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# PROFESSIONAL LIABILITY OF ABSTRACTERS

THOMAS G. ROADY, JR.*

One of the most vigorous rules in the law of conveyancing is that a vendee of real estate assumes the risk of all defects in title discovered after delivery of the deed. In short, the doctrine of caveat emptor applies with full force to the purchaser and to protect himself as fully as possible he must insist that the transaction proceed in such a manner as to give him recourse against someone should he sustain a loss by reason of the title risk taken or he must proceed in a manner that will eliminate (or at least minimize) the risks taken.

In attempting to protect himself a vendee can pursue one or more of the following methods or devices. He can refuse to accept a deed without full covenants of warranty in which case he may be able to recover from his grantor for any loss sustained due to his grantor's defective title. He can obtain a title insurance policy with a reliable company and thereby have available an independent source from which to recover for any loss he might sustain by reason of title defects. He can obtain at his own expense or can require the vendor to furnish him with an abstract of title which abstract is submitted to his attorney for examination prior to the completion of the sale. In some jurisdictions he can also insist on the registration of the title under the "Torrens system" which system is designed to clear the title of whatever defects may be involved before completion of the sale. The first two methods are designed to reimburse a vendee for loss sustained while the last two are designed to eliminate risks in advance. In the ordinary real estate transaction a combination of two and sometimes three of these methods is used. The most frequent combination is probably the warranty deed plus attorney-abstracter method which on occasions is supplemented with title insurance. In certain sections of the country the warranty deed coupled with title insurance is the prevailing practice.

Unfortunately, none of the above alone or in combination have been entirely satisfactory. Purchasers proceeding in the most cautious manner may still find themselves inadequately protected from risk of loss due to title defects. The scope of this paper is the liability of an abstracter who, as a participant in the marketing of real estate, fails to conduct an accurate search or for any reason fails to prepare a correct abstract of the record. Elsewhere in this symposium is a discussion of the liability of an attorney who renders an erroneous title opinion or who issues a certificate of title that results in loss to the one rely-

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ing thereon.[1] We are here concerned solely with the professional abstracter, whether he be an attorney or not.

The abstracter's liability for negligence arises out of the abstracter-employer relationship. This relationship is regarded as being created by a contract of employment. As a consequence, the bulk of the litigation against abstracters has proceeded on the theory of breach of contract. In those instances where the action is treated as sounding in tort the courts have made very little of the fact that the duty to exercise due care arises out of a contract. In both the contract and tort cases the important element to be established is non-compliance with the standard of care that is required of the abstracter and the language used by the courts in formulating that standard is replete with negligence terminology. In short, one engaged in the business of abstracting titles impliedly represents that he or his employees have a certain degree of skill and knowledge and that they will perform their undertaking with a degree of care commensurate with that of other abstracters. Since the issues arising in these actions are essentially the same whether based on tort or contract theory the form of the action ordinarily does not affect the outcome. In view of this fact, the discussion which follows is organized on the basis of an action against an abstracter being in tort for negligence.

## DUTY

The relationship between abstracter and client carries with it a duty on the part of the abstracter to use a certain degree of care and skill in carrying out his undertaking. It is not essential that the abstracters in fact receive any consideration for his services.[2] It is enough that plaintiff show an agreement to perform such services. From this the duty will be imposed.

The principal difficulty most plaintiffs have met in their effort to recover from abstracters is the almost universal rule that the basis of any liability is contractual.[3] In view of the fact that the abstracter is generally insulated by one or more persons from the one who eventually sustains a loss in reliance on his work, the contract approach permits him to escape liability since the requisite "privity" cannot be established.[4] It is immaterial that conveyancing custom and practice

1. Wade, *The Attorney's Liability for Negligence,* 12 VAND. L. REV. 755 (1959).

2. Decatur Land Loan & Abstract Co. v. Rutland, 185 S.W. 1064 (Tex. Civ. App. 1916).

3. National Savings Bank v. Ward, 100 U.S. 195 (1879); Talpey v. Wright, 61 Ark. 275, 32 S.W. 1072 (1895); Mallory v. Ferguson, 50 Kan. 685, 32 Pac. 410 (1893); Beckovsky v. Burton Abstract & Title Co., 208 Mich. 224, 175 N.W. 235 (1919); Henkels v. Philadelphia Title & Ins. Co., 177 Pa. Super 110, 110 A.2d 878 (1955); Equitable Bldg. & Loan Ass'n v. Bank, 118 Tenn. 678, 102 S.W. 901 (1907). Annots., 34 A.L.R. 67 (1925); 68 A.L.R. 375 (1930).

