Wyoming Law Journal

Volume 6 | Number 2 Article 3

February 2018

Abstractor's Liability in Examination of Title

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ABSTRACTOR'S LIABILITY IN EXAMINATION OF TITLE

At common law, liability of an abstractor for damages resulting from his honest mistakes depended upon privity of contract. The abstractor furnishing an abstract to one person was not held liable for omission or negligence to another person who used it, unless some privity of contract existed between them.[1] However, some courts have said that they might find liability on a negligence basis in favor of a third person, where the abstract was made for the express benefit of a third person.[2] The problem is related to the general topic of negligent misrepresentation. The New York courts have decided two leading cases in this field. In *Glanzier v. Shephard*[3] defendant gave a false weight certificate to a third person knowing that the plaintiff was relying upon it in his dealings with the third person. The plaintiff was allowed to recover. But this has been limited by the doctrine of *Ultramares Corp. v. Touche*[4] where defendant negligently certified a corporation's balance sheet with expectation that it would be used as a basis for financial dealings in general, but without notice that the particular plaintiff would rely upon it in making a loan. Liability for negligence was rejected because there was no contemplation of reliance by the specific plaintiff. One ground for not extending liability to third persons was that the abstractor would be under one duty to the client by virtue of the contract of employment but under another duty apart from the contract to the beneficiaries,[5] thereby creating two standards of conduct on the part of the abstractor.

Although some Western states still follow the common law rule,[6] most of them, including Wyoming, have enacted statutes extending greatly the duty owed by an abstractor. The form enacted by Wyoming[7] is almost identical to the statutes of nearly all the other Western states,[8] only two others having more limited statutes.[9] The use of abstracts of title has expanded greatly in conveyancing transactions in recent years. The legis-

1. Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 48 S.Ct. 134, 72 L.Ed. 290 (1927).
2. Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 48 S.Ct. 134, 72 L.Ed. 290 (1927); Merrill v. Fremont Abstract Co., 39 Idaho 238, 227 Pac. 34 (1924).
3. 233 N.Y. 236, 135 N.E. 275, 23 A.L.R. 1425 (1922).
4. 255 N.Y. 170, 174 N.E. 441, 74 A.L.R. 1139 (1931).
5. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896, 62 A.L.R. 1199 (1928).
6. Washington and Arizona.
7. Wyo. Comp. Stat., 1945, sec. 66-601. Abstractor to have complete set of abstracts and give bond.—Hereafter no person, company or corporation shall engage in or carry on the business of making or furnishing abstracts of title to any real estate within this state, without first . . . , and such person, company or corporation shall also first enter into bond to the people of the state of Wyoming for the use of any person who shall sustain loss or damage by reason of the failure of any such person, company or corporation in the performance of his or their duty as such abstractor. . . .
8. Colo. Stat. Anno. 1935 Chap. 2 Art. 6; Kan. Gen. Stat., 1947 Supp., sec. 67-802; Idaho Code Anno. 1932 sec. 53-101; Neb. Rev. Stat. 1943 sec. 76-501; New Mex. Stat. Anno. 1941 sec. 51-1301; North Dak. Rev. Code 1943 sec. 43-0111; Okl. Stat. 1941 Title 1 sec. 1; Ore. Comp. Laws Anno. 19 sec. 70-162; South Dak. Code 1939 sec. 1.0107.
9. **Montana and Utah.**

lature took the increased use of abstracts into consideration and expanded their value in that an abstract could be used as evidence in any case in which validity of title was questioned either directly or collaterally, by anyone directly interested, whether the person to whom the abstract was issued or not.[10] Having thus widened the abstract's sphere of use it was natural that the legislature should include within the protection of this statute any person who might suffer from fraud or mistake of the abstractor.[11] The act has been aptly described as "An act to provide security to the public."[12] To guard against loss by insolvency of the abstractor, the legislature provided that the abstractor should be required to give a surety bond as protection or idemnity to all persons who might act in matters involving title to lands shown by the abstract.[13] Although the minimum bond required by Wyoming[14] is greater than most states, it is doubtful whether it gives ample protection. This is especially true in view of present real estate values. The practice in two Wyoming counties[15] is to execute bonds with indefinte terms and to provide for annual continuation certificates which expressly provide that the liability shall not be cumulative. The bond agreements also provide that the aggregate liability from the date of the issuance of the bond to the expiration of the certificate shall not exceed the face amount of the bond. In view of the slight protection afforded, some abstractors carry additional liability insurance several times that of the statutory minimum.

