RECENT AMERICAN DECISIONS.

Court of Errors and Appeals of Maryland.

MARY E. TWIGG AND JESSE TWIGG, HER HUSBAND, v. A. J. RYLAND.

Any one owning or keeping an animal that he knows to be of a ferocious disposition, accustomed to attack or bite mankind, is bound to restrain such animal at his peril.

Allowing a dog to be kept on the premises does not render the owner of the premises liable for injuries inflicted by the dog away from the premises if such owner did not own or have control of the dog.

The onus is on the plaintiff to prove the knowledge of the owner or keeper of the vicious propensities of the animal, if it be of a domestic nature, though it is otherwise where it is of a wild and untamable nature.

Knowledge of a servant or wife is not knowledge of the owner or keeper, unless it be a servant who has general charge of the keeping of the animal.

To charge the defendant he must be shown to have knowledge that the animal is inclined to do the particular kind of mischief that has been done.

THIS was an action brought by the appellants in the court below to recover damages for injuries from the bite of a dog. The facts are sufficiently stated in the opinion.

G. W. Thomas and *A. B. McKaig*, for appellants.

J. A. McHenry, *Wm. M. Price* and *H. K. Douglas*, for appellees.

The opinion of the court was delivered by

ALVEY, J.—The appellants in this case were the plaintiffs below, and they brought the action to recover of the defendant for injuries received, by the female plaintiff, by the bite of a dog, alleged to have belonged to or to have been kept by the defendant, with knowledge that the dog was ferocious and dangerous.

In regard to the law of the case it is well settled that if any person keeps an animal, *mansuetæ naturæ*, of a ferocious or vicious disposition, accustomed to bite or attack mankind, knowing that it is possessed of such disposition or vicious propensity, he is bound to restrain such animal, at his peril; and if he allows it to escape or go at large he is liable for all the injury it may inflict by attacking persons in consequence of such ferocious propensity.

As declared by the Queen's Bench in *May* v. *Burdett*, 9 Q. B. 101, "Whoever keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is prima facie liable in an action on the case, at the suit of any person attacked

and injured by the animal, without any averment of negligence or default in the securing or taking care of it. The gist of the action is the keeping the animal after knowledge of its mischievous propensities."

The owner or keeper of the dog or other domestic animal must be shown to have had knowledge of its disposition to commit such injury, and the burden of proving this fact is on the plaintiff, though it would be otherwise if the animal was of a nature to be fierce and untamable, such as bears, tigers, etc.: *Spring Co.* v. *Edgar*, 99 U. S. 654.

The notice which will charge the owner or keeper with liability for the vicious conduct of the animal must be notice that it was inclined to do the particular mischief that had been done. Hence, notice that a dog is ferociously disposed toward cattle is no notice that he will attack persons. It is not necessary to show that the owner or keeper of a vicious dog has seen the animal attack mankind; but it is sufficient to show that the vicious propensity of the animal has in some way been brought to the knowledge of the owner or keeper, so as to admonish him to take the necessary precaution to prevent injury in the future. Hence, the question in each case is whether the notice was sufficient to put the owner or keeper on his guard, and to require him to anticipate the injury that has actually been done. And this duty of guarding against the vicious propensity of a dog or other domestic animal is imposed upon the keeper thereof, irrespective of the fact of ownership: Cooley on Torts 344.

The question presented by the first bill of exception is as to the admissibility of evidence to prove the *scienter*. After giving evidence of the injury inflicted by the dog, the plaintiffs gave evidence to prove that the defendant was a butcher in Cumberland and that he had about his premises a colored man as an assistant, who drove the meat wagon and delivered meat to the customers of the defendant, and that the dog was frequently with him and generally followed him. They then offered to prove that this colored man knew that the dog was vicious and dangerous, and was disposed to attack and bite and injure persons, and that such colored man while in the employ of the defendant had told one of the plaintiff's witnesses that he had made known to the defendant, before the injury to the plaintiff, that the dog was of a vicious disposition, and had attacked and bitten other persons. To this offer the defendant

objected, and the objection was sustained by the court, and as we think, rightly sustained.

It is very true, as shown by the authorities, that if the owner of a dog place it in the charge and keeping of a servant, the servant's knowledge of the dog's ferocious disposition is the knowledge of the master; but it is not true that the knowledge of any servant that a dog may follow or be with about the premises where he is employed, as to the disposition of the dog, is to be imputed to the master. This is clear upon all the authorities.

The case that goes as far upon this question as any other to be found in the reports, and which has been mainly relied on by the appellants, is that of *Gladman* v. *Johnson*, 86 L. J. (C. P.) 153, where notice of the mischievous propensity of the dog, given to the wife of the defendant, who attended to the business of her husband in his absence, for the purpose of being communicated to the husband, was held to be some evidence of a *scienter* to be considered by the jury.

But in delivering judgment in that case, BOVILL, C. J., says: "I am not prepared to assent to the proposition that notice to an ordinary servant, or even to a wife, would in all cases be sufficient to fix the defendant, in such an action as this, with knowledge of the mischievous propensity of the dog. But here it appears that the wife attended to the milk business, which was carried on upon the premises where the dog was kept, and that a formal complaint as to that dog was made to the wife, when on the premises, and for the purpose of being communicated to her husband. It may be that this is but slight evidence of the *scienter*, but the only question is whether it is evidence of it. I think it is."