4. Where the abstract is furnished at the instance of the vendor and the vendee sustains the loss, liability may be imposed on the abstracter in a

is such that an abstracter knows his work will be relied on by others or that under a "foreseeability" test he would be held accountable. All too often he has been the beneficiary of the privity requirement for it is good contract law that "no privity—no duty."

Once this hurdle is cleared, the courts have often dealt quite aggressively with abstracters for the relationship of an abstracter to his employer is a confidential one, at least during the period of his employment. He is, therefore, accountable to his employer for any advantage gained as a result of information or knowledge he acquires in carrying out his duties.[5]

The contract approach has also stimulated the abstracting profession, which is composed of a number of careful, cautious and often "clever" individuals (many of them being attorneys) to utilize the certification process in abstracting as a means of limiting the scope of their liability.[6] It is regarded as good abstracting practice to exclude via the certificate a multitude of items which to an ordinary layman might seem quite obscure.[7] And where the abstracting company is in the business of conveyancing "across the board" so to speak, situations arise which would be amusing if they did not import such tragic consequences for the lay public.[8]

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roundabout method. If there is involved a breach of vendor's warranties the vendee may sue the vendor who in turn may sue the abstracter assuming of course that he can establish, among other things, that he warranted in reliance on the record disclosed by the abstract. See Randall v. Paine-Nichols Abstract Co., 205 Okla. 430, 238 P.2d 319 (1951).

5. Vallette v. Tedens, 122 Ill. 607, 14 N.E. 52 (1887) (abstracter held as trustee for employer with respect to real estate purchased after obtaining facts in course of employment); Marston v. Catterlin, 239 Mo. 390, 144 S.W. 475 (1912) (abstracter could not assert title as purchaser against his employer as to real estate bought at foreclosure proceeding under deed of trust he had failed to show in abstract).

6. It is fundamental, for example, that the obligation extends only to the period of time indicated in the certificate and in continuations or amendments this may be a rather brief period.

7. For example, it is reasonable to indicate that the abstract does not cover judgments of record of courts whose records are geographically a considerable distance from the abstracter's place of business; to exclude rights or claims of persons in possession of the premises; to exclude expressly any statements as to area of premises other than that which a competent "survey would establish"; to exclude easements, licenses and profits not of record. It is not so reasonable to exclude ordinances and regulations of governmental authorities affecting use of the premises although this is often done. It is quite unreasonable to attempt via the certificate to escape any or all liability through some general disclaimer clause as was done by the company in Guaranty Abstract Co. v. Denman, 209 S.W.2d 213 (Tex. Civ. App. 1948), where the following words were used: "This certificate is made and evidenced by the acceptance thereof that the undersigned, while believing its construction of the records as above set out to be true and correct, still will incur no liability by reason of such construction." *Id.* at 215. The court in that case made short work of the abstracter's assertion that such a clause relieved it of liability for failure to include an outstanding deed in the chain of title.

8. In Henkels v. Philadelphia Title Ins. Co., 177 Pa. Super 110, 110 A.2d 878 (1955), the title company agreed to conduct a search and to discover and make known to plaintiff any and all taxes, liens, encumbrances or defects in

As a consequence of the privity requirement and the apparent injustices which result therefrom some courts have sustained plaintiffs' claims either by straining the concept of privity, by applying some variation of the "foreseeability" test or by relying on the statutes that exist in many of the western states.

An abstracter is not a guarantor or insurer of the title in the absence of some express undertaking and though this is the common law view[9] it is expressly so provided by statute in at least one state.[10]

### BREACH OF DUTY

The duty of the abstracter has been variously phrased in terms of the care, skill and knowledge he must employ in his undertaking. The basic decision discussing this point is *Savings Bank v. Ward*[11] wherein the court stated that those who agree to furnish information concerning the title to real estate impliedly contract to exercise reasonable care and skill in the performance of the undertaking, and if they are negligent or fail to exercise reasonable care and skill in the discharge of the stipulated services, they are responsible to their employers for the loss occasioned by such neglect or want of care.[12] This language has been often repeated.[13] A more precise statement of the standard of care, and one which is in fact more appropriate is that "which an ordinary, reasonable and prudent abstracter exercises or is acustomed to exercise under the same or similar circumstances.[14]