In the case of the party for whom the abstract was furnished, the statute has apparently given, in addition to the cause of action ex contractu, a cause of action ex delicto and he may use either theory.[16] The beneficiary of the contract may recover from the negligent abstractor damages he has sustained by reason of negligent and careless acts,[17] the proximate cause of the injury to him being in all cases the failure of the abstractor to show in the abstract the correct state of the title as shown by the records,[18] and the party for whom the abstract is made still may bring his action for breach of contract.[19] Also, any injured party may

10. Gate City Co. v. Post, 55 Neb. 742, 76 N.W. 471 (1898).
11. Merrill v. Fremont Abstract Co., 39 Idaho 238, 227 Pac. 34 (1924); Gate City Co. v. Post, 55 Neb. 742, 76 N.W. 471 (1898); Gallegos v. Ortiz, 28 N.M. 598, 216 Pac. 502 (1923); State v. Jordan, 55 Okl. 705, 155 Pac. 498 (1916); Commercial Bank of Mott v. Adams County Abstract Co., 73 N.D. 645, 18 N.W.(2d) 15 (1945).
12. Gate City Co. v. Post, 55 Neb. 742, 76 N.W. 471 (1898).
13. Gallegos v. Ortiz, 28 N.M. 598, 216 Pac. 502 (1923); Thomas v. Carson, 46 Neb. 765, 65 N.W. 899 (1896); Garland v. Zebold, 98 Okl. 6, 223 Pac. 682 (1924).
14. Wyo. Comp. Stat., 1945 sec. 66-601. Said bond shall be in the penal sum of ten thousand dollars ($10,000), with sufficient sureties, to be approved by and filed with the county clerk of such county, and conditioned for the faithful performance of his or their duty as such abstractor.
15. Albany and Carbon counties.
16. Hillock v. Idaho Title & Trust Co., 22 Idaho 440, 126 Pac. 612 (1912).
17. Washington County Abstract Co. v. Harris, 48 Okl. 577, 149 Pac. 1075 (1919); Leeper v. Patton, 91 Okl. 12, 215 Pac. 421 (1923).
18. Washington County Abstract Co. v. Harris, 48 Okl. 577, 149 Pac. 1075 (1919); Hillock V. Idaho Title & Trust Co., 22 Idaho 440, 126 Pac. 612 (1912).
19. Garland v. Zebold, 98 Okl. 6, 223 Pac. 682 (1924); Provident Loan Trust Co. v. Walcott, 5 Kan. App. 473, 47 Pac. 8 (1895).

have an action of fraud if the representations are more than honest acts of negligence, and amount to fraudulent misrepresentations. Fraud may be shown if an abstractor attempts to deceive, willfully suppresses facts, deliberately certifies to something he doesn't believe is true, or gains an advantage by reason of the mistake.[20] The statute thus does not change the nature of the liability, but it does greatly enlarge the class of people to whom the abstractor is liable. It also gives the injured party an action upon the bond, or he may waive the bond and bring his action directly against the abstractor, since the right of action on the bond is cumulative and not exclusive.[21]

The abstractor and his bondsman are jointly[22] and separately[23] liable for any damages resulting from negligence of the abstractor, the bond being collateral security for anyone who may have been injured as a direct result[24] of the breach of the conditions of the particular engagement.[25] The statute of limitations begins to run against the abstractor on the date of delivery of the abstract and not when the error is discovered,[26] but this has been criticized by the Idaho court[27] on the ground that although there has been a wrong, there is nothing to redress until the wrong has progressed into actual damages. But if the action is for fraud the courts say the action accrues upon the discovery of the fraud.[28] Once the action against the abstractor is barred, then the cause of action on the bond is barred, since the bondsman is just a surety.[29]

