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# Notes

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# NOTES

BANKS AND BANKING—PERSONAL LIABILITY OF AN OFFICER OF A BANK FOR FALSELY REPRESENTING THE FINANCIAL CONDITION OF THE BANK TO DEPOSITORS, THEREBY INDUCING THEM TO LEAVE MONEY ON DEPOSIT—PREFERENCE OF SUCH DEPOSITORS IN THE ASSETS OF THE BANK IN INSOLVENCY.—At common law directors of a bank are not individually liable to the depositors merely on account of their assent to the receipt of deposits with the knowledge that the bank was insolvent.[1] A violation of the director's duty to the bank gives rise to no cause of action in favor of the depositors and any cause of action which the depositors may have must be based upon some violation of a duty owing them by the directors.[2] "Neither, in the absence of a special statute, are the directors of a bank liable to a general depositor for mismanaging the affairs of the bank so that his debt is lost, for unless they are made liable by statute, the breach of duty of which they have been guilty is to the bank and not to its customers . . . . directors of a bank may make themselves liable to ordinary depositors in damages, for false and fraudulent representations made by them, whereby the depositors have suffered loss." [3] " 'As a general rule, officers and directors of a corporation are not trustees of the corporate creditors and are not liable to them for negligence or mismanagement of the company's business, resulting in its insolvency, unless made so by charter or statute.' " [4] However, where the director in violation of the laws of the state pertaining to banks and banking permits deposits to be made knowing the bank is in failing circumstances or insolvent he is individually liable to the depositors. By reason of such violation of the laws the depositors have a cause of action against the directors to the extent of the damages suffered.[5]

No contractual relation exists between the depositors and the directors. The depositor's contract is with the bank in its separate capacity as an entity. There is no implied contract between the depositors and the directors as individuals for the directors are merely agents of the bank. There is a division of opinion as to whether the directors bear the relation of trustees to the depositors. In *Daniels v. Berry*[6]

1 Ellitt v. Newland, 132 So. 763 (La. 1931).
2 Daniels v. Berry, 146 S. E. 420 (S. C. 1929).
3 3 THOMPSON, COMMENTARIES ON THE LAW OF CORPORATIONS, § 4138.
4 *Op. cit. supra* note 2, at p. 422.
5 Paris v. Beckner, 289 Pac. 276 (Okla. 1930).
6 *Op. cit. supra* note 2.

it was said that the better view seems to be that the directors are not such trustees. "Depositors do not deal with the directors but with the bank itself, and the relationship between them and the bank is that of debtor and creditor; under these conditions we cannot see how there could arise any such relationship between the directors who are merely agents of the bank and the depositors as would create the former trustees of the funds the latter placed on deposit in the bank." [7]

When a bank becomes insolvent it should refuse to accept deposits and should discontinue the doing of business. If it continues to do business and accepts a deposit, it will commit a fraud upon the depositor for title to the deposit remains in the depositor. The depositor "may follow and recover it, if it augmented the assets of the bank and can be identified." [8] The money must not be mingled with the assets of the bank. Where the failure of the bank is imminent and the possibility of obtaining necessary money to meet its obligation is too doubtful, then the bank is not justified in mingling the deposits made at that time with money in the bank's vault.[9] Where an officer of the bank by misrepresentation induces a depositor not to withdraw his deposit when he knows of the failing condition or insolvency of the bank and had the depositor known that such was the condition of the bank would not have left his money on deposit, this constitutes a fraud upon the depositor and he has a cause of action against the bank and its officers.[10] It is not enough that the officer knew that the bank was in an embarrassed condition.[11] The officers must have known or believed that the bank was in an insolvent condition when the deposit was received to constitute fraud so as to enable the depositor to recover. But where the bank's officer knew that the bank was failing, or even in truth insolvent, and expected by their inducement to strengthen the bank's condition, their action in receiving deposits is not fraudulent and the deposits cannot be recovered.[12]

In *Hinson v. Drummond* [13] the President and director of bank represented to the depositor that the bank was in a sound condition and solvent and thereby persuaded depositor to leave his money in the bank, where the bank was insolvent and depositor lost deposit, the court said, that if the president had no actual knowledge of the condition of bank, his situation was such that it was his duty to know the truth or falsity of representation, and such party is in law guilty of fraud as much as if he had actual knowledge.