In applying the standard to given fact situations it has been held, or suggested, that an abstracter was negligent who relied on a mar-

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or against said title. They reported that there were no taxes outstanding although in fact a small strip of the premises had been encumbered by taxes for a long period of time. This was called to plaintiff's attention after the purchase and plaintiff paid the taxes. The title company, in addition to making search, preparing instruments of conveyance, and performing other tasks for all of which plaintiff received an itemized statement, had also issued a policy of title insurance, the coverage of which expressly excepted from the policy the part of the premises encumbered by the tax lien. The company contended that this settlement certificate containing the exceptions constituted notice to plaintiffs that defendant was making no representations concerning the taxes on the strip. The defense was held to be inadequate.

9. Shine v. Nash Abstract & Invest. Co., 217 Ala. 498, 117 So. 47, 4 ALA. L.J. 40 (1928).

10. ARIZ. REV. STAT. ANN. § 20-1563 (1956).

11. 100 U.S. 195 (1879).

12. *Id.* at 205. It is to be noted that this is the general language of negligence and indicates that the tort measure of damages is applicable, *i.e.*, "all loss occasioned by the neglect" not just the loss contemplated by the parties for breach, as in contract.

13. See cases collected in Annot., 28 A.L.R.2d 891 (1953) and Hall, *Abstracter's Liability in Examination of Title*, 6 WYO. L.J. 184 (1952).

14. Adams v. Greer, 114 F. Supp. 770, 775 (W.D. Ark. 1953). By statute in some jurisdictions a degree of care higher than that of an ordinarily prudent abstracter is required. But in Mallory v. Ferguson, 50 Kan. 685, 32 Pac. 410 (1893), the defendant was a clerk in an official's office and in determining the standard of care applied to him the court stated that it was only such as the "defendant in fact possessed."

ginal entry on a mortgage rather than examining the actual mortgage instrument,[15] failed to show an acceleration clause in a mortgage[16] omitted a deed in chain of title,[17] omitted a tax lien on premises,[18] failed to show the nature of the estate devised by clause in a will included in the abstract,[19] failed to show judgment against a grantee in chain of title,[20] or omitted an entry in judgment docket even though decree of foreclosure at judicial sale and decree of confirmation were shown.[21] No breach of duty was involved where abstracter did not include a deed made by a common grantor not in direct chain of title to premises described in caption of abstract,[22] failed to show judgment entered against grantee in chain of title where middle initial of name was different,[23] or failed to include all of the records in a judicial proceeding affecting title to the real estate.[24]

Such exceptions as exist to the almost universal rule that a plaintiff must establish privity of contract in order to recover from an abstracter are based upon statutes, or upon some strained concept of privity employing third party beneficiary language or some strained treatment of a fact situation to support a finding that an abstract was issued to an agent or was reissued or recertified to a purchaser.

*Liability Based on Statutes*

In a number of states legislatures cognizant of the special problem posed by the common law rule limiting liability of an abstracter to those with whom he is in privity of contract and desiring to expand the scope of an abstracter's liability have enacted statutes providing a basis for recovery to all those injured by the fraud or mistake of abstracters.[25] An important provision of these statutes is the one re-

15. Wacek v. Frink, 51 Minn. 282, 53 N.W. 633 (1892); Morin v. Divide County Abstract Co., 48 N.D. 214, 183 N.W. 1006 (1921) (abstracter relied upon his own books rather than searching official record).

16. National Savings Bank v. Ward, 100 U.S. 195 (1879); Adams v. Greer, 114 F. Supp. 770 (W.D. Ark. 1953); Dickle v. Nashville Abstract Co., 89 Tenn. 431, 14 S.W. 896 (1890).