This case was referred to and commented upon in *Good* v. *Martin*, 57 Md. 610, 611. And in the case of *Stiles* v. *Cardiff St. Nav. Co.*, 33 L. J. (Q. B.) 319, where a similar question arose, the Lord Chief Justice said that notice of the vicious propensity of the dog given to porters or servants employed about the premises would not suffice; but that if brought home to a person who had the general management of the yard in which the defendants themselves could not be supposed to be acting, and who had authority to say whether a dog should be kept there or not, or whether it should be chained up or not, it would be otherwise.

The case of *Baldwin* v. *Casella*, L. R., 7 Exch. 325, proceeded upon the ground that the defendant had deputed to his coachman

the care and control of the dog, and therefore a notice to him of the vicious nature or propensity of the dog was notice to the master. And there is nothing in the case of *Appleton* v. *Percy*, L. R., 9 C. P. 647, that in any way contravenes the principle of the previous cases to which we have referred. We are clearly of opinion, therefore, upon the facts as stated in the bill of exception, that the knowledge, whatever it may have been, of the negro man, in regard to the propensity of the dog, was not legally imputable to the defendant; and especially were not the declarations of the negro man evidence against the defendant. The man himself should have been called as witness.

Of the several prayers offered by the plaintiffs, those granted would seem to have given the plaintiffs the benefit of all the law to which they were entitled, and that, too, in a most liberal form; and those rejected were clearly erroneous, and therefore properly rejected. The fourth and fifth prayers rejected by the court appeared to have been based entirely upon the evidence that was offered, but which was excluded by the court upon objection.

The evidence not being before the jury, of course it could not be made the basis of an instruction to them. Besides, those prayers did not even require the jury to find that the vicious disposition of the dog was to attack and injure mankind, but simply that the dog was of vicious or dangerous propensities. This alone was a defect which made them misleading, and therefore required their rejection. *Judge* v. *Cox*, 1 Stark. 285; Wood on Law of Nuisances, § 761.

The seventh prayer asked the court to say that there was no sufficient evidence to be submitted to the jury, of any contributory negligence on the part of the female plaintiff in bringing about the injury complained of, to defeat the right to recover. The prayer was properly rejected; for although the evidence is manifestly very meagerly and defectively set out in the record as to the precise circumstances of the injury, yet it is stated in a general way that evidence was given "tending to prove that the plaintiff (Mary) knew the said dog, and knew that he was a dog liable to attack persons, and was of a fierce disposition, and that she had encouraged the dog to be in and about her premises prior to said injuries." If she had cultivated a familiarity with the dog, and encouraged him to come to her house and be about her, with knowledge of his disposition, it was certainly evidence to go the jury upon the subject

of contributory negligence on her part, and the court was therefore right in refusing the prayer.

The first prayer on the part of the defendant, which was granted, we do not understand to be seriously questioned. But the third and fourth prayers of the defendant, which were granted by the court, are questioned by the plaintiffs. The third prayer sought to preclude the right to recover upon the ground of contributory negligence on the part of the female plaintiff, Mary, and if the facts therein enumerated were found by the jury, they certainly constituted a good ground of defence. Cooley on Torts 346.

In granting the fifth prayer, the jury were instructed that if they found that the dog committing the injury did not belong to the defendant, but was at the time the exclusive property of the defendant's son, a young man over twenty-one years of age, and that the latter "had sole charge, custody, and control of said dog, and that the defendants never had the custody, care or control of said dog, and that the injury complained of occurred off the premises of the defendant, and upon the premises of the plaintiff, Mary E., a half mile away," then the defendant was not liable, although the jury might "find that the defendant allowed said dog to be kept by his son on or about his premises." This instruction we think unobjectionable. The defendant, to be liable for the vicious conduct of the dog, must have been either owner or keeper of the animal, or had some control of him. If he was neither owner or keeper, and had no control of the dog, and the injury was done away from his premises and out of his presence, it is difficult to perceive upon what principle he could be held liable.

In the case of *Auchmuty* v. *Ham*, 1 Denio 495, where the damage was done by the dog away from the premises of the defendant, it was held not to be sufficient to render the defendant liable, that the dog belonged to the defendant's hired man-servant, who kept the dog at the defendant's house during the day but took him away at night.

The principle of that case would seem to apply fully to this, and be an authority for granting the fifth prayer of the defendant, if any authority were needed.

Finding no error in the rulings of the court below, we must affirm the judgment.

The keeper of animals *feræ naturæ*, such as lions, tigers and the like, is *prima facie* liable without notice for any damage that one may receive from them.

And in such case, it is not necessary for the plaintiff in his declaration to aver negligence in the owner or keeper, for the reason, that such animals are by nature fierce and dangerous, and their owner is supposed to be acquainted with their nature. See *Congress Spring Co.* v. *Edgar*, 99 U. S. 645; the leading case of *May* v. *Burdett*, 9 Q. B. (N. S.) 101; and the cases cited below.

The owner or keeper of animals *mansuetæ naturæ*, such as horses, oxen, cows, sheep, swine, dogs, etc., can on the other hand only be rendered liable by proving notice of their mischievous propensities, and such notice must be averred in the declaration.

