey*, 26 Mo. 280 (1858).
14. *Chase v. Heaney*, 70 Ill. 268 (1873).
15. The reasoning behind the doctrine of strict liability is that the defendant, although he departs in no way from ordinary standards, must proceed at his peril and his conduct is regarded as tortious not because it is morally or socially wrong, but because as a matter of social engineering the responsibility must be his. *Prosser, Torts* 430 (1941).
16. Although the reported cases involve examination of the records, logically the same rules would apply whether the original instruments or the abstracts are examined.

principles of law that are well established and clearly defined in elementary books, or that have been duly reported and published a sufficient length of time to have become known to those who exercise reasonable diligence in keeping pace with the literature of the profession. A lawyer is without excuse who is ignorant of the settled rules of pleading and practice and of the statutes and published decisions in his own state."<sup>17</sup> An examiner will be liable for negligence if he misreads the instrument<sup>18</sup> or if he knows there is a cloud on the title but fails to make the fact known to his client.<sup>19</sup> But he will not be liable for mere errors in judgment.<sup>20</sup> Thus there is no liability for misconstruction of a doubtful judgment,<sup>21</sup> although it is probably better practice to tell the client of instruments involved in doubt and let him decide,<sup>22</sup> or for mistakes in law in matters where the law is not well settled.<sup>23</sup> Nor is an attorney required to possess more than a slight knowledge of other professions, so that an examining attorney will not be liable for mistakes made by surveyors.<sup>24</sup>

The cases seem to indicate that an attorney in examining either original instruments or abstracts of the instruments is required to exercise the care and skill of a reasonable man who possesses some minimum amount of special learning and ability. In other words conduct is demanded which is consistent with his special knowledge or skill and anything less is negligence. This seems to be in accord with the minimum standard rule<sup>25</sup> commonly applied to the various professions. The standard is ordinarily a community<sup>26</sup> standard<sup>27</sup> so the general customs previously referred to as determining the obligations assumed by an examining attorney are relevant in determining that standard. Thus Wyoming attorneys are of the opinion that reasonable care is being exercised when relying upon the abstract alone<sup>28</sup> if proper objections and requirements are made in the title opinion, and it seems likely the courts would take these customs into consideration when determining that minimum standard. Custom and the decided cases indicate the minimum standard of knowledge and skill for a title examiner is rather liberal, since negligence in applying the law seems

17. *Citizens' Loan, Fund and Savings Ass'n v. Friedley*, 123 Ind. 143, 23 N.E. 1075 (1890).
18. *Byrnes v. Palmer*, 18 App.Div. 1, 45 N.Y.Supp. 479 (1897), *aff'd mem.*, 160 N.Y. 699, 55 N.E. 1093 (1899).
19. *Dorr v. Massachusetts Title Insurance Co.*, 238 Mass. 490, 131 N.E. 191 (1921).
20. The "Standards for Title Examination" adopted and used by the Wyoming Bar Association will in many situations assist in preventing errors of judgment.
21. *Watson v. Muirhead*, 57 Pa. 161 (1868). *Contra: Byrnes v. Palmer*, 18 App.Div. 1, 45 N.Y. Supp. 479 (1897), *aff'd mem.*, 160 N.Y. 699, 55 N.E. 1093 (1899).
22. *Byrnes v. Palmer*, *supra* note 21.
23. *Dodd v. Williams*, 3 Mo.App. 278 (1877).
24. *Toth v. Vazquez*, 3 N.J.Super. 379, 65 A.(2d) 778 (1949).
25. "Professional men in general, and those who undertake any work requiring special skill, are required not only to exercise reasonable care in what they do, but also possess a minimum of special knowledge and ability." Prosser, *Torts* 236 (1941).
26. In Wyoming the community would in most cases be the county or sometimes even the state.
27. Prosser, *Torts* 237, 238 (1941).
28. There is a presumption that the abstract contains a true synopsis of the records and of every matter and thing contained therein which in any way affects or implicates the title. North and Van Buren, *Real Estate Titles and Conveyancing* 197 (1940).

to have been found only in instances in which it is shown there is a definitely settled principle of law which has been misapplied or not applied at all. Although this seems inconsistent with the much stricter liability imposed upon attorneys, who in searching the records, overlook some instruments entirely, the two views may perhaps be reconciled on the ground that examining an instrument for its legal effect is a matter of opinion of the attorney since the law is not an exact science and absolute certainty is not always possible.