17. Guaranty Abstract Co. v. Denman, 209 S.W.2d 213 (Tex. Civ. App. 1948).

18. Henkels v. Philadelphia Title Ins. Co., 177 Pa. Super 110, 110 A.2d 878 (1955).

19. Equitable Building & Loan Ass'n v. Bank, 118 Tenn. 678, 102 S.W. 901 (1907).

20. Stephenson v. Cone, 24 S.D. 460, 124 N.W. 439 (1910).

21. Boone v. Sparrow, 235 N.C. 396, 70 S.E.2d 204 (1952).

22. Lizzio v. Craft, 135 N.Y.S.2d 748 (1954), *Appeal dismissed,* 284 App. Div. 862, 135 N.Y.S.2d 777 (4th Dep't 1954).

23. Turk v. Benson, 30 N.D. 200, 152 N.W. 354 (1915).

24. Kenthan v. St. Louis Trust Co., 101 Mo. App. 1, 73 S.W. 334 (1903).

25. COLO. REV. STAT. ANN. § 1-1-4 (1953) (no license issued until bond filed and approved). Section 1-1-5 covers any and all actual damages sustained by or accruing to *any person* having cause of action due to error or deficiency in abstract or continuation thereof. Minimum bond $5,000—maximum $15,000. Other similar statutes may be found in IDAHO CODE ANN. § 54-101 (1947); KAN. GEN. STAT. ANN. § 67-802 (1949); MONT. REV. CODE ANN. § 66-2113 (1947); NEB. REV. STAT. § 76-501 (1943); NEV. REV. STAT. § 240-270 (1957); N.D. REV. CODE § 43-0109 (1943); OKLA. STAT. ANN. tit. 1 § 1 (1952); S.D. CODE § 1.0107

quiring the posting of a surety bond by those who would engage in such business designed to provide a source from which injured persons can be indemnified. While in view of today's inflated real estate values the amount of the bond required is unrealistic, it is not greatly significant since the opening of the door by the legislature for suits in tort against abstracters has the practical effect of causing most of them to insure the risk they now assume in those jurisdictions.

As a consequence of such statutes the bulk of litigation against abstracters in recent years has arisen in these jurisdictions. Some of the decisions indicate the tremendous extension over common law liability that the statutes provide in such matters as the degree of care required of an abstracter,[26] the parties within the statutes' coverage,[27] and the assurance of some financial responsibility.[28] Save for the *Hillock* case,[29] however, a cause of action is held to arise under such statutes when the abstract is delivered and not when the defect or omission is discovered.[30]

*Third Party Beneficiary*

Can the vendee be given the status of a third party beneficiary of an agreement between the vendor and abstracter for the purchase of an abstract? In those few instances where this theory of liability has been discussed much has been made of the fact that the abstracter knew the abstract was intended for the third person's information and use.[31] In fact, in the jurisdiction giving most support to this theory it was subsequently pointed out that an abstracter could not be held lia-

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(1939); UTAH CODE ANN. § 1-1-12 (1953); WYO. COMP. STAT. ANN. § 66-601 (1945).

In Alabama it is a misdemeanor to fraudulently certify an abstract. ALA. CODE ANN. tit. 14 § 10 (1940). Arkansas and Minnesota statutes are designed apparently to protect the public records. ARK. STAT. ANN. § 71-103 (Supp. 1957); MINN. STAT. ANN. § 386.18 (1958). The Arkansas statute § 71-115 provides for permissive bonding to cover actual damages that may be sustained or accrue to any person by reason of error or deficiency in abstract.

26. Leeper v. Patton, 91 Okla. 12, 215 Pac. 421 (1923) ("high degree of care"); Gate City Abstract Co. v. Post, 55 Neb. 742, 76 N.W. 471 (1898) ("vouches for correctness of abstract").

27. Goldberg v. Sisseton Loan Title Co., 24 S.D. 49, 123 N.W. 266 (1909). See cases collected at Annot., 34 A.L.R. 67 (1925).

28. Bondsman and abstracter are jointly and severally liable. See Merrill v. Fremont Abstract Co., 39 Idaho 238, 227 Pac. 34 (1924).

29. Hillock v. Idaho Title & Trust Co., 22 Idaho 440, 126 Pac. 612 (1912).

30. E. T. Arnold & Co. v. Barner, 91 Kan. 768, 139 Pac. 404 (1914); Mott v. Adams County Abstract Co., 73 N.D. 645, 18 N.W.2d 15 (1945); Freemon v. Wilson, 105 Okla. 87, 231 Pac. 869 (1924). The *Hillock* case proceeded on the theory of fraud. The action was held to arise when the fraud was discovered. In the *Mott* case, the same view was expressed.

