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Extension of Liability of Abstracters

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EXTENSION OF LIABILITY OF ABSTRACTERS

The General Rule.—In 1900 a standard encyclopedia said: "By the weight of authority an abstracter is liable only to the person ordering and paying for the abstract; and where this view obtains, the fact that an abstracter has knowledge that his abstract is to be used in a sale or loan to advise a purchaser or person about to lend money does not affect the rule as to his liability. In some jurisdictions, however, the abstracter's liability has been extended to protect those who, relying on the correctness of the abstract, are injured."[1]

In 1914 another excellent encyclopedia asserted: "While there is some apparent and perhaps actual conflict of authority upon the question, the general rule is that the liability of an abstracter extends only to the person employing him, or to one who is a party or privy to the contract of employment, and this rule seems to be unquestioned in cases where the abstractor has no knowledge that the abstract is intended for the information or use of another; but the general rule is not without exceptions, and there are cases where, under certain circumstances, the liability has been extended to persons other than those directly employing the abstracter, who are injured by reliance upon the abstract; although it seems, and has been so stated, that these cases are based upon peculiar circumstances and are not in conflict with the general rule. Under some statutes the liability upon the bond required of abstracters is expressly extended to persons other than those employing them."[2]

Basis of General Rule.—The general rule respecting the persons to whom an abstracter is liable for loss resulting from reliance upon his negligently erroneous abstract of title undoubtedly is supported by the great weight of numerical authority.[3] The view that only

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[1] Cyc. 215.

[2] 1 Corpus Juris 369-70.

[3] *National Savings Bank* v. *Ward*, 100 U. S. 195, 25 L. ed. 621; *Dundee Mtg. etc. Co.* v. *Hughes*, 20 Fed. 39; *Talpey* v. *Wright*, 61 Ark. 275, 32 S. W. 1072, 54 Am. St. Rep. 206; *Mechanics' Bldg. Assoc.* v. *Whiteacre*, 92 Ind. 547; *Allen* v. *Hopkins*, 62 Kan. 175, 61 Pac. 750; *Mallory* v. *Ferguson*, 50 Kan. 685, 32 Pac. 410, 22 L. R. A. 99; *Symns* v. *Cutter*, 9 Kan. A. 210, 59 Pac. 671; *Schade* v. *Gehner*, 133 Mo. 252, 34 S. W. 576; *Clark* v. *Marshall*, 34 Mo. 429; *Zweigardt* v. *Birdseye*, 57 Mo. A. 462; *Security Abstract of Title Co.* v. *Longacre*, 56 Neb. 469, 76 N. W. 1073; *Glawatz* v. *People's Guaranty Search Co.*, 49 App. Div. 465, 63 N. Y. S. 691; *Lockwood* v. *New York Title Ins Co.*, 73 Misc. 296, 130 N. Y. S. 824; *Thomas* v. *Guarantee Title, etc., Co.*, 81 Ohio St. 432, 91 N. E. 183, 26 L. R. A. N. S. 1210; *Equitable Building, etc., Assoc.* v. *Bank of Commerce*

those who are parties or privies to the contract employing an abstracter can recover from him is based (1) on the old view of the invariable necessity of privity of contract to support an action *ex contractu* and (2) on the denial of any action *ex delicto*. For the most part, the decisions upholding this view are dogmatic. They are based on authority—the *ipse dixit* of the past. They speak the language of a time when courts, obliged to choose, were prone to prefer legal form before justice, and when abstracters played little, if any, part in business negotiations. "The abstracter is not bound to know," say a majority of the courts, "that his certificate is for the use or reliance of any one but the person who receives it, nor can it be assumed that he gives it for any other use. He contracts with the person who requests it and pays for it to give a certificate which shall state the facts, but he enters into no relation of contract or otherwise in respect to it with any other person, and if another relies upon it to his injury, he cannot have redress."[4]

Vendor's Duty to Furnish Abstract.—The consequences of this severely technical rule become more obvious and deplorable when it is considered that in England the vendor is bound to furnish at his own expense an abstract of every material document of title after the date fixed for the commencement of title;[5] and in a few American decisions the same rule seems to have been followed.[6] By the great weight of American authority, however, the vendor of land is not required to furnish the vendee an abstract of title in the absence of a specific agreement therefor.[7] Nevertheless, either because of contract or custom, the owners of land usually furnish abstracts of title to prospective grantees or mortgagees;[8] and it seems to be the opinion of several text writers that the duty de-

etc. Co., 118 Tenn. 678, 102 S. W. 901, 12 L. R. A. N. S. 449, 12 Ann. Cas. 407; *Bremerton Dev. Co.* v. *Title Trust Co.*, 67 Wash. 268, 121 Pac. 69; *Land etc. Co.* v. *Rutland*, — Tex. Civ. A. —, 185 S. W. 1064.