Obligations arising from a contract of employment run only to the parties designated by that contract. The general rule has been that the examiner is liable to his client alone for negligent performance of professional duties.<sup>29</sup> If some third person, not a party to the contract, whether spouse,<sup>30</sup> assignee,<sup>31</sup> or mortgagee,<sup>32</sup> brings the action, it will not lie even though he may have suffered damages, because the examination was made at the instance and for the use of the client only. But if the client was in fact agent for another,<sup>33</sup> or the attorney was working for the other at the same time in the same transaction, the obligation runs to that party.<sup>34</sup> It is quite obvious that the problem is simply one of privity of contract, which will be decided on the physical facts such as source of payment, fraud, duty imposed by statute, or parol agreements arising during casual conversation. The tendency is to restrict liability to these rather narrow limits regardless of damages suffered.

However, there is one situation in which a duty to another party might be found, should the case ever arise. By the doctrine of *Glanzer v. Shephard*,<sup>35</sup> the New York court has found a duty where a representation was made by defendant to a third person with knowledge that he intended to communicate it to the plaintiff for the purpose of inducing him to act. There seems to be some indication that if this exact situation should arise, the doctrine would be followed in some jurisdictions.<sup>36</sup> But the United States Supreme Court has refused to extend it to include cases in which defendant might have anticipated such a situation but does not have positive knowledge.<sup>37</sup>

This reluctance to find liability to a stranger seems rather arbitrary

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29. *National Savings Bank v. Ward*, 100 U.S. 195, 25 L.Ed. 621 (1879); *Dundee Mortgage and Trust Investment Co. v. Hughes*, 20 F.39 (9th Cir. 1884); *Schade v. Gehner*, 133 Mo. 260, 34 S.W. 576 (1896); *Lawall v. Groman*, 180 Pa. 532, 37 A. 98 (1897); *Currey v. Butcher*, 37 Or. 380, 61 Pac. 631 (1900).
30. *Currey v. Butcher*, supra note 29.
31. *Dundee Mortgage and Trust Investment Co. v. Hughes*, 20 F. 39 (9th Cir. 1884).
32. *National Savings Bank v. Ward*, 100 U.S. 195, 25 L.Ed. 621 (1879) (Mortgagee made a loan upon faith of title examination previously made for mortgagor.)
33. *Currey v. Butcher*, 37 Or. 380, 61 Pac. 631 (1900).
34. *Lawall v. Groman* 180 Pa. 532, 37 A. 98 (1897) (The fact that the attorney was compensated by one party does not preclude performance of service to another party in the same transaction.)
35. 233 N.Y. 236, 135 N.E. 275, 23 A.L.R. 1425 (1922) (Defendant was a public weigh-master and the plaintiff's vendor employed him to weigh some beans.)
36. *Dundee Mortgage and Trust Investment Co. v. Hughes*, 20 F. 39 (9th Cir. 1884).
37. *National Savings Bank v. Ward*, 100 U.S. 195, 25 L.Ed 621 (1879).

because the courts have found in favor of third persons in analogous situations on the theories of third party beneficiary, equitable estoppel, or even assignment. However, there are too few decisions to say with any certainty that the present trend will continue.

Once it has been determined that the attorney has caused injury to his client by negligently examining title to real property, the further question arises as to what will be the measure of damages charged against the attorney. The very general rule is that he is liable to his client for any loss resulting from his failure to exercise reasonable care and skill in any service he has undertaken.<sup>38</sup> Recoverable damages are seemingly limited to losses within the range of probable contemplation. In other words the damages recovered must be for the direct and proximate consequences of the attorney's negligence. Such a limitation is not entirely satisfactory because it is rather indefinite, but the problem is no different than that which must be dealt with in all fields of negligence. It is said that the limitation is purely one of policy and not connected in fact with causation at all.<sup>39</sup> Whether this is true is not as important as discovering the general pattern of damages which have been recovered. As yet there are only scattered cases to indicate it, and they have concerned damages clearly resulting from the attorney's faulty examination.