31. Dickle v. Nashville Abstract Co., 89 Tenn. 431, 14 S.W. 896 (1890), Denton v. Nashville Title Co., 112 Tenn. 320, 79 S.W. 799 (1904); Economy Bldg. & Loan Ass'n v. West Jersey Title & Guaranty Co., 64 N.J. 427, 44 Atl. 854 (1899); Brown v. Sims, 22 Ind. App. 317, 53 N.E. 779 (1899). *Contra*, Zweigardt v. Birdseye, 57 Mo. App. 462 (1894).

ble save where privity of contract existed and this privity could only be satisfied in exceptional cases by showing that the abstracter knew of the specific use intended.[32] And in *Thomas v. Guarantee Title & Trust Co.*[33] this line of cases was criticized as examples of courts straining the privity doctrine to mitigate the rigorous nature of the rule.

It is essential that one claiming as a third party beneficiary show that the promisor (abstracter) or the promisee (vendor) intended to confer a benefit upon him.[34] This intent will not, however, be inferred from a custom or practice by vendors in supplying vendees with abstracts no matter how well established it might be.

*Grantor as Agent of Vendee*

In *Young v. Lohr*[35] it was held that an abstracter was liable to the owner of the premises though the contract was by the owner's agent, who did not disclose his principal.[36] Certainly there would be no strain on the privity requirement but for the fact that the principal was undisclosed. This case stands alone but offers a suggestive alternative to a court trying to find some basis for holding an abstracter liable to a vendee when the abstract was prepared at the request of the vendor and the jurisdiction is committed to the privity requirement.[37]

*Reissuance or Recertification to Third Party*

From the vendee's point of view a practical solution [to the privity requirement] is to insist that the abstract be certified to him[38] and that where an extension or amendment only is involved to insist that there be a reissuance or recertification of the entire abstract. If this

32. Equitable Bldg. & Loan Ass'n v. Bank of Commerce & Title Co., 118 Tenn. 678, 102 S.W. 901 (1907). See also Phoenix Title & Trust Co. v. Continental Oil Co., 43 Ariz. 219, 29 P.2d 1065, 82 U. PA. L. REV. 876 (1934) (court erroneously indicated that knowledge as to the actual beneficiary's identity was essential); Sickler v. Indian River Abstract & Guaranty Co., 142 Fla. 528, 195 So. 195 (1940).

33. 81 Ohio St. 432, 91 N.E. 183 (1910).

34. 2 WILLISTON, CONTRACTS §§ 356A, 380 (1936).

35. 118 Iowa 624, 92 N.W. 684 (1902).

36. For discussion criticizing this approach see 2 WILLISTON, CONTRACTS § 352 (1936).

37. When an abstracter has an arrangement with a bank or building and loan association whereby abstracts are furnished at the cost of borrowers for the use of the lending institution and abstracts are delivered knowing that they are for such use and that the lending institution will rely on their accuracy, it would seem that there is sufficient privity to sustain a recovery for negligence of the abstracter. It has been so held. Western Loan & Savings Co. v. Silver Bow Abstract Co., 31 Mont. 448, 78 Pac. 774 (1904). While it is possible for an abstracter to incur tort liability on facts similar to Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931) it would seem to require him to certify that he had searched the records when he had in fact not done so. There are no abstracter cases which have proceeded on this theory.

38. Beckovsky v. Burton Title & Abstract Co., 208 Mich. 224, 175 N.W. 235 (1919).

is done there is no question but that he is entitled to whatever protection the law affords one in privity with the abstracter. But the expense involved will ordinarily discourage this procedure and in many sections of the country it would be quite an extreme departure from the established routine.

### CASUAL RELATION

In order for plaintiff to recover in his action against an abstracter it is necessary for him to show that the latter's negligence was the legal cause of damage to him. There is, of course, no real problem in the obvious case where a purchaser informs the abstracter that he will not buy until such abstract is completed and it is delivered to him with the omission of a deed which renders the vendor's title defective as a result of which the purchaser loses the land[39] or where omission by the abstracter is of a valid lien which the purchaser is required to discharge to protect his interest in the premises.[40]

But the requirement that a plaintiff established a casual relationship between his damage and defendant's breach of duty[41] has at times given plaintiffs considerable difficulty. In *Roberts v. Leon Loan & Abstract Co.*,[42] even though defendant had erroneously indicated the date of an execution sale in the abstract and even though plaintiff may have relied on the date therein set forth, a directed verdict for defendant was sustained because there was no evidence tending to show that plaintiff would have or could have redeemed from such sale had she known the true date; therefore, the error was not the proximate cause of the loss.[43]