[4] *Mechanics' Building Ass'n* v. *Whiteacre*, 92 Ind. 547; *Houseman* v. *Girard, etc. Ass'n*, 81 Pa. St. 256.

[5] *In re Stamford etc. Banking Co.*, 1 Ch. 287, 69 L. J. Ch. 126, 81 L. T. Rep. N. S. 708; *Poppleton* v. *Buchanan*, 4 C. B. N. S. 20, 4 Jur. N. S. 414, 27 L. J. C. P. 210, 93 E. C. L. 20; 43 L. R. A. N. S. 46, Note.

[6] *Connolly* v. *Pierce*, 7 Wend. (N. Y.) 131; *Carpenter* v. *Brown*, 6 Barb. (N. Y.) 149; *Brewer* v. *Fox*, 62 Ill. App. 609; *Chapman* v. *Lee*, 55 Ala. 616.

[7] *Tapp* v. *Nock*, 89 Ky. 414, 12 S. W. 713; *Espy* v. *Anderson*, 14 Pa. St. 308; *Smith* v. *Flatonia Nat. Bank*, 43 Tex. Civ. A. 495, 95 S. W. 1111; *Thompson* v. *Robinson*, 65 W. Va. 506, 65 S. E. 718, 17 Ann. Cas. 1109; *Easton* v. *Montgomery*, 90 Cal. 307, 27 Pac. 280, 25 Am. St. Rep. 123; *McQuary* v. *Mo. Land Co.*, 230 Mo. 342, 130 S. W. 335; *Eiche* v. *Keonka*, 255 Ill. 392, 99 N. E. 684, 43 L. R. A. N. S. 44.

[8] *Easton* v. *Montgomery*, 90 Cal. 313, 27 Pac. 280; WARVELL ON VENDORS, (2nd Ed.), § 290.

volves upon he mortgagor to bear the expenses of searching the title, upon the ground that the mortgagee is entitled to the full amount of his loan and interest, without discount for expenses incurred in preparing the security and ascertaining its value.[9]

Harshness of General Rule.—As Chief Justice Black trenchantly has said: "It is very well known that the owner of real estate seldom incurs the expense of procuring an abstract of the title from the abstracter, except for the purpose of thereby furnishing information to some third person or persons who are to be influenced by the information thus provided. If the abstracter in all cases be responsible only to the person under whose employment he performs the service, it is manifest that the loss occasioned thereby must in many cases, if not in most cases, be remediless."[10]

The oppression of the general rule, provoking the bitter condemnation of laymen, is thus focalized. An abstracter, holding himself out as an expert, is paid by a landowner to furnish him an abstract of title to certain land. The abstracter knows, as a matter of fact, that the owner seldom wishes or needs it for his own information. He knows the owner, because of custom, contract, or other legal duty, customarily exhibits such abstract to a third person contemplating the acquisition of some interest in the land. He knows also that such third person customarily relies upon the abstract. Yet when the third person, acting with the prudence generally exercised by those in his position and in harmony with general custom, is injured by his reliance thereon, because the abstracter has failed to exercise due care and skill in his work, the abstracter escapes all liability, for the reason that the owner, not being misled, isn't injured; and the third party who is injured isn't in privity of contract with him. Such a state of affairs is a reproach to the law. It may be remedied by legislation; but legislation is slow and capricious, and it should be cured, if possible, by an enlightened application of the common law.

Reaction of Modern Courts.—The view taken by a majority of the courts respecting an abstracter's liability makes his profession a comparatively safe proposition; but it is not calculated to develop carefulness or accuracy therein. Considering the tremendous interests at stake, the legal conclusion reached is not good public policy. It fosters a dangerous illusion of security, likely to result in im-

[9] MAUPIN ON MARKETABLE TITLES TO REAL ESTATE, 2nd Ed., § 73, citing MART. ON ABST. 9 and WILLARD ON REAL EST. AND CONV. 559.

[10] *Brown* v. *Sims*, 22 Ind. A. 317, 53 N. E. 779, 72 Am. St. Rep. 308.

mense losses. It renders everyday practices unsafe. Consequently, it is not surprising to find modern judicial thought, which is adopting "the ethical standard of reasonable conduct"[11] as a criterion of legal liability, protesting against the rigor of the rule limiting the liability of the abstracter to those in strict privity of contract with him. In 1912 the Supreme Court of Washington, referring to the rule laid down in 1 Cyc 215, said:

"We are not willing to apply it, unless it is plain that there was no duty on the part of the abstracter to the party injured.*** What is called the general rule has not been allowed to stand without strong and persistent challenge. In one of the leading cases, *Savings Bank* v. *Ward,* 100 U. S. 195, 25 L. Ed. 621, the doctrine was denied by Chief Justice Waite, dissenting, with whom Justices Swain and Bradley concurred. He said: 'The circumstances were such as ought to have satisfied him that his certificate was to be used by Chapman in some transaction with another person as evidence of the fact certified to.*** It seems to me that under these circumstances Ward is liable to the bank for any loss it may sustain by reason of his erroneous certificate.' Like expressions are to be found in many of the cases. In some other states the injustice of the rule invoked by plaintiff has been recognized by the legislature and abrogated by statute.*** The general rule was recognized, if not expressly affirmed, in *Bremerton Development Company* v. *Title Trust Company,* 67 Wash. 268, 121 Pac. 69, where a recovery was allowed upon our finding of strict privity of contract; but it does not follow that there are no exceptions to the rule. Indeed, they have been recognized and, in our judgment, are as securely established as the rule itself."[12]

Exceptions to the General Rule.—Let us now notice the exceptions to the general rule that have received judicial sanction, and then consider whether the formulation of theories for a broader liability of the abstracter in contract and in tort is possible. The exceptions differing from each other for the most part only in slight degree, are as follows:

(1) Where there is fraud or collusion on the part of an abstracter he will be held liable to third parties, even though there is no privity of contract; but where there is neither fraud nor collusion nor privity of contract, a party will not be held liable, unless the act

[11] Law & Morals, 22 HARV. L. REV. 99.

[12] *Anderson* v. *Spriestersbach et ux.,* 69 Wash. 393, 125 Pac. 166, 42 L. R. A. N. S. 176.

is one imminently dangerous to the lives of others, or is an act performed in pursuance of some legal duty.[13]

(2) An abstract company which undertakes, at the instance of the buyer of land, to examine, correct and complete an abstract made for the seller, after it is informed that he contemplated the purchase and would rely on the title as shown in the abstract, is liable to the purchaser. The company in this case insisted that if it reaffirmed and recertified the abstract as found by the lower court, it did so gratuitously and therefore no contractual tie was created between it and the purchaser. But the court declared:

"It seems to us that the legal effect of facts found as stated was to show the existence of a valid contract between appellant and Rutland. The former performed service at his request. Even if the latter had not agreed to pay the former for the service the law would imply an undertaking on his part to do so. If appellant might, when it performed the service, have demanded of Rutland that he pay it a reasonable sum therefor, the fact that, waiving its right, it did not do so, would not relieve it of the obligation it incurred when it undertook to pass upon the correctness and completeness of the abstract presented to it."[14]

(3) A purchaser of land requiring the vendor to furnish an abstract of title is entitled to maintain an action against the abstracter for defects of title omitted in the abstract, where the abstracter knows that such abstract is procured for his use.[15] Should the purchaser decline to purchase until furnished an abstract at the expense of the vendor, it has been held in effect that there is privity of contract between him and the abstracter.[16]

(4) If an attorney, knowing that the lender is relying upon him in his professional capacity to see that her mortgage is the first lien, although the borrower is to pay the fees, undertakes to perform this duty, he is bound to do it with ordinary and reasonable skill and care and is liable for negligence in that respect, under the principle settled in *Coggs* v. *Barnard*.[17] This conclusion seems based upon the view

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[13] *National Savings Bank* v. *Ward*, 100 U. S. 195, 25 L. ed. 621; citing *Langridge* v. *Levy*, 2 Mees. & W., 519, 530. Accord, *Peabody Bldg. etc. Ass'n* v. *Houseman*, 89 Pa. St. 261, 33 Am. Rep. 757.

[14] *Land, etc. Co.* v. *Rutland*, — Tex. Civ. A. —, 185 S. W. 1064. Accord, *Dickle* v. *Abstract Co.*, 89 Tenn. 431, 24 Am. St. Rep. 616; *Siewers* v. *Commonwealth*, 87 Pac. St. 15.

[15] *Denton* v. *Nashville Title Co.*, 112 Tenn. 320, 79 S. W. 799.

[16] *Dickle* v. *Nashville Abstract Co.*, 89 Tenn. 432, 14 S. W. 896, 24 Am. St. Rep. 616.