Since the statute merely extends liability of the abstractor and does not prescribe any form of certificate to be used, the certificate is still the same as it was at common law. The certificate should state the exact time for which the abstract shows the condition of the title, including the minute, hour, day, month and year, and it should correctly and exactly describe the land involved. It is also customary to state the principal place of business, the number of pages including the caption sheet contained in the abstract of title, and also that it is duly and regularly auth-

20. Commercial Bank of Mott v. Adams County Abstract Co., 73 N.D. 645, 18 N.W.(2d) 15 (1945)
21. Merill v. Fremont Abstract Co., 39 Idaho 238, 227 Pac. 34 (1924).
22. Merrill v. Fremont Abstract Co., 39 Idaho 238, 227 Pac. 34 (1924); Gate City Co. v. Post, 55 Neb. 742, 76 N.W. 471 (1898); Leeper v. Patton, 91 Okl. 12, 215 Pac. 421 (1923).
23. Merrill v. Fremont. Abstract Co., 39 Idaho 238, 227, Pac. 34 (1924); Gate City Co. v. Post, 55 Neb. 742, 76 N.W. 471 (1898).
24. Thomas v. Carson, 46 Neb. 765, 65 N.W. 899 (1896); Commercial Bank of Mott v. Adams County Abstract Co., 73 N.D. 645, 18 N.W.(2d) 15 (1945).
25. Thomas v. Carson, 46 Neb. 765, 65 N.W. 899 (1896).
26. Walker v. Bowman, 27 Okl. 172, 111 Pac. 319, 30 L.R.A. 642, Ann. Cas. 1912B 839 (1910); Garland v. Zebold, 98 Okl. 6, 223 Pac. 682 (1924); Commercial Bank of Mott v. Adams County Abstract Co., 73 N.D. 645, 18 N.W.(2d) 15 (1945); Freeman v. Wilson, 105 Okl. 87, 231 Pac. 869 (1924); E. T. Arnold & Co. v. Barner, 91 Kan. 768, 139 Pac. 404 (1914).
27. Hillock v. Idaho Title & Trust Co., 22 Idaho 440, 126 Pac. 612 (1912).
28. Wyo. Comp. Stat., 1945 sec. 3-506; Commercial Bank of Mott v. Adams County Abstract Co., 73 N.D. 645, 18 N.W.(2d) 15 (1945).
29. Wyo. Comp. Stat., 1945 secs. 3-508 and 3-405; Garland v. Zebold, 98 Okl. 6, 223 Pac. 682 (1924); Provident Loan Trust Co. v. Walcott, 5 Kan.App. 473, 47 Pac. 8 (1895).

orized to transact business under the laws of the state. For thereby it represents to the purchaser that its employees are competent and qualified to make examinations of the records and to furnish such abstracts, and that the purchaser of such abstract may safely rely upon the statements and representations contained in the abstract and certificate.[30] The abstractor should expressly state whether he searched all offices where instruments affecting realty must be recorded[31] and should expressely state that the abstract is correct and a complete abstract of all conveyances and other written instruments,[32] that it contains abstracts or sufficient notations of all proceedings affecting title in civil and probate courts of the county wherein the land is located,[33] and that it contains abstracts of all records in the office of the county treasurer reflecting taxes against the property whose title is being abstracted.[34] The abstractor must clearly and unequivocally show any limitation on his employment or investigation, reciting the method or instruments used in making the abstract.[35] It also should be expressly stated that there are no judgments, mechanic's liens, mortgages, contracts, incumbrances, leases, trust deeds, notice of suit, tax sales unredeemed, tax deed, etc.[36] Since enactment of the statute requiring bond it is now also customary that the certificate show that the abstractor has given bond as required by the statute, which is now in full force and effect. The date the bond expires should also be given. Such a complete and detailed certificate should be required for the reason that although the certificate is not the basis of the cause of action or does not contain any enforceable obligation, it is evidence of the act done by the abstractor in purported satisfaction of the obligation assumed by him in accepting employment. It is the evidence relied upon to establish the breach of that contract.[37]