### DAMAGES

The measure of damages used in an action to recover from an abstracter is ordinarily stated in terms of those which are directly or proximately caused by the breach of duty to furnish a true and correct abstract. While this rule does not seem to pose any great limitation on the amount to be recovered other than that the plaintiff establish a casual connection between the injury and the breach the cases reveal that the amount allowed rarely, if ever, exceeds that which may reasonably be supposed to have been within the con-

39. Morin v. Divide County Abstract Co., 48 N.D. 214, 183 N.W. 1006 (1921).
40. Henkels v. Philadelphia Title Ins. Co., 177 Pa. Super 110, 110 A.2d 878 (1955).
41. Guaranty Abstract Co. v. Denman, 209 S.W.2d 213 (Tex. Civ. App. 1948).
42. 69 Iowa 673, 29 N.W. 776 (1886). See also Randall v. Paine-Nichols Abstract Co., 205 Okla. 430, 238 P.2d 319 (1951) where although abstract was admittedly erroneous plaintiff did not rely on abstracter's error when he executed warranty deed resulting in his liability to grantee.
43. See also Gronseth v. Mohn, 57 S.D. 604, 234 N.W. 603, 3 DAK. L. REV. 320 (1931); Williams v. Hanly, 16 Ind. App. 464, 45 N.E. 622 (1896).

templation of the parties at the time of the contract as the probable result of the breach.[44]

Certainly, it is everywhere recognized that before a plaintiff can recover he must establish that he relied on the abstract as negligently prepared[45] and that he suffered actual loss as a result.[46] If, for example, a purchaser buys without waiting for an abstract he has ordered, he would not be heard to complain that the abstract as later delivered was defective[47] and further, even though an abstract may be defective in not revealing the true state of the record, it is obvious that there may be no actual loss and no recovery.[48]

Damages have been awarded in a number of cases measured by the amount of an existing tax lien negligently omitted from the abstract and paid by the plaintiff,[49] the difference between the amount paid for land and its value as encumbered by a mining lease erroneously omitted from the abstract[50] and where as a result of the negligence plaintiff has lost the land he has been awarded the money paid for the premises plus his expenses in defending his title with interest.[51]

The generally accepted principle of contract law that a party injured by breach of a contract must act to avoid or minimize damages and cannot recover for losses which could have been avoided through the exercise of reasonable diligence on his part is applicable to the abstracter liability cases.[52] One of the most recent statements of this rule is contained in *Guaranty Abstract Co. v. Denman*[53] although on the facts it was found that plaintiff had not breached this obligation. In that case the vendor, who was liable on breach of his warranties, offered to pay the vendee (plaintiff) part of the loss occurred because

44. See cases collected at Annot., 28 A.L.R.2d 891 (1953).
45. Maggio v. Abstract Title & Mortg. Corp., 98 N.Y.S.2d 1011 (App. Div. 4th Dep't 1950).
46. Walker v. Bowman, 27 Okla. 172, 111 Pac. 319 (1910).
47. Beckovksy v. Burton Abstract & Title Co., 208 Mich. 224, 175 N.W. 235 (1919).
48. An extreme example would be the showing of a tax lien that had in fact been discharged. A more logical illustration would be failure to show an encumbrance of record long since barred by the statute of limitations. Nor could he recover for the satisfaction of an invalid claim or encumbrance. See Manville v. Le Flore-McCasland Abstract & Realty Co., 65 Okla. 12, 162 Pac. 682 (1917).
49. Henkels v. Philadelphia Title Ins. Co., 177 Pa. Super 110, 110 A.2d 878 (1955); Walker v. Bowman, 27 Okla. 172, 111 Pac. 319 (1910).
50. See DeVilliers v. Pioneer Abstract & Loan Co., 92 Okla. 80, 218 Pac. 310 (1923). This result even though plaintiff had expanded a considerable sum attempting to remove lease as a cloud on title and had eventually paid a substantial sum for the leasehold interest.
51. Morin v. Divide County Abstract Co., 48 N.D. 214, 183 N.W. 1006 (1921). See also Washington County Abstract Co. v. Harris, 48 Okla. 577, 149 Pac. 1075 (1915).
52. Roberts v. Leon Loan & Abstract Co., 63 Iowa 76 (1884); Washington County Abstract Co. v. Harris, 48 Okla. 577, 149 Pac. 1075 (1915); Sackett v. Rose, 55 Okla. 398, 154 Pac. 1177 (1916).
53. 209 S.W.2d 213 (Tex. Civ. App. 1948).

of a defect in title, which defect had been negligently omitted from the abstract by the defendant company. The vendor promised to pay the balance over a period of time. The court held that refusal of plaintiff to accept the money was not a breach of his duty to minimize damages since it might have crippled his right of action against the abstract company who was financially able to respond in damages.[54]

The failure to minimize damages is treated as an affirmative defense[55] and applies to the abstracter as well as to his employer.[56]

## DEFENSES

### *Statute of Limitations*

The defense asserted most frequently by abstracters is that the statute of limitations has run on plaintiff's cause of action. In this connection the customary problems arise. What statute is applicable? When does the cause of action accrue?