There is, however, no distinction between the cases of keeping an animal which breaks through the ordinary tameness of its nature and becomes fierce, and is known by its owner or keeper to be so, and the keeping of one, *feræ naturæ*: *Jackson* v. *Smithson*, 15 M. & W. 563; s. c. 15 L. J. Ex. 311; *Popplewell* v. *Pierce*, 10 Cush. 509. *Prima facie* he who keeps a dog or any other animal which is ordinarily of a quiet and domestic nature, after notice that such animal has done hurt, has exhibited a fierce and threatening disposion towards or has made an attack upon a person, biting or injuring him, is thereupon made liable in an action for damages: *May* v. *Burdett*, 9 Q. B. (N. S.) 101; *Congress Spring Co.* v. *Edgar*, 99 U. S. 645; *Perkins* v. *Mossman*, 44 N. J. L. 579; *Pickering* v. *Orange*, 1 Ill. 338; *Kightlinger* v. *Egan*, 75 Id. 141; s. c. 64 Id. 235; *Wormley* v. *Gregg*, 65 Id. 251; *Partlow* v. *Haggarty*, 35 Ind. 178; *Durden* v *Barnett*, 7 Ala. 169; *Marsh* v. *Jones*, 21 Vt. 378; *Dearth* v. *Baker*, 22 Wis. 73; *McCaskill* v. *Elliot*, 5 Strob. 196; *Murray* v. *Young*, 12 Bush 337; *Barclay* v. *Leonard*, 4 Den. 500; *Campbell* v. *Brown*, 19 Penn. St. 359. Most of the cases above cited lay down the rule, that the gist of the action is the keeping with notice or knowledge of the vicious propensity, and that an averment of negligence in the declaration is not necessary. The following cases are explicit upon this point; *May* v. *Burdett*, *supra*; *Congress Spring Co.* v. *Edgar*, *supra*; *Campbell* v. *Brown*, *supra*; *Poppenwell* v. *Pierce*, *supra*; *Jackson* v. *Smithson*, *supra*; *Durden* v. *Barnett*, 7 Ala. 169.

A man may keep a dog, which he knows is disposed to bite, but in such keeping he takes upon himself all risks, and renders himself liable for all injuries sustained by persons pursuing their ordinary callings: *Logue* v. *Link*; 4 E. D. Smith 63; *Kelly* v. *Tilton*, 3 Keyes 263; *Stumps* v. *Kelley*, 22 Ill. 140.

Negligence of the owner of an animal will likewise render him liable; and when negligence is averred, it will not be necessary to aver knowledge of mischievous propensities. See *Dickson* v. *McCoy*, 39 N. Y. 400; *Fallon* v. *O'Brien*, 12 R. I. 518; *Goodman* v. *Gray*, 15 Penn. St. 188, where it was held that the owner of a horse who voluntarily permits it to go at large in the streets of a populous city, is answerable to an individual who is kicked, without proof that he knew it was vicious. To the same point, see *Dickson* v. *McCoy*, 39 N. Y. 401.

As to the extent of the knowledge or notice that will charge the owner or keeper, it would seem that notice of facts which would put a careful and prudent man upon his guard, or upon inquiry, is sufficient notice. Under a count alleging a ferocious and dangerous disposition in a dog, proof of a knowledge of a dangerous propensity of the animal has been held sufficient: *McCaskill* v. *Elliot*, 5 Strob. 196. In the words of the court, per WARDLAW, J., "To require that a plaintiff before he can have redress for being bitten, should show that some other sufferer had previously endured harm from the same dog, would be always to leave the first wrong unredressed, and to lose sight of

the thing to be proved in addition to one of the means of proof."

Notice to the defendant of mischief to mankind on a single previous occasion is sufficient. See *Arnold* v. *Norton*, 25 Conn. 92; *Kittredge* v. *Elliott*, 16 N. H. 77; *Smith* v. *Pelah*, 2 Stra. 1264. Where the owner of a dog which has bitten other persons, has notice of the fact and afterwards suffers him to be at large, and he bites the plaintiff, it is no answer to the plaintiff's action that the dog was generally inoffensive. *Buckley* v. *Leonard*, 4 Den. 500.

Knowledge that a dog allowed to run at large was of a savage and ferocious disposition is not, however, of itself sufficient to make the owner liable to one bitten by the dog. To charge the owner he must have had knowledge of the dog's propensity to bite mankind: *Keightlinger* v. *Egan*, *supra*.

If the mere reading of the principal case were not sufficient to convince one of its correctness, as it would seem it must, the cases above cited must render its correctness beyond question. On the whole it is a very well considered case and entirely satisfactory both on principle and authority.

M. D. Ewell.

Chicago.

United States Circuit Court; District of Oregon.

DUNDEE MORTGAGE AND TRUST INVESTMENT CO. v. HUGHES.

An attorney employed by a mortgagee to examine the security, and who gives his client a certificate of title, is not liable to a subsequent assignee of the mortgage for loss by reason of error in the certificate.

A. applied to a money lender for a loan of $3000, and offered his note therefor, secured by a mortgage on certain real property; B., the attorney of the money lender, examined the title to the real property and furnished the latter a certificate to the effect that A.'s title was good and the property unincumbered, and thereupon the loan was made on the terms proposed; subsequently, and before the maturity of the note, it was assigned to the plaintiff, who foreclosed the mortgage and sold the property, when it was found that it was incumbered by a prior mortgage, so that the plaintiff did not realize the amount of his debt by $4794.35. *Held*, that there was no privity of contract between B. and the plaintiff, and that he was not liable to the latter for the loss.