As has been said, liability arises out of a breach of the duty imposed by the contract of employment. But in all cases this duty is limited to making a painstaking examination of the records and setting forth in the abstract all facts relating to title of the land under inspection. It is not up to him to determine whether the instruments are valid or invalid.[38] States which have enacted the statute require a higher degree of care from the abstractor than that required of the ordinary reasonably prudent man. By his contract of employment he agrees to furnish a true and correct abstract of title, and if he fails to do so for any reason, he is negligent.[39] Some courts

30. Hillock v. Idaho Title & Trust Co., 22 Idaho 440, 126 Pac. 612 (1912).
31. Hamilton v. Binger, 162 Kan. 415, 176 P.(2d) 553 (1947).
32. Jorgensen v. McAllister, 34 Idaho 182, 202 Pac. 1059 (1921); Hamilton v. Binger, 162 Kan. 415, 176 P.(2d) 553 (1947).
33. Note 30, supra.
34. National Life & Accident Insurance Co. v. Parkinson, 136 F.(2d) 506 (C.C.A. 10th 1943).
35. Crook v. Childers, 99 Neb. 684, 157 N.W. 617 (1916).
36. Hamilton v. Binger, 162 Kan. 415, 176 Pac.(2d) 553 (1947).
37. Provident Loan Trust Co. v. Walcott, 5 Kan.App. 473, 47 Pac. 8 (1895).
38. Morin v. Divide County Abstract Co., 48 N.D. 214, 183 NW. 1006 (1921); Gronseth v. Mohn, 57 S.D. 604, 234 N.W. 603 (1931).
39. Garland v. Zebold, 98 Okl. 6, 223 Pac. 682 (1924).

say simply that "a high degree of care is required;"[40] some courts say that the abstractor "vouches for the correctness of the abstract;"[41] one court says "ordinary care and diligence requires him to avail himself of every faculty at hand in order to furnish his client an accurate and complete abstract of the records;"[42] another court says that "abstracting requires specialized knowledge and skill, and if the abstractor engages in that business he represents that he possesses specialized knowledge and skill."[43] The strict duty thus imposed is commensurate with the abstractor's specialized knowledge and he will be found negligent if he fails to mention in his abstract such things as a tax deed,[44] a judgment lien,[45] an attachment lien,[46] or a valid outstanding tax sale,[47] a mortgage,[48] or a deed.[49] He is thus liable for any error or incompleteness, resulting from negligence.

A little different problem arises when the abstractor is employed to bring up to date an abstract previously made. He is expected and required only to examine and certify it as to matters which have been brought upon the records during the intervening period and in such event, his liability would be limited to errors made in the extension.[50] He will not certify the accuracy of the earlier entries unless expressly asked to do so.[51] He may, however, agree to examine the entire records and reissue the previously prepared abstract. An attorney examining an abstract should make this known to his client, so that if the bond covering the older entries has expired, the client will understand that he is only partially protected and may desire to order a reissue with a new certificate covering all entries.

If the statute of limitations has not yet barred the action the general rule of recovery is that the injured party is entitled to all damages proximately resulting from the negligence of the abstractor.[52] The limitation generally placed upon this rule is that if title fails completely damages allowed will be the price of the land and reasonable attorney's fees.[53] But if there is an incumbrance on the land omitted from the abstract, such as a mortgage, judgment or tax lien, being fixed, definite sums which the law