As to the applicable statute, there is quite general agreement that the one governing contract actions applies.[57] This, of course, where there is no statute of limitations specifically applicable to abstracters. But even though the action is in contract disputes have arisen over the period governing the action since many jurisdictions have multiple statutes applying to contracts or agreements.[58]

In the case of *Adams v. Greer*[59] the defendant abstracter had failed to show an acceleration clause in a mortgage. Plaintiff and defendant had entered into an oral agreement obligating defendant to bring down to date an existing abstract. Defendant completed the amendment and certified it as of August 24, 1949 delivering the completed abstract some time between August 24th and 31st. Plaintiff's action was filed on July 28, 1953. Defendant asserted that the three year statute of limitations applicable to contracts, obligations or liabilities not under seal and not in writing applied whereas plaintiff contended that the five year statute applicable to instruments in writing applied. Plaintiff's argument proceeded on the theory that the abstracter's certificate (in writing) was the basis of the contractual obligation but the court held that the contract arose out of the acceptance of employ-

54. See also Murphy v. Fidelity Abstract & Title Co., 114 Wash. 77, 194 Pac. 591 (1921).

55. Hershiser v. Ward, 29 Nev. 228 (1906).

56. Hillock v. Idaho Title & Trust Co., 22 Idaho 440, 126 Pac. 612 (1912).

57. Adams v. Greer, 114 F. Supp. 770 (W.D. Ark. 1953); Talpey v. Wright, 61 Ark. 275, 32 S.W. 1072 (1895); Lattin v. Gillette, 95 Cal. 317, 30 Pac. 545 (1892); Russell & Co. v. Polk County Abstract Co., 87 Iowa 233, 54 N.W. 212 (1893); Provident Loan & Trust Co. v. Walcott, 5 Kan. App. 473, 47 Pac. 8 (1895); Schade v. Gehner, 133 Mo. 252, 34 S.W. 576 (1896); Close v. Coates, 187 Okla. 315, 102 P.2d 613 (1940); Equitable Building & Loan Ass'n v. Bank of Commerce, 118 Tenn. 678, 102 S.W. 901 (1907).

58. ALA. CODE ANN. tit. 7, § 21 (1940) (contract not under seal, 6 years), § 20 (contract under seal, 10 years).

59. 114 F. Supp. 770 (W.D. Ark. 1953).

ment by defendant and antedated the making of the certificate. The agreement being an oral one, the three year statute controlled the action.[60]

Since there ordinarily is little difference in time allowed for bringing actions[61] the most important factor in applying a statute of limitation is the determination of when the cause of action accrues. On this point there is quite general agreement that it is at the time the abstract is delivered.[62] But in *Hillock v. Idaho Title & Trust Co.*,[63] the court said that the cause of action did not accrue upon mere delivery of the abstract and certificate but rather when plaintiffs "were called upon to pay some valid claim held against the property and not shown by the abstract or had notice of the claim and the falsity of the representation."[64] The court apparently regarded the action as in tort for fraudulent misrepresentations and as not arising until a discovery of the fraud.

*Others*

There are a few cases where it seems that courts have applied the doctrine of contributory negligence or assumption of the risk to claims against abstracters although they can probably best be explained in terms of nonreliance by plaintiff on defendant's breach. In *Lizzio v. Craft*,[65] the defendant had failed to include in the abstract deeds containing restrictions not in the direct chain of title to the captioned premises but executed by a common grantor. In holding that the common grantor could not assert such restrictions the court stated that the grantor could not "excuse her failure to bring the restrictions to the attention of her grantee or shift the burden of responsibility to the shoulders of the abstract company."[66] In any event, if the defendant relies on contributory negligence, assumption of risk, or notice, he must assert such defense and prove it.[67]

60. Citing Lattin v. Gillette, 95 Cal. 317, 30 Pac. 545 (1892) and Close v. Coates, 187 Okla. 315, 102 P.2d 613 (1940).

61. An examination of the state statutes reveals that the average period is three to five years with a few jurisdictions providing for periods as long as ten years.