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7 Daniels v. Berry, *op. cit. supra* note 2, at p. 422.
8 BANKS AND BANKING, 7 C. J. 730.
9 In re Bank of Whitecastle, 119 So. 872 (La. 1929).
10 BANKS AND BANKING, 7 C. J. 730.
11 Quin v. Earle, 95 Fed. 728 (1899).
12 BANKS AND BANKING, 7 C. J. 730.
13 123 So. 913 (Fla. 1929) (see the court's syllabus).

" 'Courts of equity,' " it is said, " 'will not only interfere, in cases of fraud, to set aside acts done, but they will also, if acts have, by fraud, been prevented from being done by the parties, interfere, and treat the case exactly as if the acts had been done.' " [14] However, these principles have no application to a set of facts involving the mere relation of creditor and debtor. The money deposited becomes the property of the bank. In *Venner v. Cox*,[15] a case decided in the Court of Chancery Appeals of Tennessee, it was said, that where the depositor had demanded payment and upon the false representation that the bank was solvent remained a creditor, he was not entitled to preference on the theory that deposits became impressed with trust in favor of depositors because of fraud. "If such misrepresentations operate in equity to divest title of property, and to convert debtors into trustees for their creditors, the field of trust estates will be immensely enlarged. Such a principle would ultimately constitute a serious obstruction to trade and commerce." [16]

The creditors have two remedies which they may enforce simultaneously when the bank becomes insolvent. They may sue the bank and have a receiver appointed for the collection of the assets and application of them to the debts, and, at the same time, sue the stockholders on their statutory liability.[17] "The liability of the stockholders to the depositors is an individual liability to the depositors only, and is not an asset of the bank, the receiver having nothing to do with it." [18]

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EVIDENCE—ADMISSABILITY OF AN ATHEIST'S DYING DECLARATION. —The recent decision of *Wright v. State*,[1] handed down by the Alabama Court of Appeals, held the dying declaration of one who did not believe in a Supreme Being, who did not believe there was a place to reward the faithful or punish the wicked, to be admissable in evidence. Although there is nothing inharmonious with decisions of other courts in this country, the dissenting opinion of one of the learned justices, in its adherence to the old common law doctrine, presents a very interesting question for discussion.

It would not be totally without profit in consideration of this case to give some attention to the history of dying declarations from their

14 Venner v. Cox, 35 S. W. 769, 770 (Tenn. 1895).
15 *Op. cit. supra* note 14.
16 Venner v. Cox, *op. cit. supra* note 14, at pp. 770, 771.
17 Ford v. Sauls, 136 S. E. 888 (S. C. 1927).
18 Ford v. Sauls, *op. cit supra* note 17, at p. 889.

1 136 So. 636 (Ala. 1931).

advent into the legal machinery of meting out justice, down to the present day tenets of our learned courts. To do this it is first necessary that the definition and nature of an oath be propounded.

An oath is an appeal by a person to God to witness the truth of what he declares, and an imprecation of Divine punishment or vengeance upon him if what he says is false.[2] Professor Wigmore, in his treatise on "Evidence," says: "The theory of the oath in modern common law may be termed a subjective one in contrast to the earlier one, which may be termed objective. The oath is not a summoning of Divine vengeance upon false swearing, whereby when the spectators see the witness standing unharmed, they know that the Divine judgment has pronounced him to be a truth-teller. But it is a method of reminding the witness strongly of the Divine punishment somewhere in store for false swearing, and thus of putting him in a frame of mind calculated to speak only the truth as he saw it." [3] The learned court in *Clinton v. State* [4] expresses it very well in saying: "The purpose of the oath is not to call the attention of God to the witness but the attention of the witness to God; not call upon Him to punish the false-swearer but on the witness to remember that He will surely do so. By thus laying hold of the conscience of the witness and appealing to his sense of accountability, the law best insures the utterance of truth."