[17] 1 Ld. Raym. 909, 1 Smith's Lead. Cas. Eq. 199.

that there was evidence in the case from which a jury might find the relation of attorney and client between the defendant and the lender. "Even adverse interests," the court said, "if to be amicably adjusted, may be represented by the same counsel."[18]

(5) Where a borrower informs a title company that, in order to secure a loan, it is necessary for him to have a certificate that certain land is not incumbered, and the company delivers it to the borrower, who pays for it, the mortgagee who relies on it may recover upon contract from the abstracter. Here the court said:

"The sole contention of the demurrant is that the count discloses no privity of contract between it and the plaintiff, but only a contract between it and Moore (the mortgagor). But this is too narrow a view of the transaction set out in this count. Upon its averments there is disclosed either a contract between plaintiff and defendant, made through the agency of Moore, by which defendant was employed to examine and certify the title, or a contract of like employment between Moore and defendant, made for the benefit of plaintiff "upon which a right of action by plaintiff would arise."[19]

(6) An abstracter of title employed by a landowner desiring to obtain a loan to make an abstract of title to property is liable for his negligence to the lender who, before making the loan, informs the abstracter that he shall rely entirely upon his abstract and is assured by the latter, who delivers him the abstract, that he can do so.[20] In holding that, where there is an arrangement between a loan association and an abstract company that abstracts are to be furnished at the expense of borrowers, the abstracter may be liable to the loan association as a privy, the Supreme Court of Montana said: "Privies are defined as persons connected together in the same action or thing by some relation other than that of actual contract between them."[21]

(7) 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 business transaction with another person as evidence of the facts 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

[18] *Lawall* v. *Groman*, 180 Pa. St. 532, 57 Am. St. Rep. 662.

[19] *Economy Bldg. etc. Assoc.* v. *West Jersey Title Co.*, 64 N. J. L. 27, 44 Atl. 854. See *Cann* v. *Willson*, L. R. 39, Ch Div. 39.

[20] *Brown* v. *Sims*, 22 Ind. A. 317, 53 N. E. 779, 72 Am. St. Rep. 308.

[21] *Western Loan & Savings Co.* v. *Silver Bow Abstract Co.*, 31 Mont. 448, 78 Pac. 774, 107 Am. St. Rep. 435, citing BLACK'S LAW DICTIONARY, 940.

the title, which by the use of ordinary professional care and skill he might have found.[22]

These exceptions to the general rule show it is the growing conviction of modern judges that when an abstracter, before he certifies, recertifies, or verbally affirms the correctness of his abstract, definitely knows that a specific third party not in privity of contract with him will rely upon such abstract, he is liable to such party when he does rely to his injury upon such abstract which is erroneous for lack of legal care and skill in its preparation. So far so good. But why should the same conclusion not be reached when the abstracter, instead of definitely knowing that a specific third party will rely upon his abstract, *ought in common experience to know* that some person dealing with the one ordering the abstract will rely upon it? Such person should have a remedy. "If there are no authorities which grant one it is high time for such an authority."[23]

Development of the Law.—Unless modified by legislation, any legal conclusion so strongly established as that respecting the persons to whom an abstracter is liable, must, on account of judicial conservatism, change slowly. Yet the doctrine of *stare decisis* is declining in favor;[24] it does not strictly necessitate an adherence to the old rule touching the liability of abstracters, because it is not one of property;[25] and the present exceptions to the general rule indicate its gradual disintegration by the erosion of judicial distinctions and discriminations. In this there is nothing new. The law has rightly put its ideals of justice higher than considerations of scientific consistency.[26] There is no finality about law and we need not sigh over the fact. Where there is life and growth there can be no finality.[27] The progress of law, as the development of the human body, is zigzag. Public opinion and agitation render one branch of law more consonant with justice than others, which lag behind. Consequently, the reasoning of cases in one field some times differs from that in others. Let us see, therefore, whether there is analogy for holding that an abstracter who has furnished an abstract to a landowner is liable to a third party who relies upon the abstract to his injury.

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[22] Dissenting opinion, C. J. Waite and Swayne and Bradley, JJ., *National Savings Bank* v. *Ward*, 100 U. S. 195, 25 L. ed. 621. Accord, *Anderson* v. *Spriestersbach*, 69 Wash. 393, 125 Pac. 166, 42 L. R. A. N. S. 176.

[23] *Ketterer* v. *Armour & Company*, 200 Fed. 322.

[24] 3 Mich. L. Rev. 89.

[25] 11 Cyc. 749; 7 R. C. L., p. 1008.

[26] Street's Foundations of Legal Liability—Introduction, p. 25.

[27] Preface, Mew's Eng. Case Law Digest—Supplement 1898-1907.

Rationale of Contract Liability.—It has been stated that in the exceptional cases, in which courts have sought to mitigate the rigor of the general rule, that object has been accomplished by straining the doctrine of privity of contract.[28] Yet it is submitted that the general contract liability of the abstracter to third parties may be maintained without this result on the theory (A) that the landowner is an agent of the third party to procure the abstract for him; (B) that the abstracter promises to make the abstract for the benefit of the third party; or (C) that the abstracter breaks an implied warranty running with his abstract.