62. See case cited *supra* note 57.

63. 22 Idaho 440, 126 Pac. 612 (1912).

64. *Id.* at 448.

65. 135 N.Y.S.2d 748 (1954) *Appeal dismissed*, 284 App. Div. 862, 135 N.Y.S.2d 777 (4th Dep't 1954). See also Manville v. Le Flore-McCasland Abstract & Realty Co., 65 Okla. 12, 162 Pac. 682 (1917) wherein the court referred to payment by plaintiff of an omitted, invalid mortgage as a voluntary act made at their peril with full knowledge of the law.

66. *Id.* at page 762. See also Maggio v. Abstract Title & Mortgage Corp., 98 N.Y.S.2d 1011 (App. Div. 4th Dep't 1950) wherein the court said that a plaintiff must show he relied on the title search "otherwise he assumes risk of any loss he may sustain," and American Trust Invest. Co. v. Nashville Abstract Co., 39 S.W. 877 (Tenn. Ch. App. 1896).

67. Guaranty Abstract Co. v. Denman, 209 S.W.2d 213 (Tex. Civ. App. 1948).

## CONCLUSION

What is the explanation of the dearth of cases on abstracter liability? One could be generous and say that the professional abstracter just does not make mistakes or that he readily settles claims, but either reason would be difficult to support with facts. A more adequate explanation of the small number of cases would involve the limitations on actions against abstracters imposed by the common law rules discussed in this article. This explanation is supported by the fact that the only substantial activity, if indeed it is substantial, involving abstracter liability has occurred in jurisdictions where legislatures have by statute expanded the scope of this group's liability to those who sustain a loss in reliance on their work. One can only conclude that, in the absence of such statutes, it is somewhat futile for anyone other than the person who orders the abstract prepared to attempt to hold an abstracter liable. Even those who are "in privity of contract" with the abstracter find that the statute of limitations, which starts running upon the delivery of the abstract; the shortness of the statutory period; the necessity for establishing reliance on the abstract as prepared; and the recognition of the abstracter's power to limit the scope of his undertaking via the certification process have a cumulative effect which negatives any real chance of a recovery.

Even though he operates under circumstances giving him a large measure of immunity from lawsuits, it is still necessary to have available abstracts of the record in order to facilitate real estate transactions. Looking at the problem as a purchaser of real estate or a lending institution it would appear imperative that they avail themselves of covenants of warranty, title insurance and/or title registration where this is available. Perhaps much of the increased use of title insurance throughout the country can be credited not just to defects in the recording system but also to the rather limited liability of abstracters and of attorneys preparing title opinions based on such abstracts. Unfortunately, title insurance can also prove to be a snare and a delusion for many policies written today exclude from coverage the very risks that a vendee desires insured.

There does not seem to be any valid reason why the statutes in vogue in the western states should not be adopted throughout the country. These statutes certainly stimulate a careful search of the record and they insure the financial stability of the profession. At best however, these measures offer only a partial solution in view of the short statute of limitations and the fact that the statute runs from the delivery of the abstract. Still, if the abstracting profession wishes to halt the penetration of their domain by the title insurance companies (many of whom conduct their own search of the records) it would

appear that they would be well advised to participate in sponsoring such legislation and in apprising the public that title insurance is not a panacea for the evils in the law of conveyancing.

It is astonishing that so little has been written on the general subject of abstracter liability.[68] It is hoped that this paper will at least focus the attention of attorneys with substantial real estate practices on what seems to be a soft spot in the attorney-abstracter system. The system is worth saving and the profession should not let it go by default.

68. Hall, *Abstracter's Liability in Examination of Title*, 6 WYO. L.J. 184 (1952); Hoehl, *Liability of Abstracters to Third Parties for Omissions in the Abstract*, 1 FLA. L. REV. 70 (1948); Phillips, *Liability of Abstracters*, 62 AM. L. REV. 868 (1928); Trusler, *Extension of Liability of Abstracters*, 18 MICH. L. REV. 127 (1919); Comment, 7 ALA. L. REV. 87 (1954); *Liability of Abstracting Attorneys;* Note, 4 ALA. L.J. 40 (1928).