From earliest times then it may be said that the essence of an oath was a belief in God and in a state of future reward and punishment. The original common law set forth the rule that in order to be a competent witness one must maintain such beliefs. What religious tenets one adhered to was of no consequence but a belief in a Supreme Being was essential. Lord Chief Justice Lee, in *Omychund v. Barker*,[5] says: "I agree . . . that where . . . the witness is of a religion, it is sufficient; for the foundation of all religion is the belief of a God. . . ." Martin, B., in *Miller v. Salomons*,[6] says: "The doctrine laid down by the Lord Chancellor and all the other Judges [in *Omychund v. Barker, supra*] was, that the essence of an oath was an appeal to a Supreme Being, in whose existence the person taking the oath believed, and whom he also believed to be a rewarder of truth and an avenger of falsehood . . . ."

Passing to the consideration of dying declarations, they are held to be admissable in evidence in criminal prosecutions for homicide as one of the exceptions to the hearsay rule. The theory upon which they are admitted is that the situation of the declarant is regarded as

2 WEBSTER'S DICTIONARY.
3 3 WIGMORE ON EVIDENCE (2d ed. 1923) § 1816.
4 33 Ohio St. 33 (1877).
5 Lee, L. C. J., Omychund v. Barker, 1 Atk. 21, 46 (1744).
6 7 Exch. 475, 515 (1852).

a substitute for an oath. It is presumed that they are made by one who is in a condition so solemn and awful as to exclude the supposition that he could be influenced by malice, revenge or any conceivable motive to speak anything except the truth. The ancient axiom was: *Nemo moriturus praesumitur mentire.*[7] The great dramatist, Shakespeare, in depicting his character, *Melun,*[8] expressed the common feeling long before it was sanctioned by judicial opinion. To quote the language of Chief Baron Eyre in *The King v. William Woodcock*:[9] ". . . the general principle on which this species of evidence is admitted is, that they are declarations made in extremity when the party is at the point of death and when every hope of this world is gone; when every motive to falsehood is silenced and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is created by a positive oath administered in a court of justice." The Supreme Court of Georgia, in *Hill v. State,*[10] went so far as to hold that such a declaration made under sense of impending death is more liable to be true than the testimony of a witness given under oath, stating: "When dissolution is approaching and the dying man has lost all hope of life, and the shadows of the grave are gathering in around him, and his mind is impressed with full sense of his condition, the solemnity of the scene and the hour gives to his statement a sanctity of truth more impressive and potential than the formalities of an oath."

As a further reason for the admission of dying declarations, it is now universally held that such evidence is absolutely necessary. The defendant who by his own act has put it out of the power of his victim to appear in evidence against him, cannot justly complain of the admission of the dying declarations of his victim without the sanction of an oath or without his appearance in person as a witness against him. The Supreme Court of South Carolina, in the case of *State v. Ferguson,*[11] says: "The principle on which deathbed declara-

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7 WIGMORE, *op. cit. supra* note 3, at § 1430, footnote 1.

8 *King John,* Act V, Scene 4; WIGMORE, *op. cit. supra* note 3, at § 1438, footnote 1.

9 1 Leach 500, 502 (1789).

10 Hill v. State, 41 Ga. 484 (1871). *Cf.* People v. Kraft, 36 N. Y. S. 1034, 91 Hun. 474 (1896), wherein it was declared that the statements of a person who is dying are not necessarily credible. See also Railing v. Commonwealth, 110 Pa. St. 100, 1 Atl. 314 (1885), as to the unsatisfactory nature of reasons for admission.

11 2 Hill (S. C.) 624, 27 Am. Dec. 412 (1835). See, also, editorial note of Chief Justice Redfield in 1 GREENLEAF ON EVIDENCE, 156. *Accord:* Mattox v. United States, 146 U. S. 140 (1892); Morgan v. State, 31 Ind. 198 (1869); People v. Corey, 157 N. Y. 332, 51 N. E. 1024 (1898); People v. Lonsdale, 122 Mich. 388, 81 N. W. 277 (1899); Donnelly v. State, 26 N. J. L. 617 (1857).

tions are admitted is that of necessity. The assassin does not seek the open day or the crowded thoroughfare to do his deed of darkness, and it frequently happens that none but the victim witnesses the deed. The sanction is that of approaching death. No one who has a proper sense of religion or who believes in a future state of rewards and punishments, would willingly incur the guilt of falsehood who had before him the immediate prospect of a final account for the deeds done in the body when every thought, word, and deed of evil must rise up for his condemnation."