(A) Let us consider the case where the landowner promises to procure an abstract for the benefit of a third party. Although consideration is not necessary to the existence of an executed agency,[29] there is consideration in this case, because the agreement of the third party to buy the land or to accept a mortgage on it, is predicated upon the owner's promise to procure an abstract of it. If the owner procures it by the "authority" of the third party, he is his agent, whether the parties realize it or not.[30] "Authority" is the lawful delegation of power however informal by one person to another.[31] Even in a criminal case, where strict construction should be the rule, it has been held that where a person requested a saloon keeper to keep money gratuitously for him in a safe until a following day and the saloon keeper appropriated the money to his own use, he was an agent of the former party.[32] How much more, then, is the landowner an agent of his prospective vendee or mortgagee, who not only has requested the landowner to procure an abstract for him, but for a consideration has made it his duty to do so.

The fact that the abstracter is unaware of the agency is immaterial. As the Supreme Court of Iowa has said: "There was evidence showing that Walters and Wadsworth were acting as the agents of the plaintiff in procuring an extension of the abstract. It is true that their agency may not have been disclosed by their action or by the nature of the transaction, but such disclosure was

[28] *Thomas* v. *Guaranty Title, etc. Co.*, 81 Oh. St. 432, 91 N. E. 183, 26 L. R. A. N. S. 1210.

[29] 31 Cyc. 1216; 21 R. C. L., p. 819; 1 HALSBURY'S LAWS OF ENGLAND, p. 193.

[30] *Bradstreet Co.* v. *Gill*, — Tex. —, 2 L. R. A. 405; 31 Cyc. 1189; CLARK & SKYLES ON THE LAW OF AGENCY, § 1.

[31] 1 BOUVIER LAW DICT. 199; 1 HALSBURY'S LAWS OF ENGLAND, pp. 156-157.

[32] *Wynegar* v. *State*, 157 Ind. 577, 62 N. E. 38, See *State* v. *Smith*, 57 Kan. 657, 47 Pac. 535; *Schneider* v. *Schneider*, 125 Io. 1, 98 N. W. 159; *Garvey* v. *Scott*, 9 Ill. App. 19; *Economy Building etc. Ass'n* v. *West N. Jersey Title Co.*, 64 N. J. L. 27, 44 Atl. 854.

not necessary to create liability on the part of the defendant. If the agency in fact existed, the abstract was furnished for the plaintiff, and he was liable to the defendant for the service rendered, whether the defendant knew him as a principal or not. Being liable for this service, he is entitled to reciprocal rights against the defendant, and may maintain this action, subject to any defense which the defendant might have interposed against the agents."[33]

It must be admitted that this theory of agency can be maintained only on the analogy of extreme cases. But it is possible for the courts, in order to do justice, to find the existence of agency on a slight basis of ascertained facts. And it would seem that if the prospective vendee or mortgagee stipulates in his contract with the landowner that the latter, as his agent, is to procure the abstract for him, there could be no reasonable doubt of the fact of agency.

(B) Where a landowner promises to procure an abstract for a prospective vendee or mortgagee, it clearly is for the latter's benefit. Such vendee or mortgagee is the real party in interest and, as such, should be allowed to sue the abstracter, in jurisdictions allowing the real party in interest to sue.[34] By the great weight of American authority, a third party may enforce a promise made for his benefit, although he is a stranger both to the contract and to the consideration.[35] The fact that the particular person who is to benefit from the promise is not known, or is uncertain, when the promise is made and even that he does not know of the promise in his favor when it is made, is immaterial. He may sue for the breach of it.[36] Thus, where a purchaser of property sold at a receiver's sale enters into a written agreement under seal with the receiver to pay the expenses of the final accounting of the latter, the receiver's attorney may maintain an action against the purchaser for his services in such final proceedings, although he had not been retained by the receiver when the contract was made.[37] Likewise we may say, when an abstracter promises a landowner to furnish him an abstract which the landowner is bound to give to a third party, although unknown, and when the abstracter knows, or in common experience ought to know, it is to be given to such third party, then the abstracter's promise is for the latter's benefit.

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[33] *Young* v. *Lohr*, 118 Iowa 624, 92 N. W. 684, citing MECHEM'S AGENCY, § 769; 1 AM. & ENG. ENC. LAW, 2nd ed., 1168.

[34] 6 R. C. L., p. 885.

[35] 6 R. C. L., p. 884; 13 C. J. 705.

[36] 13 C. J. 711.

[37] *Traver* v. *Snyder*, 35 Misc. 261, 71 N. Y. S. 761, affirmed, 69 N. Y. S. 750.