Demurrer to complaint.

William H. Effinger, for plaintiff.

The defendant *in propria personæ*.

The facts are stated in the opinion, which was delivered by

Deady, J.—This action is brought to recover, among other things, damages to the amount of $5312.35, for losses alleged to have been sustained on two loans on note and mortgage, amounting to $3300, upon the certificate of the defendant, as an attorney at law, concerning the title of the borrower to the mortgaged premises and the

condition of his estate therein. From what I conceive to be the legal effect of the statement of the first cause of action in the complaint as amended, it appears that "about" April 28th 1877, the Oregon and Washington Trust Investment Company was a corporation formed under the laws of Great Britain, and resident in Dundee, Scotland, and engaged in loaning money in Oregon upon note and mortgage; that the defendant, who was then a practising attorney in this state, was employed by said corporation to examine the title and condition of the real property offered as security by any one applying to said corporation for a loan; that at this time a loan of $3000 was made by said corporation to C. W. Shaw, on his promissory note, payable to its order on June 1st 1882, with interest, at the rate of ten per centum per annum, and secured by a mortgage on certain real property then owned by said Shaw, upon which the defendant certified there was no prior lien or encumbrance; that on December 19th 1879, said corporation "amalgamated" with the plaintiff, and "assigned" thereto "all its mortgages," including "all claim, right and interest to or in or growing out of this loan to Shaw," and plaintiff is now "the owner and holder thereof," of which the defendant had notice; that in 1882 the plaintiff requested the defendant "to foreclose said mortgage," and in the course of the proceeding therefor it was ascertained and determined by the decree of this court that the same was subject to a prior mortgage on the premises, so that the whole amount realized by the plaintiff on said loan was $938.25; and that said Shaw is insolvent. The second cause of action, as appears from the original complaint, is upon a certificate given by the defendant to the Oregon and Washington Savings Bank, another British corporation engaged in loaning money in Oregon on note and mortgage, as to the title of property taken by said corporation, as a security for a loan of $300 made to H. H. Howard on November 27th 1876, on his promissory note payable on December 1st 1877, with interest at the rate of twelve per centum per annum, to the effect that said Howard was the owner in fee of the same, and that it was unencumbered; that in 1883 said corporation "found out" that said property was not owned by said Howard, so that the whole amount of said loan was lost; that Howard is insolvent, and the plaintiff is now "the assignee" and "owner" of all the "assets" of said corporation. The defendant demurs to both these statements,

for that they do not contain facts sufficient to constitute a cause of action.

In the first statement it is alleged that the loss arising from the insufficiency of the security for the loan was sustained by the Oregon and Washington Trust Investment Company, and that the defendant now owes to said corporation the full amount thereof, to wit, $4794.35; and it is also alleged that the plaintiff is now "the owner and holder" of the mortgage, notwithstanding it appears that the same has been "foreclosed" and merged in a decree of this court and partly satisfied from the proceeds of the mortgaged premises; and notwithstanding the further allegation that the defendant "now owes" the amount of this loss to the Oregon and Washington Trust Investment Company. But none of these contradictory allegations are admitted by the demurrer, except such as the law adjudges to be true (*Freeman* v. *Frank*, 10 Abb. Pr. 370), and those which are mere conclusions of law are not thereby admitted at all: *Branham* v. *The Mayor, etc.*, 24 Cal. 602; *Hall* v. *Bartlett*, 9 Barb. 297. This action is brought upon the hypothesis that the defendant is now liable to the plaintiff for this loss, but the allegation that he "now owes" the amount thereof to the Oregon and Washington Trust Investment Company is utterly at variance therewith. He cannot be liable on this account to both of them at the same time.

Again, it is alleged that the defendant "guaranteed" that the Shaw property was clear of encumbrance. But this is a mere conclusion of law, and the facts stated do not support it. Upon these, the transaction is simply an employment of the defendant by the Oregon and Washington Trust Investment Company to examine and report upon the title and condition of real property offered as security for a loan by the latter. *Prima facie* there is no element of a guaranty involved in such employment. The defendant only undertook to bring to the discharge of his duty reasonable skill and diligence. He did not warrant or guaranty the correctness of his work any more than a physician or a mechanic does.

It is admitted that if the Oregon and Washington Trust Investment Company had sustained a loss by the negligence or want of skill on the part of the defendant in this matter, the right to recover damages for the same might be assigned to the plaintiff, and it could maintain an action thereon. But taking the facts of the case according to their legal import, and construing contradictory allegations

according to the law of the case, the plaintiff does not sue as the assignee of a cause of action accruing to the Oregon and Washington Trust Investment Company during its existence and ownership of the Shaw note and mortgage. The only thing assigned by the latter was this note and mortgage, and, nothing appearing to the contrary, presumably the consideration therefor was equal to its par value. It does not appear, then, that the assignor ever lost anything by reason of the incorrectness of the defendant's certificate. Nor could the insufficiency of the surety be absolutely, if at all, determined until the maturity of the note in 1882, while the assignment to the plaintiff was made in 1879.