40. Leeper v. Patton, 91 Okl. 708, 215 Pac. 421 (1923).
41. Scott v. Jordan, 55 Okl. 708, 155 Pac. 498 (1916); Commercial Bank of Mott v. Adams County Abstract Co., 73 N.D. 645, 18 N.W.(2d) 15 (1945); Gate City Co. v. Post, 55 Neb. 742, 76 N.W. 471 (1898).
42. Crook v. Childers, 99 Neb. 684, 157 N.W. 617 (1916).
43. Scott v. Jordan, 55 Okl. 708, 155 Pac. 498 (1916).
44. Hillock v. Idaho Title & Trust Co., 24 Idaho 242, 133 Pac. 119 (1913).
45. Gate City Co. v. Post, 55 Neb. 742, 76 N.W. 471 (1898).
46. Marcell v. Midland Title Guaranty & Abstract Co., 112 Neb. 420, 199 N.W. 731 (1924).
47. Leeper v. Patton, 91 Okl. 12, 215 Pac. 421 (1923); Marley v. McCarthy, 129 Neb. 880, 263 N.W. 385 (1935).
48. Crook v. Childers, 99 Neb. 684, 157 N.W. 617 (1916).
49. Washington County Abstract Co. v. Harris, 48 Okl. 577, 149 Pac. 1075 (1919).
50. E. T. Arnold & Co. v. Barner, 91 Kan. 768, 139 Pac. 404 (1914).
51. Marley v. McCarthy, 129 Neb. 880, 263 N.W. 385 (1935).
52. Marcell v. Midland Title Guaranty & Abstract Co., 112 Neb. 420, 199 N.W. 731 (1924); Provident Loan Trust Co. v. Walcott, 5 Kan.App. 473, 47 Pac. 8 (1895); Washington County Abstract Co. v. Harris, 48 Okl. 577, 149 Pac. 1075 (1919).
53. Washington County Abstract Co. v. Harris, 48 Okl. 577, 149 Pac. 1075 (1919).

required to be paid, the measure of damages is the amount necessarily spent to remove them as clouds,[54] plus interest and costs.[55] A mineral lease is slightly different, the measure of damages being the purchase price of the land, less the value of the land as incumbranced by the mineral lease.[56] The injured party is also entitled to recover any reasonable expenses which he may have been subjected to in removing the incumbrance.[57]

It is a matter of common knowledge that titles are generally transferred and incumbered on the faith and credit of certificates furnished by abstractors to the owners of land. It has become the usual concomitant of every instrument evidencing an interest or ownership in land; it vouches for title and defines its character. At common law or in the absence of statute, the courts have been reluctant to extend the liability of persons such as abstractors who furnish statements of purported facts which may be relied upon by large numbers of persons. Extension of liability was a matter of business expediency and since the courts did not feel free to do so, the legislatures enacted statutes which have shown good results. This is a far more equitable view than existed under the common law because in most cases it is the beneficiary of the contract of employment who suffers damage rather than the person who has the abstract made. It is ordinarily the grantor or mortgagor who has the abstract made, and the grantee or mortagee has acted in reliance upon that abstract. The effect of the statutes has been to bring the calibre of abstractors' work to a higher level and to increase confidence in the abstract of persons who are involved in conveyancing transactions.

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THE PRESUMPTION OF DEATH PROBLEM IN TITLE EXAMINATION

The rule very generally adopted in the United States, either by statutory enactment or adjudication following the common law, is that for all legal purposes a presumption of death arsies from the continued absence of a person from his home or place of residence without any intelligence from or concerning him for a period of seven years.[1] This presumption in its present form has long ceased to suffice for dealing with the problems involved. Numerous articles have been written about the important issues of litigation in which the presumption of death becomes material. The majority of these deal with problems affecting life insurance claims by

54. DeVilliers v. Pioneer Abstract & Loan Co., 92 Okl. 80, 218 Pac. 310 (1923).
55. Marcell v. Midland Title Guaranty & Abstract Co., 112 Neb. 420, 199 N.W. 731 (1924).
56. DeVilliers v. Pioneer Abstract & Loan Co., 92 Okl. 80, 218 Pac. 310 (1923).
57. Marcell v. Midland Title Guaranty & Abstract Co., 112 Neb. 420, 199 N.W. 731 (1924).

1. 16 Am. Jur. 19.