There is no difficulty in assessing the amount of recovery because it is simply a matter of producing evidence to show the kind and amount of actual damages the client suffered. If a lien has been negligently overlooked, damages will usually be set at the amount required to satisfy it,<sup>40</sup> but the amount will be limited to the purchase price of the property.<sup>41</sup> In case of total failure of title the measure of damages would ordinarily be the purchase price, with interest.<sup>42</sup> If the property were taken as security for a loan the recoverable damages would ordinarily be the difference in value of the security bargained for and the security received.<sup>43</sup> In addition there may be special damages such as brokers' commissions<sup>44</sup> or attorneys' fees.<sup>45</sup> Therefore, the real problem is not so much one of proving the measure of damages, but proving that the attorney caused the damages.<sup>46</sup>

Although the right to bring an action for negligence has accrued, the statute of limitations may be a bar to recovery. The rule is, the statute of limitations begins to run from the time an attorney gives his client the

38. *Morehead's Trustee v. Anderson*, 125 Ky. 77, 100 S.W. 340 (1907); *Jacobsen v. Peterson*, 91 N.J.L. 404, 103 A. 983 (1918), *aff'd mem.*, 92 N.J.L. 631, 105 A. 894 (1918); *Bayerl v. Smyth*, 117 N.J.L. 346, 189 A. 93 (1937).

39. Prosser, *Torts* 312 (1941).

40. *Bayerl v. Smyth*, 117 N.J.L. 346, 189 A. 93 (1937) (This is so even if he sells the property at a higher price than the purchase price and lien combined.)

41. *Hill v. Cloud*, 48 Ga.App. 506, 173 S.E. 190 (1934).

42. *Wlodarek v. Thrift*, 178 Md. 453, 13 A.(2d) 774 (1940).

43. *Lawall v. Groman*, 180 Pa. 532, 37 A. 98 (1897).

44. *Trimboli v. Kinkel*, 226 N.Y. 147, 123 N.E. 205, 5 A.L.R. 1385 (1919).

45. *Ibid.*

46. See Chapter 8, *Negligence—Proximate Cause*, Prosser, *Torts* 311 et seq. (1941).

incorrect opinion—from the time of the breach of duty and not from the time actual damages are sustained.<sup>47</sup> Of course, if the attorney is guilty of fraud, a different problem is presented and the statute begins to run when the fraud is discovered.<sup>48</sup> As unreasonable as it might appear the statute is not suspended or tolled by the fact that negligence was not ascertained for several years,<sup>49</sup> or that the error was not determined by the court until many years later.<sup>50</sup> The only possible chance of escaping the results of these settled rules is the provision for tolling the statute.<sup>51</sup> It is only necessary to look at them as a client would to see the unfairness. If his attorney rendered an opinion in 1942 and he attempts to sell the land in 1951, but is unable to do so because of a serious undiscovered flaw in the title, he can recover nothing from the attorney.<sup>52</sup> Although the right of recovery on the cause of action should not be allowed indefinitely, the rules seem to distinctly favor the examining attorney.

One general problem arises from all the individual problems which would seem to be a definite hindrance to the bringing of an action for negligence. It stems from the fact that ordinarily actual loss or damage resulting to the interests of another is one of the necessary elements of such a cause of action.<sup>53</sup> Therefore an action cannot be brought until actual damages have been suffered. In the case of examination of title it may be several years before the client has actually sustained any damages and can bring the action. But the courts have unanimously held that the cause of action accrues at the time the attorney writes his title opinion, which is not at all consistent because one of the basic elements is lacking until his client has suffered actual damage. Further, since the statute of limitations runs from the time he gives the faulty title opinion, the final result is that action accrues when title is examined, but the client can't sue until he sustains actual damages, at which time recovery may already be barred by the statute. Perhaps this situation might explain the small amount of litigation. In New York it has been said, "An attorney is liable immediately for all damages *likely to be sustained* by reason of his negligence,"<sup>54</sup> but this is *contra* to the requirement of actual damages, and is illogical because no one would contemplate bringing an action until he has actually suffered a material loss. The general tenor of the decisions is to hold the attorney to a rather lenient standard of conduct in examining title to real property.

HAROLD MAI.

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47. *Lilly v. Boyd*, 72 Ga. 83 (1883); *Lattin v. Gillette*, 95 Cal. 317, 30 Pac. 545 (1892); *Maloney v. Graham*, 171 Ill.App. 409 (1912); *Sullivan v. Stout*, 120 N.J.L. 304, 199 A. 1 (1938).

48. Wyo. Comp. Stat., 1945, sec. 3-506.

49. *Sullivan v. Stout*, 120 N.J.L. 304, 199 A. 1 (1938).

50. *Lattin v. Gillette*, 95 Cal. 317, 30 Pac. 545 (1892).

51. Wyo. Comp. Stat., 1945, sec. 3-510.

52. Wyo. Comp. Stat., 1945, sec. 3-506.

53. *Prosser, Torts* 177 (1941).

54. *Gardner v. Wood*, 37 Misc. Rep. 93, 74 N.Y. Supp. 750 (1902).