The only question, then, really in this case is whether the defendant is liable, on this certificate, to any one but his employer, the Oregon and Washington Trust Investment Company. The defendant maintains that he is not, while the plaintiff contends he is; not on the ground of privity of contract between them, or that it was aware of the existence of the certificate, or ever acted on it, or was misled by it, but on the ground that the certificate was a necessary preliminary to the contract of loaning, and therefore an integral part of that contract, operating, of course, as an assurance or security to the person about to make the loan, but as much a part of the transaction as the mortgage itself. This question has been decided by the Supreme Court in *Savings Bank* v. *Ward*, 100 U. S. 195. The case was this: A., an attorney employed by B. to examine and report on the title of the latter to a certain lot of ground, certified that it was "good," upon which certificate B. procured a loan from C., and gave a mortgage on the property as security. It turned out that B. had parted with the title to the property prior to the date of the certificate—a fact that, in the exercise of reasonable care, might have been learned from the records. The security having proved worthless, and B. being insolvent, C. lost his money, and brought suit against A. for damages. The court *held*, in the language of the syllabus, "that there being neither fraud, collusion, nor falsehood by A., nor privity of contract between him and C., he is not liable to the latter for any loss sustained by reason of the certificate." True, Mr. Chief Justice WAITE, with whom concurred Justices SWAYNE and BRADLEY, delivered a dissenting opinion; not upon the general question, however, but on the special ground that it appeared that A. gave his client the certificate in question with knowledge, or reason to

know, that he intended to use it in a business transaction with a third person, as evidence of the facts contained therein, and was therefore liable to such person for any loss resulting from a reliance on such certificate, in any particular, which might have been prevented by the exercise of ordinary care and skill on the part of A. But this is not the case. The defendant prepared this certificate at the instance and for the use of his client, the Oregon and Washington Trust Investment Company, and none other. Nor was there anything in the nature of the business that informed him or gave him any reason to believe that any other person would be called upon to act upon it, or part with any right or thing of value on the strength of the representations contained in it. Such a certificate made at the instance of the owner of the property may be used to influence a third person to make a loan thereon; but a certificate made for the information of the lender is presumably made for his use alone, and when the loan is made and the security accepted it is *functus officio* — has performed its office. The defendant is liable to the Oregon and Washington Trust Investment Company for any loss sustained by it on account of any error or mistake in the certificate, arising from a want of ordinary professional skill and care in the preparation of it, and not otherwise. But he is not so liable to the plaintiff, or any third person. There is no privity of contract between them, or any relation whatever.

The ruling is also maintained in *Houseman* v. *Girard M. B. & L. Association*, 81 Penn. St. 256, in which it was held that the recorder of deeds is liable in damages for a false certificate of title, but only to the party who employs him to make the search, and not to his assignee or alienee. And in *Winterbottom* v. *Wright*, 10 M. & W. (Exch.) 109, it was held that although the maker of a carriage is liable to the person for whom he makes it, for any loss or injury arising directly from negligence in its construction, he is not so liable to any third person who may use the same, for the reason there is no privity of contract between them.

The statement of the second cause of action is of the same character as the first; and it is also defective in not stating absolutely that the certificate is untrue. The allegation that in 1883 the bank "found out" that Howard did not own the property, is not in form or effect an averment that he did not own the same and had not title thereto at the date of the certificate. It does not appear to

have been "found out" in any judicial proceeding that the certificate was untrue in this respect; and while it may, nevertheless, be shown in this action to be a fact, it must first be alleged, so that issue can be taken on it. Because in 1883 the bank was of the opinion that Howard had no title to the land, that did not make it so, and the statement of that irrelevant matter is not an allegation by the plaintiff that he was not the owner thereof. Neither does it appear that the bank ever made any assignment of this note and mortgage to the plaintiff or of and claim that may have accrued to it against the defendant for a loss sustained by it on account of any error in this certificate. The allegation that the plaintiff is now the "assignee" and "owner" of the "assets" of the bank is far too vague and indefinite to include this note and mortgage, or such claim, if there is one. The owner of what "assets?" For aught that appears, the bank may have parted with this note and demand before the plaintiff became the owner of its assets. Unless it is shown when the assignment was made and that the bank was then the owner of this "asset," the plaintiff does not show itself entitled to maintain the action, even upon its theory of the law and the defendant's liability. The allegation that the plaintiff is "now" the assignee and owner of the assets of the bank, implies, it is true, an assignment at some time, but it cannot be assumed in favor of the plaintiff that it was more than a day before the commencement of this action—January 9, 1884. But there is no direct allegation in the statement of any loss on the mortgage or of the facts necessary to show one. The statement that the loan was lost to the bank, appears to be a mere inference from the fact that the bank was of the opinion that the mortgagee had no title. And if there was such allegation, and it appeared therefrom that the loss was sustained by the plaintiff, the defendant is not liable for it; while if it was sustained by the bank the defendant is not liable to the plaintiff therefor, unless it should further appear that the right of action thereon has been duly assigned to it.

The demurrer is sustained to both statements.

LIABILITY OF ATTORNEY TO CLIENT—ADVICE AS TO TITLES.

Duty of Attorney.—Attorneys employed by the purchasers of real property to investigate the grantor's title, prior to the purchase, impliedly contract to exercise reasonable care and skill in the performance of the undertaking, and if they are negligent, or fail to exercise such reasonable care and skill in the discharge of the stipulated service, they are responsible to their employers for the loss occasioned by such neglect or want of care and skill: Addison on Contracts, 8th

ed., 593; *Savings Bank* v. *Ward*, 100 U. S. 195.