In a case decided by the Supreme Court of Washington, it appears that a landowner, Huston, leased land to Fuhrman for a rental of one-third of the crops. Fuhrman purchased wheat from the defendant with which to seed the land. This wheat was unfit for spring sowing—the purpose for which the defendant knew Fuhrman bought it. Huston and Fuhrman jointly sued the defendant, who demurred on the ground, *inter alia,* that the sale was made to Fuhrman only, and that no privity of contract existed between Huston and defendant. It does not appear that the defendant knew of the lease between Huston and Fuhrman. In allowing Huston to recover, the court said: "Although the appellant sold the seed wheat to Fuhrman only, *the sale was for the benefit of Huston as well.* He was interested in the prospective crop. A sale of wheat unfit for use damaged him as directly and positively as it did Fuhrman."[38] Exactly the same reasoning is apposite where an abstracter furnishes a negligently defective abstract to a landowner under obligation to give it to a prospective vendee or mortgagee, who is damaged because he relies on it.

(C) It is possible to hold an abstracter liable to third parties not in privity of contract with him on the theory that he has breached an implied warranty respecting the quality of his abstract. One who engages in the business of making abstracts of title impliedly undertakes that he possesses the requisite skill and knowledge and that he will exercise due care and skill in the performance of his duties and for a failure to do so he will be liable in damages.[39] A warranty is an express or implied statement of something which a party undertakes shall be a collateral part of the contract.[40] Implied warranties arise by operation of law and they exist without any intention of the seller to create them.[41] Hence, the implied undertaking of an abstracter touching his care, knowledge and skill may be considered an implied warranty that his abstract is impressed with the qualities resulting from the exercise of the requisite care, knowledge and skill.

It is true that the benefit of a warranty of a chattel is not ordinarily available to any except the immediate vendee. However, the view has been taken as regards the sale of canned or bottled food

[38] *Fuhrman* v. *Interior Warehouse Co.,* 64 Wash. 159, 116 Pac. 666, 37 L. R. A. N. S. 89.

[39] 1 C. J. 368.

[40] 24 R. C. L., p. 153.

[41] 24 R. C. L., p. 178.

products that the manufacturer under modern conditions impliedly warrants his goods when dispensed in original packages, and such warranty is available to all who may be damaged by reason of their use in the legitimate channels of trade.[42]

It may be observed that canned or bottled food products are not per se articles of an imminently dangerous nature. True, when impure, they may produce serious injury or death; but so may defective engines, paint, carriages, soft drinks, shot guns, and engine oil; and such articles have been considered not imminently dangerous.[43] Hence, the liability of an abstracter may well fall under the exception of canned and bottled products.

The layman is as unable personally to investigate the accuracy of an abstract as he is personally to determine the purity of canned or bottled products. The extension of the liability of manufacturers of canned or bottled products is because it is unreasonable to require the consumer to have them chemically analyzed every time they are used. It is submitted that it is equally unreasonable to require a third party using an abstract to invoke professional assistance to ascertain its accuracy. Where the reason for a rule has ceased, a new rule should be applied that will more nearly harmonize with what is reasonable and just. This has been done in the case of canned and bottled products.[44] Why should it not be done also in the case of abstracts? It is true that the impure canned or bottled products inflict physical damage, whereas a defective abstract inflicts pecuniary damage, but the law recognizes the actionable nature of each.[45]

Rationale of Tort Liability.—Although it is commonly said that an action against an abstracter is based on contract and not on tort,[46] it appears as easy to develop a tort basis for his liability to third parties as a contract one. In cases where an abstracter has conspired with a landowner to omit incumbrances from the abstract in

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[42] 24 R. C. L., p. 160.

[43] Notes, 19 L. R. A. N. S. 923; 48 L. R. A. N. S. 213.

[44] *Ketterell* v. *Armour & Co.*, 200 Fed. 322; *Mazette* v. *Armour & Co.*, — Wash. —, 135 Pac. 633, 48 L. R. A. N. S. 213; *Captain* v. *Swift & Co.*, 251 Pa. St. 52, 95 Atl. 931, L. R. A. 1917B 1272.

[45] *Mazette* v. *Armour & Co.*, — Wash. —, 135 Pac. 633, 48 L. R. A. N. S. 213.

[46] *Russell* v. *Polk Co. Abstract Co.*, 87 Io. 233, 54 N. W. 212, 43 Am. St. Rep. 381; *Thomas* v. *Guarantee Title etc. Co.*, 81 Oh. St. 432, 91 N. E. 183, 26 L. R. A. N. S. 1210; *Eq. Build. etc. Assoc.* v. *Bank of Commerce etc. Co.*, 118 Tenn. 678, 102 S. W. 901, 12 L. R. A. N. S. 449; *Lockwood* v. *Title Ins. Co. of N. Y.*, 130 N. Y. S. 824; *Bremerton Devel. Co.* v. *Title Trust Co.*, 67 Wash. 268, 121 Pac. 69.

order to mislead a prospective vendee or mortgagee, his tort liability to the misled party is unquestionable.[47]