Having set out the requisites which render a witness at common law competent to take an oath and the reasons for the admission of dying declarations, the question now presents itself: Is the dying declaration of an atheist admissible in evidence? The fact that an atheist at common law could not take an oath is not a matter subject to dispute. An atheist is one who disbelieves or denies the existence of God. The belief in God gives vitality to the oath. How then can one who renounces the very foundation upon which an oath is based, call upon God to witness the truth of what he declares and to impricate His Divine vengeance upon him if what he says is false? Following this reasoning the Supreme Court of Vermont, in *Arnold v. Arnold,* said: "Atheists or those who do not believe in the existence of any Supreme Moral Governor of the universe, cannot be sworn nor give testimony in any judicial tribunal." [12]

Generally speaking, dying declarations to be admissable in evidence must have been made by one who if he had been called upon to give testimony in court, would have possessed the requisite qualifications of a witness.[13] It was the rule of common law that persons who are insensible to the obligations of an oath because of their want of religious belief, are incompetent to testify as witnesses, and it would logically follow that dying declarations are inadmissable in evidence where the declarant because of such rule would have been incompetent to testify as a witness. The Supreme Court of Mississippi very expressly says in *Lombeth v. State:*[14] "An oath derives the value of its sanction from the religious sense of the party's accountability to his Maker and the deep impression that he is soon to render Him his final account. The danger of immediate and impending death and the belief of the party therein, are by our law, considered equivalent to this sanction. It follows, as a necessary consequence of the rule which admits dying declarations made under such circumstances, that the law must presume them, in the absence of proof to the con-

12 13 Vt. 362 (1841).

13 People v. Olmstead, 30 Mich. 434 (1874); Boyle v. State, 97 Ind. 322 (1884), judg. aff'd in 105 Ind. 469 (1885); People v. Sanchez, 24 Cal. 26 (1864).

14 23 Miss. 322 (1852).

trary, to have been made under a solemn and religious sense of impending dissolution; that is under a serious sense that the party would be soon called to account for the truth or falsehood of the statements in the same manner as the law will presume in the absence of proof to the reverse, that every witness placed upon the stand and sworn to testify, believes in the existence of a God and a state of accountability in the future for the commission of crimes perpetrated here."

The common law rule is now practically abrogated by constitutional or statutory provisions under which religious belief or the lack of it has no bearing whatsoever on the competency of the witness. The tendency of these modern constitutions and statutes is to abolish this religious test of the common law under a constitutional provision that civil or political rights shall not be affected by religious beliefs.

There is no denying that the moral efficacy of the oath has long since ceased to be what it once was. The prevalent belief, in the days when the *Judicum Dei* was no empty phrase, was that God would strike the perjurer down before the multitude. The effect of the modern oath is to remind the witness of inevitable Divine punishment at some future time. Its object is not to exclude any person on account of his or her theological beliefs; its true purpose is not to exclude any competent witness, but merely to add a stimulus to truthfulness whenever such a stimulus is feasible.

In every jurisdiction there has been some legislation dealing with the subject of oaths. Some of these provisions are inconsistent with the old common law and set forth their own qualifications for the competency of a witness, while others are merely declaratory of the requirements as laid down in the common law. It would be profitless to attempt to analyze the precise state of the law in each jurisdiction, but with reference to the abolition and dispensation of the oath, the condition in general is summarized as follows by Professor Wigmore:

"(1) In no jurisdiction has the use of the oath been *abolished.*

"(2) In almost every jurisdiction, the rigor and injustice of the common-law rule has been removed, for persons having an *incompatible theological* belief . . . ." [15]

The modern legislators, considering the true purpose of the oath to be a stimulus for the witness to tell the truth, have come gradually to perceive that the use of the oath, not to increase testimonial efficiency, but to exclude qualified witnesses, was not only an abuse of its true principle, but also a practical injustice to suitors who need

[15] WIGMORE, *op. cit. supra* note 3, at § 1828.

such testimony. Accordingly, it has now been legislated in all but a few jurisdictions that those who lack the requisite belief or those who may have the belief but are forbidden by conscientious scruples to take an oath, may choose to make an affirmation of what he testifies to be the truth instead of making an oath. Another source of relief from the iron-clad qualifications of the common law doctrine has been found under the constitutional provisions guaranteeing that theological belief shall not effect one's civil capacities.[16] The various States in the formation of their "Bills of Rights" and in interpreting the Constitution of the United States granting, "life, liberty and pursuit of happiness" to its citizens, have enacted laws to the effect that one's political and religious belief are personal and not subject to be questioned. The result of this legislation has been to allow the administration of the oath to persons who lack the common law belief.