Like care and skill are also required of attorneys when employed to investigate titles to real estate to ascertain whether it is a safe or sufficient security for a loan of money, the rule being that if the attorney is negligent or fails to exercise reasonable care and skill in the performance of the service, and a loss results to his employers from such negligence or want of care and skill, he shall be responsible to them for the consequences of such loss: Addison on Torts (Dudley & Baylies's ed.) 499; *Howell* v. *Young*, 5 B. & C. 259; *Watson* v. *Muirhead*, 57 Penn. St. 161.

So if a person engages in the business of searching the public records, examining titles to real estate, and making abstracts thereof, for compensation, the law will imply that he assumes to possess the requisite skill and knowledge, and that he undertakes to use due and ordinary care in the performance of the duty, and for a failure in either of these respects, resulting in damages, the party injured is entitled to recover: *Clark* v. *Marshall*, 34 Mo. 429; *Chase* v. *Heaney*, 70 Ill. 270. See Story on Bailments, sec. 431.

If the attorney certifies that the security is a good one, he thereby warrants that the title shall not only be found good at the end of a contested litigation, but that it is free from any palpable grave doubts or question as to its validity: *Page* v. *Trutch*, 3 Cent. Law J. 559; s. c. 8 Chicago Leg. News 385.

The examiner of a title cannot limit his liability by an obscure certificate, without specially calling the attention of the other party to it. If he discovers that he cannot furnish a complete and reliable abstract, it is his duty to give the other party notice of the fact, that he may apply elsewhere; otherwise such other party will have a right to rely on his competency and fidelity: *Chase* v. *Heaney*, 70 Ill. 270. But by giving a certificate of title he does not become an indemnitor. He is liable for lack of due care or diligence, and for ignorance of his business: *Rankin* v. *Schaffer*, 4 Mo App. 108.

The specific employment of an attorney to examine a title does not in itself include the duty or obligation to satisfy liens; it is discharged by truly ascertaining and reporting them: *Josephthal* v. *Heyman*, 2 Abb. N. C. 22.

Said the court, in *Dodd* v. *Williams*, 3 Mo. App. 278: "What is a lien on real estate may be a difficult question, in some cases, to decide; but an examiner of title is bound to know the state of the law on the subject, at least sufficiently to put him on his guard; and where there may be a reasonable doubt as to whether such or such a recorded instrument is a lien, if he choose to resolve the doubt he does so at his peril."

Whenever the attorney of a proposed mortgagee has reason to suspect that the intended mortgagor has been bankrupt or insolvent, it is the duty of the attorney to make proper searches to ascertain the fact, and he is guilty of negligence for not doing so: *Cooper* v. *Stephenson*, 21 L. J. (N. S.). Q.B. 292.

Where an attorney acts for a client who advances money on a legacy given under a will to the borrower, he is not justified in relying upon a partial extract from the will furnished by his client, unless the latter agrees to take the responsibility on himself: *Wilson* v. *Tucker*, 3 Stark 154. If the examiner incorrectly states the quantity of land previously conveyed, he will be liable: *Clark* v. *Marshall*, 34 Mo. 429.

Privity of Contract Necessary.—In *Savings Bank* v. *Ward*, 100 U. S. 195, referred to in the principal case: A., an attorney employed and paid solely by B. to examine and report on the title of the latter to a certain lot of land, gave over his signature this certificate: "B.'s title to the lot" (describing it) "is good,

and the property is unencumbered." C., with whom A. had no contract or communication, relied upon this certificate as true, and loaned money to B., upon the latter executing, by way of security therefor, a deed of trust for the lot. B., before employing A., had transferred the lot in fee by a duly recorded conveyance, a fact which A., on examining the records, could have ascertained, had he exercised a reasonable degree of care. The money loaned was not paid, and B. being insolvent, it was *held*, there being neither fraud, collusion, or falsehood by A., no privity of contract between him and C., he was not liable to the latter for any loss sustained by reason of the certificate. See *Fish* v. *Kelly*, 17 C. B. (N. S.) 194; *Day* v. *Reynolds*, 23 Hun 131; s. c. 11 N. Y. Weekly Dig. 196; *Commonwealth* v. *Harmer*, 6 Phila. 90.

A., B. & C. were employed in a manufacturing business in which secrecy was essential; and to insure their fidelity, they were required to execute deeds under which a portion of their wages was to be invested in the name of a trustee, with a stipulation for determining the engagement on giving two months' notice, at the expiration of which, in the case of B. and C., the money so invested was to be paid over *to them*, but in the case of A., the deed was so framed as to make it payable only *to his executors* on his death. D., the attorney for the employers, being upon the premises, was asked by A. if he would receive his money if he gave notice to quit the service; whereupon D. (not recollecting that A.'s deed differed in this respect from those of B. and C., though he himself drew them all and had them in his custody) answered in the affirmative. Upon receiving this information, A. gave notice, but afterwards discovered that the money invested for him could only be paid to his executors. *Held*, that A. could not maintain an action against D. for the loss and disappointment sustained by him in consequence of his acting upon D.'s mistake: *Fish* v. *Kelly*, *supra*.