But the theory of tort liability is broad enough to embrace cases of simple negligence on the part of the abstracter. A tort, as Mr. Justice Holmes has said in substance, is a wrong which consists in the infliction of temporal damage by a responsible person under circumstances of such nature that the person inflicting the damage knows, or in common experience ought to know, that his conduct is likely to result in harm.[48] No branch of law is developing more rapidly than that of tort; and it develops through the judicial recognition of legal duties heretofore unexpressed. As early as 1896 Judge Vann declared: "As was recently said by this court in an action then without precedent, 'If the most that can be said is that the case is novel, and is not brought plainly within the limits of some adjudged case, we think such facts not enough to call for a reversal of the judgment.'[49] The question therefore is not whether there is any precedent for the action, but whether the defendant inflicted such a wrong upon the plaintiff as resulted in lawful damages."[50]

The general tort liability of an abstracter to third parties not in privity of contract with him may be maintained on the theory (A) of deceit for fraudulent representations or (B) of case for negligent representations.

(A) In considering an abstracter's responsibility the Supreme Court of Idaho said: "Although a misrepresentation is made through mistake of the facts as they actually exist, when such misrepresentation is made by one whose duty it is to know the facts and who represents himself as possessing all the facts with reference to the matter, the misrepresentation is in law equally as fraudulent and actionable as if it had been knowingly made."[51]

True, in this case the court was considering an abstracter's liability to one who had ordered and paid for the abstract. Yet the matter of primary importance is that the court found that this liability, even in the absence of positive fraud, might be considered tortious, upon the principle announced in 1842 by Chief Justice Tindal, "the

[47] *Nat. Sav. Bank* v. *Ward*, 100 U. S. 195, 25 L. ed 621; *Dundee Mortg. etc. Co.* v. *Hughes*, 20 Fed. 39; Cooley on Torts, 3rd ed., pp. 938-944; 12 R. C. L., p. 402.

[48] The Path of the Law, 10 HARV. LAW REV. 457, 471.

[49] *Piper* v. *Hoard*, 107 N. Y. 73, 13 N. E. 626.

[50] *Kujeck* v. *Goldman*, 150 N. Y. 178, 44 Atl. 773.

[51] *Hillock et al.* v. *Idaho Title & Trust Co.*, 22 Idaho 440, 126 Pac. 612, 42 L. R. A. N. S. 178, citing *Fisher* v. *Mellen*, 103 Mass. 503; Smith on Fraud, § 2. See also *Gerner* v. *Mosher*, 58 Neb. 135, 46 L. R. A. 244; *Watson* v. *Jones*, 41 Fla. 241; 25 So. 678.

contract creates a duty, and the neglect to perform that duty, or nonfeasance, is a ground of action upon a tort."[52]

It remains now to consider whether the fraud of an abstracter entitles a third party injured thereby, but not in privity of contract with him, to recover from him. The abstracter "in common experience ought to know that his conduct is likely to result in harm" to others than his employer, although they are not specifically called to his attention. This is a fact of universal recognition; it has been given vigorous judicial expression;[53] and the courts have no more right dogmatically to deny it than they have to impugn the actionable nature of all mental anguish unconnected with unlawful physical impact—a position from which they are now receding.[54] When the courts cease to maintain a position contrary to fact, and consider whether or not an abstracter "knows that his conduct is likely to result in harm" to third parties, they must then recognize that third parties often may have a tort action against an abstracter, agreeable to the above criterion of Mr. Justice Holmes.

It is true the Supreme Court of Ohio, in denying the tort liability of abstracters, said: "The argument founded upon certain classes of decisions, designated as sub-vendee cases, telegraph cases, time-table cases, professional cases, and director cases, does not impress us as possessing any relevance to the issue here. Those decisions are founded upon a public, or quasi public, nature inherent in the business or transactions involved."[55]

There is, however, no "public, or quasi public nature" inherent in transactions where one gives his financial standing to commercial agencies which transmit it to the public, or where statements of officers are inserted in prospectuses, bonds, or reports of private companies, which influence the public. Yet it has been held that representations made to a commercial agency having general authority to publish them may be relied on by others than patrons who have rightfully come into possession of the information.[56] Original stockholders who make false statements as to the amount of capital stock paid into the corporation cannot escape liability to its creditors who

[52] *Boorman* v. *Brown*, 3 Q. B. (Ad. & E. N. S.) 511. See BURDICK ON TORTS, 3rd ed., p. 11; COOLEY ON TORTS, 3rd ed., pp. 155-160.

[53] *Brown* v. *Sims*, 22 Ind. 317, 53 N. E. 779, 72 Am. St. Rep. 308.

[54] BURDICK ON TORTS, 3rd ed., pp. 113-125; 17 C. J. 828-843.