In conclusion it might be said that while it has not been the object of statutory legislation to devitalize the oath, it has, at least, robbed it of its moral efficacy and substituted for witnesses who lack the theological belief requisite at common law what might be termed an empty formula. The reasoning and policy of these statutes is based on the interference with one's civil capacities, and the possibility of injustice being wrought upon a litigant due to the exclusion of evidence necessary to prove or defend the cause.

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TORRENS SYSTEM OF TITLE REGISTRATION.—Speaking broadly, there are three various systems of dealing with transfers of real estate. The first is that in use prior to the passage of the English statute of Frauds in 1677—conveyancing without any pretense of public registration. Livery of seisin was the mode of conveyance; actual delivery of a part of the realty as an indication of delivery, by symbol and performed in the presence of witnesses, of the whole estate. Although satisfactory at that remote and retarded age it would be supremely insufficient today. Following the rise of England out of the seclusion of the feudal period and the passage of the various statutes in response to the crying need of the people for a better system of conveyancing, a second system grew up.[1]

It was that of registering of the instruments or documents of title to real estate, so that a public record was formed, doing away with

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[16] Bush v. Commonwealth, 80 Ky. 244 (1882); Hroneck v. People, 134 Ill. 139, 24 N. E. 861 (1890); Hood v. State, 59 S. E. 971 (W. Va. 1907).

[1] See Alfred G. Reeves, *Progress in Land Title Transfers; the New Registration Law of New York* (1908) 8 COL. L. REV. 438, 439.

livery of seisin, and at the same time following the statutes. Naturally the English common law became rooted into the new soil of the colonies, and after the break with the mother country it was far too efficient and too firmly rooted to replace. As a consequence this is the system generally followed in the various jurisdictions of the United States.[2] It has been reasonably safe and convenient for many years, as was livery of seisin during the period of the middle ages, when needs were thus adequately served. That day was outgrown and a different, and more efficient system placed in operation. It seems reasonable to suppose that some day our present system will be superceded by one more responsive to the more complex needs of our involved civilization. This second system, like all man-made devices, is subject to faults, among these the danger and difficulty of unrecorded liens, generality of judgment liens, unknown dower rights, and other defects in suits, and their preliminary matter, over real estate.

The two vital defects of the present system, first the time and expense of re-examination of title whenever it is to be passed or encumbered. The second is the growing volume of public records. This may appear a rather futile argument, but we will see a little later that there is a practical solution for it, should it become a pressing problem. In this day when every saving possible both of time and expense, is so eagerly sought, it is most impractical, not to say wasteful, to examine and re-examine title to a particular piece of land over a period, possibly compassing a hundred or more years.

The third system of conveyancing is devised for official registration of the title of the land itself. Perhaps better known as the Torrens system of title registration, it was first introduced and advocated among English-speaking peoples by Sir Robert Richard Torrens, an Irish immigrant to Australia in 1840, who later became the first premier of South Australia, where he introduced the system into successful operation in 1858. From there it has spread over all of Australasia, South Africa, much of Canada, and, by Lord Cairn's Act of 1875, to the county of London. It is said that Sir Robert conceived the idea of his scheme of registration while acting as collector of the customs at the port of Adelaide, making the system analogous to the method of registering ownership of vessels. It seems more probable that he had heard of the system as it was practiced among Germanic peoples, since the first record of such a transaction as this system contemplated was found in Vienna, dated as of the year 1369. Subsequently it was employed at various times up to 1880 in various towns and cities of Germany and Austro-Hungary. In 1900 the German Civil Code made title registration compulsory, and it is now

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2 *Op. cit. supra* note 1, at p. 441.

achieved through judicial proceedings there as well as in Austro-Hungary, Prussia, and some of the Swiss Cantons.