It would seem that the rule as to privity of contract should, in some instances, be modified. In *Savings Bank* v. *Ward*, *supra*, Mr. Chief Justice WAITE, with whom concurred Mr. Justice SWAYNE and Mr. Justice BRADLEY, in a dissenting opinion, said: "I think, if a lawyer, employed to examine and certify to the recorded title of real property, gives his client a certificate which he knows or ought to know is to be used by the client in some 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 the title, which, by the use of ordinary professional care and skill, he might have found."

Instances of Liability.—In *Allen* v. *Clark*, 7 L. T. (N. S.) 781; 11 Weekly R. 304, the plaintiff entered into a contract for the purchase of certain household property under certain conditions of sale, one of which was that the purchaser should take an under-lease, "according to the draft under-lease already prepared, which will be produced at the time of sale, and may, in the meantime, be inspected at the office of H.; but no abstract of the vendor's title thereto shall be required, nor the lessor's title objected to or gone into." He afterwards employed the defendant's testator, an attorney, to complete the purchase, who failed to make the required search, or to investigate the vendor's title or to require the production of the original lease. It subsequently appeared that the premises had been previously mortgaged, and the plaintiff was turned out of possession by the mortgagee. *Held*, that this amounted to negligence on the part of the attorney sufficient to maintain an action against him.

If an attorney is employed by the lender to examine the title of real property

offered as a security for a contemplated loan by the borrower, he is responsible to the lender for the correctness of his opinion, although the expense of the examination is paid by the borrower: *Page* v. *Trutch*, 3 Cent. L. J. 559; 8 Chicago L. N. 385.

If an attorney employed by a vendor to settle on his part the assignment of a term, allow him to execute an unusual covenant without explaining the liability thereby incurred, he is responsible to him for his consequent loss, notwithstanding he is himself, at the time of the assignment, aware of the fact in respect to which he afterwards incurs liability on his covenant: *Stannard* v. *Ullithorne*, 10 Bing. 491; s. c. 3 Scott 771

In *Taylor* v. *Blacklow*, 3 Bing. 235, the defendant, an attorney, being employed to raise money on mortgage for the plaintiff, disclosed to the proposed lender certain defects in plaintiff's title, *per quod*, plaintiff was subjected to divers actions at the suit of the proposed lender, was delayed in obtaining the money he wanted and compelled to give higher rate of interest. *Held*, that this was a breach of duty for which an action would lie against the defendant, notwithstanding he had been the attorney of the proposed lender before his retainer by the plaintiff.

An attorney is liable for a failure to report a judgment by confession against property: *Gilman* v. *Hovey*, 26 Mo. 280.

Where the declaration stated that the plaintiff retained the defendants as attorneys in and about ascertaining the title of G. R. to certain lands and tenements, and to take due and proper care that "the same" should be a sufficient security for the repayment of a sum of 600*l.*, *Held*, that the words "the same" had reference to the title of G. R., and were not to be construed as charging the defendants upon a contract to inquire into the value of the lands, and was, therefore, supported by evidence of a retainer to investigate the title as a security for the repayment of the 600*l.*: *Hayne* v. *Rhodes*, 15 L. J. Q. B. 137; 10 Jur. 71.

In *Ware* v. *Lewis*, Irish R., 4 Eq. 419, plaintiff gave a sum of money to a firm of solicitors to invest upon freehold security. They found a security and invested the money upon it. The security turned out valueless. *Held*, that the giving of the money to the solicitors for the purpose of general investment did not of itself create the relation of trustee and *cestui que trust*, so as to make them liable as trustees.

In *Craig* v. *Watson*, 8 Beav. 427, a solicitor took an insufficient security for his client, and the nature of the transaction was such as in the opinion of the court created a case of combined agency and trust. He was held (under the circumstances) personally responsible for the deficiency and for the costs of the suit.

And where A. placed moneys in the hands of her solicitor, who acted also for her as a money scrivener, undertaking to find securities for her, and he placed the moneys out on insufficient securities, misrepresenting to her their character, *Held*, that as against him, if living, it would have been, and as against his estate after his death it was not, a matter for an action for negligence, but a matter of account between principal and agent, and the client had a right to reject the charge for disbursements on the insufficient securities: *Smith* v. *Pococke*, 2 Drew. 197.

Where it is contended that the evidence fails to show that at the time the abstract was made the judgment and sale were of record, it was *held* that as it was the duty of the officers to promptly make the necessary records thereof, such entry would be presumed to have been made: *Chase* v. *Heaney*, 70 Ill. 270.

As to what is sufficient evidence of negligence, see *Ireson* v. *Pearman*, 3 Barn. & C. 799. See generally, *Van Schaick* v. *Sigel*, 60 How. Pr. 122;

affirming s. c. 58 How. Pr. 211; *Dartnall* v. *Howard*, 4 B. & C. 345; *Knights* v. *Quarles*, 4 Moore 532; *Watts* v. *Porter*, 3 El. & Bl. 743; *Waine* v. *Kempster*, 1 Fost. & F. 695; *Potts* v. *Dutton*, 8 Beav. 493; *O'Hanlon* v. *Murray*, Ir. R., 12 C. L. 161.