[55] *Thomas* v. *Guarantee Title & T. Co.*, 81 Oh. St. 432, 91 N. E. 183, 26 L. R. A. N. S. 1210.

[56] *Davis* v. *Louisville Trust Co.*, 181 Fed. 10, 104 C. C. A. 24, 30 L. R. A. N. S. 1011; 12 R. C. L., p. 366.

become such after a transfer of such stock.[57] The president of a company who has signed corporate bonds containing a false representation is liable in deceit to one who takes them as collateral security relying upon the representation, although the president is not personally connected with this particular transaction.[58] A bank also is liable for a fraudulent statement in its cashier's certificate respecting the paid-up capital of an insurance company to persons buying, from original subscribers, worthless stock of the insurance company in reliance on this statement.[59] These cases show that in imposing liability for fraud the courts, in the interest of justice, have not insisted upon privity of contract between plaintiff and defendant. The principle deducible from them is that where the defendant has made a fraudulent statement under circumstances where he knows, or is likely to know, that it will result in harm to third persons reasonably relying on it, he must respond in damages to those who have relied on it to their injury. Every consideration of public policy demands that abstracters should be subject to this principle; and the above cases and others similar are authority for so holding.

(B) In disapproving the result reached in the Ohio case previously mentioned,[60] where the court somewhat sneeringly rejected the contention that an abstracter is liable in tort to a third party who relies to his injury upon a negligently defective abstract, the author of a note in the Harvard Law Review[61] ably maintains that the abstracter is liable on the theory of negligent misrepresentation. In part he says:

"The problem depends on whether or not there is a duty to use care as to the accuracy of representations. Undoubtedly such a duty does not exist under all circumstances, but a review of the decisions makes it equally certain that at times such a duty does exist. There may be a duty imposed by statute, as in the case of recording clerks. Then if the clerk negligently fails to record a mortgage he is liable to a plaintiff who relied on the record to his damage.[62] And apart from statute, in this country telegraph companies are considered to owe such a duty to the public that the recipient of a telegram may recover for losses caused by negligent mistakes made

[57] *McBryan* v. *Universal Elevator Co.*, 130 Mich. 111, 89 N. W. 683, 97 Am. St. Rep. 453.

[58] *Stickel* v. *Atwood*, 25 R. I. 456, 56 Atl. 687.

[59] *Hindman* v. *First Nat. Bk. of Louisville*, 98 Fed. 562, 48 L. R. A. 210.

[60] *Thomas* v. *Guarantee Title & Trust Co.*, 81 Oh. St. 432, 91 N. E. 183, 26 L. R. A. N. S. 1210.

[61] 21 HARV. L. REV. 439. See 14 HARV. L. REV. 184-99.

[62] *Appleby* v. *State*, 45 N. J. L. 161.

in transmission.[63] The courts also find there is a breach of duty where the misrepresentation imperils the lives of others.[64] An attempt has been made to confine the duty to use care in making representations to cases where 'the act is one imminently dangerous to the lives of others or is an act performed in pursuance of some legal duty.'[65] Other decisions, however, show that this limitation is not sound. Physicians have been held liable to persons with whom there was no privity of contract for the results of negligent opinions which were not imminently dangerous to life.[66] It has even been held that a druggist is similarly liable for negligently and falsely representing a hair tonic as harmless.[67] The position of the abstract company can be distinguished only on the ground that the damage caused is pecuniary instead of physical, and such a distinction seems untenable. In both cases the plaintiffs were reasonable in relying on the statement; in both the defendants knew persons such as the plaintiff would rely on the statements and would probably be damaged if the statements were false. It is submitted, therefore, that a similar duty to use care should be imposed on the defendants in both cases."

In attempting to formulate theories of liability of abstracters in contract and in tort broader than those usually recognized in the exceptions to the general rule, it has been necessary to reason from principle and analogy. In some cases the decisions used for purposes of comparison conflict with others. But if the principle of a decided case leads to the advocated conclusion, it should be adopted by courts believing in the decided case. The purpose of this discussion is to provoke thought that may lead to additional mitigation of the general rule giving abstracters, in most cases, unjust immunity from legal liability. Should the courts further extend the accountability of abstracters, it will be necessary to determine whether it is confined to the person first dealing with the landowner who secures the abstract, or whether it extends to others.

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[63] *Western Union Tel. Co.* v. *Dubois*, 128 Ill. 248.
[64] *Thomas* v. *Winchester*, 6 N. Y. 397.
[65] *Savings Bank* v. *Ward*, 100 U. S. 195. See 57 Am. Dec. 461, Note.
[66] *Edwards* v. *Lamb*, 69 N. H. 599; *Harriott* v. *Plimpton*, 166 Mass. 585.
[67] *George* v. *Skivington*, L. R. 5, Exch. 1.