As stated by Sir Robert, "The fundamental principle is to establish and certify to ownership of an absolute and indefeasible title to real property, without requiring any judicial proceeding for that purpose, and to simplify and expedite transfer of such property." Here is the fundamental difference between the English system and the systems put into effect by the statutes of the various states of the United States. The English system does away with the necessity of a judicial proceeding. Our statutes may not do this, because of the provision of the *due process* clause of the Fifth amendment to the Constitution of the United States. This point has been the source of some misunderstanding, which should disappear upon a comprehension of the original system, as practiced in Germany much earlier than the English system, where the nucleus of the whole matter was a judicial proceeding.

Now for a brief sketch of the system itself. To bring one's land under the act, the owner of the fee or of an interest therein must apply to a court designated under the statute, which court has power to inquire into the state of the title and may make any decrees necessary to determine title against all persons, upon proper proceedings being taken. The application is then referred to an examiner of titles, who proceeds to determine whether the applicant has a merchantable title to the land. When his report is filed the clerk, by order of the court issues summons, naming the applicant as plaintiff, to all persons having an interest in or claim to the land. These must be directed to known defendants by name, directing them to answer within a specified time, and service must be made in regular fashion, but service by publication is perfectly permissible as against persons unknown as defendants. All defendants may appear and answer; if none do so, the court may enter a default, but the plaintiff must prove his title, the court not being bound by the report of the examiner but being able to require further proof. If the court finds the applicant's title good then a decree confirming title and ordering registration is made, which is binding and conclusive on all persons, whether mentioned by name or coming under the head of unknown defendants and served by publication. Title is thereby quieted in the owner. A certified copy of the decree is filed with the registrar of titles who proceeds to register the title as directed by the decree, by making an entry of an original certificate in the files and presenting the owner with a duplicate.

Now there is only one way in which the owner may transfer property in this real estate. This is by going to the registrar with the pur-

chaser (either of these parties may be represented by authorized agents) and surrendering the old duplicate to the registrar, who enters a new certificate in the file in the name of the new owner, and gives him a new certificate in duplicate of the one on file. Many of the states retain the deed, but it has become practically inoperative as a conveyance even after proper execution. The advantage of this type of conveyancing is manifest. It is quick, easy, safe, and inexpensive. The record books grow only when a track hitherto entered under one certificate is divided, so that the divisions each command one entry. Under our system each transaction since the beginning of occupation is recorded and preserved. While there is no immediate danger of the records crowding area necessary to population, still the problem of finding these early records is real, commanding time and creating expense. Under the Torrens system, a transfer, once the land is under the act, calls for no examination of title and may be wholly consumated in a short time and at little cost.

The register deals with the legal title exclusively and only legal claims against the land, estates less that fee simple are entered on the certificate, but one holding an equity may protect it by entering of a *caveat* on the certificate. A subsequent buyer now takes with notice of these outstanding interests. The statutes also provide for the entry on the certificate of *memorials* of subsequent transfers, liens or adverse claims, which protects the adverse interest of such claimant, and is notice to any purchaser. One being omitted from registration proceedings may show his right to an interest and file this as a memorial.

Now let us list a few of the advantages of such a system. It does away with voluminous records and difficult indexes, one of the great defects of the present system. It makes for a convenient way of clearing a title of mechanical imperfections by the judicial procedure necessary to place land under the act. Most of the statutes provide for an assurance fund from which one who had an interest in, or a claim against land whose rights have been destroyed by the decree, any person who incurs loss, damage or deprivation through any omission or mistake of a registrar, examiner of title or other employee in the performance of their duties under the statute, may be compensated. This fund is made up from a tax placed on the operation of transfer. The system is simple, because there is only one entry for each parcel of land; safe, because the system of duplication militates against loss by fire, and very probably will be less expensive in operation than our present system. The expense to the transferor and transferee will most certainly be reduced, since no abstracts need be examined and corrected. There is only one complete examination of title, at the time the property goes under the act. It does not do away with fraud but renders it more difficult by requiring a surrender of the former certificate and