A bill in equity will not lie against an attorney for damages for negligence in investigating a title: *British Mutual Investment Co.* v. *Cobbold*, L. R., 19 Eq. 627; *Nancrede* v. *Voorhis*, 32 N. J. Eq. 524. But otherwise, if he becomes a trustee to invest: *Nancrede* v. *Voorhis*, *supra*. In this case the attorney had promised the complainant to obtain first mortgage for her, and he was held—it being a case of mingled trust and agency—accountable for the amount of the encumbrance on the property prior to hers, but not for any subsequent depreciation in the value, caused by general business depression, the property at the time being shown to have been, apart from the prior encumbrances, abundant security.

To pass the title, there being at the time a judgment by default against the vendor, the damages on which have not been liquidated, is not evidence of a want of ordinary knowledge and skill and due caution: *Watson* v. *Muirhead*, 57 Penn. St. 161. And deeds recorded before the grantor has any record title may be safely disregarded in examinations of title under the system of registration and notice adopted in Missouri. They are not constructive notice to an innocent purchaser, and the examiner is not bound to look for deeds of any person through whom the title passes, before the date of his record title: *Dodd* v. *Williams*, 3 Mo. App. 278. See also *State* v. *Bradish*, 14 Mass. 296; *McCusker* v. *McEvoy*, 10 R. I. 610; *Farmers' Loan & Trust Co.* v. *Maltby*, 8 Paige 361.

In *Kimball* v. *Connolly*, 33 How. Pr. 247, it was held that the county clerk of the city and county of New York is not liable for damages resulting from errors, inaccuracies or mistakes in his certificates of searches under the act of 1853, unless the loss to the party by which such damage accrued is the direct consequence of such error or mistake. Thus, where the owner of real estate, for the purpose of procuring a loan of money thereon, caused the usual written requisition to the county clerk to search for judgments against the property, to be delivered to him, who made the requisite search, and certified to its correctness in the usual manner, and thereupon the loan of money was obtained on bond and mortgage upon the premises, and subsequently it was ascertained that a certain judgment upon the property had been overlooked and not returned by the clerk, upon which judgment the premises were thereafter sold, and the owner was compelled to pay a considerable sum over and above the amount of the judgment, in order to compromise and settle the matter. *Held*, that the county clerk was not liable to the owner. His loss occurred from the non-payment of the judgment, and not from the error in the clerk's return. He obtained the loan for which he applied, and nothing was abated from it on account of this encumbrance.

An attorney having been retained by two trustees about to advance trust money upon the security of property already mortgaged, to see that the security was sufficient and that the proper deeds were executed, one of the trustees advanced moneys on the execution of the mortgage without receiving an assignment of the first mortgage. It having turned out that there was another previous mortgage, and the security proved insufficient: *Held*, that there was no evidence of negligence on the part of the attorney, although by the agreement which he had prepared, part of the money advanced was to be applied to the redemption of the prior mortgage; it not appearing that the defendant was aware of the trustee's intention to act as he did: *Brumbridge* v. *Massey*, 28 L. J. (N. S.) Exch. 59; 32 L. T. 108.

In *Elder* v. *Bogardus*, Lalor's Sup. (N. Y.) 116, the declaration averred that the attorney was retained to examine the title to certain premises, and to procure an estate in fee simple therein to be conveyed to plaintiff within a reasonable time, and assigned as a breach of duty that the attorney did not procure a good and sufficient title to the fee simple within such reasonable time, but advised plaintiff to purchase without having a good unincumbered and sufficient title to the fee simple, by reason whereof plaintiff had to pay a large sum to release incumbrances. *Held*, bad on demurrer. The action appeared to be brought for not procuring an unincumbered title, while the retainer was to examine the title and to procure a conveyance in fee simple. The existence of incumbrances did not prevent the plaintiff from acquiring a title in fee. The retainer did not cover the breach: *Held, further*, that the declaration should have stated what incumbrances affected the premises. See also, *Whitehead* v. *Greetham*, 2 Bing. 464; 10 Moore 183.

Statute of Limitations.—The cause of action accrues at the time the examiner fails to do what he agreed to do, and not at the time when it is discovered that the certificate is untrue: *Rankin* v. *Schaeffer*, 4 Mo. App. 108; *Short* v. *McCarthy*, 3 B. & Ald. 626; *Wilcox* v. *Plummer*, 4 Pet. 172; *Argall* v. *Bryant*, 1 Sandf. 98.

The gist of the action is the negligence, and therefore the statute of limitations runs from the time of the negligence, and not from the time of the loss of interest: *Howell* v. *Young*, 2 Car. & P. 238; 5 B. & C. 259.

In an action upon the case, against a recorder of deeds, for damages suffered by reason of a false certificate of search given by a recorder to the plaintiff, in the absence of fraud the statute of limitations begins to run from the time when the search was given, and not from the development of the damage, and it is immaterial that the party who received and paid for the search had no knowledge of its falsity or cause for inquiry until more than six years after it was given. The cause of action, within the meaning of the statute of limitations, was the issuing of the false certificate. The right of action accrued to the plaintiff as soon as it parted with its money on the faith of it, and from that period the statute began to run: *Owen* v. *Western Saving Fund*, 97 Penn. St. 47.

See, generally, as to the liability of attorneys for advice as to titles, Weeks on Attorneys 520; Warvell on Abstracts 555–565; Wharton on Neg. 751, note; Shea. & Redf. on Neg. §§ 232, 233; Addison on Contracts 8th ed. 593; Addison on Torts (Dudley & Baylies's ed.) 499.

CHARLES L. BILLINGS.

Chicago.