LAND LAW REFORM

IN ENGLAND.

BY

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"The Land Question is coming to the front." The key-note of the cry has been struck by the leader of the Liberal party in one of his weightiest and most effective speeches. It will be re-echoed in hundreds of addresses throughout the country at the next election. Already the subject is being discussed from different points of view at every public meeting, from a Trades Union Congress to an agricultural dinner. Yet I suspect that of the speakers who talk glibly about "Free Land," which may include anything from a refusal to pay rent to an alteration in the law of entail, not a few would be somewhat puzzled to say what the phrase means. Indeed, to most Englishmen, what is called the Land Question is a strange medley, of which the three main ingredients are primogeniture, ground game, and very long lawyers' bills. A vague notion that land in England cannot be made to change hands without cost and delay, and that a good deal of it cannot be made to change hands at all, coupled with a strong impression that the Agricultural Holdings Act has left the tenant farmer just where he was before, probably represents the sum total of all that they know or think on the question. But of the best mode of remedying these evils, or whether they are even capable of remedy, they probably have formed and can form no opinion whatever.

Let us begin with an aspect of the question which will come home to most of us. A man wants to buy a house or a farm. The bargain is struck and the money is ready. But weeks, and possibly months, may pass before he can be certain whether the seller is able to make him the owner of

the thing he has bought. Of the possible cost of the transaction, until it is completed, even his own lawyer—be he ever so honest—can give him but a vague hint. If having gone through the tedious and expensive process of investigating the title, he wishes to borrow money on his purchase, he finds that his mortgagee insists upon going through exactly the same investigation over again, and on making him pay for what he feels to be a needless and irksome repetition. Nay, more, if he wishes to pay off his mortgage debt, he is not allowed to do so without having to dispense a handsome sum for the privilege of getting back his own property. Yet with all these precautions there is probably no civilised country in which a mortgage of landed property carries with it so little real protection against fraud, as it does in England. Certainly it would be difficult to point to any other place where a man could, like the notorious Downs, mortgage the same property to fourteen different persons, each of whom believed it to be unencumbered, and could, when convicted, plead in extenuation of the crime, that the law had made such frauds so easy that the temptation to commit them was almost irresistible.

Lest the sketch I have drawn should be thought exaggerated, let me quote a few sentences from a speech made in 1859 by the present Lord Chancellor, then Sir Hugh Cairns, in the House of Commons on the introduction of a Bill to simplify the title to landed estates in England:—

"Suppose," he said, "I buy an estate to-day, I spend a year, or two, or three years, in ascertaining whether the title is a good one. I am at last satisfied. I pay the expense—the considerable expense—which is incurred in addition to the price which I have paid for my estate, and I obtain a conveyance of my estate. About a year after I desire to raise money upon mortgage of this estate. I find some one willing to lend me money, provided I have a good title to the land. The man says, 'It is very true that you bought this estate, and that you investigated the title; but I cannot be bound by your investigation of the title, nor can I be satisfied by it.' Perhaps he is a trustee who is lending money which he holds upon trust. He says: 'My solicitor must examine the title, and my counsel must advise upon it.' And then, as between me, the owner of the estate, and the lender of the money, there is a repetition of the same process which

took place upon my purchase of the estate, and, consequently, the same expense is incurred as when I bought it; and for the whole of that I, the owner of the estate, and the borrower of the money, must pay. Well, that is not all. Months or years after all this is completed, from circumstances, I find I must sell my estate altogether. I find a person willing to become a purchaser. The intending purchaser says, 'No doubt you thought this was a good title when you bought this estate, and no doubt this lender of money thought he had a very good security when he lent his money; but you are now asking me to pay my money. I must be satisfied that the title is a good one. My solicitor must look into it, and my counsel must advise upon it.' Then again commence abstracts, examinations, objections, difficulties, correspondence, and delay. I am the owner of the estate, and I must pay substantially for the whole of that, because although the expense there is paid in the first instance by the purchaser, of course in the same proportion as that expense is borne by him in the same proportion will abate the price which he will give for the estate." [1]

It would be impossible to add anything to this picture, but it may be questioned whether the amount of these charges, though in the case of small purchases sometimes almost prohibitive, is as great an evil as their uncertainty. For, thanks to the preposterous principle on which conveyancing costs are taxed, the measure of payment is not the value of the work done, but the length and number of the documents prepared. The result is that the client is left practically at the mercy of the solicitor, and one lawyer may, without much difficulty, entitle himself to charge £200 for a result which a more honest or a less timid practitioner would have obtained for £20.[2]

Now it is inconceivable that all these drawbacks should have no effect upon the marketable value of land. Sir Hugh Cairns, in the speech which I have quoted, cited a high authority to show that, under a really improved system of land transfer, "every estate in England might be made to

(1) Hansard's *Parliamentary Debates*, N.S. vol. cliii. pp. 281—2.

(2) Mr. W. J. Farrer, in his evidence before the Select Committee of the House of Commons on Land Titles and Transfer, mentions a case in which three ladies employed three different solicitors to transact some business relating to landed property in which they were jointly interested. Though "the business was exactly and precisely the same in each case," the bill of the first was taxed at £17, that of the second at £18, that of the third at £223.

sell for at least three years more purchase." The statement was certainly not an exaggerated one. It was addressed to an assembly, nearly every member of which either was or hoped to be a landowner. It meant in the case of a man who owned an estate worth £20,000 a present of £2,000 added to the selling price of the estate. It meant an addition of many millions to the aggregate market value of the fee-simple of England. Yet tempting as the prospect was, scarcely any part of it can be said to have been realised. Bills, it is true, have been introduced, Acts have been passed, Royal Commissions and Parliamentary Committees have reported again and again. But, if we except two valuable Acts passed in 1874 for simplifying sales and purchases of land, and shortening the time during which claims against real property may be made, the question of land law reform remains just where Sir Hugh Cairns left it in 1859. At no time, indeed, has the fall in rents, and the consequent depreciation in the value of landed estates, made the subject so vitally interesting to the landowner; at no time has so much been said about the importance of enabling working men to invest their savings, cheaply and easily, in the purchase of small plots of ground. Yet so profound and general is the distrust of every proposed remedy, that the most valuable contribution which the most competent authority could make to the subject would until very lately have excited far less public interest than the controversy on Civil Service trading, or the personal experiences of a convicted felon.

Nor are the causes of this apparent indifference difficult to trace. The land laws of England are wrapped in a fog so dense as to make the subject intensely unattractive to the general public. Unlike our commercial code, they have their origin in remote and semi-barbarous times, and are overlaid by a mass of mediæval rubbish, a legacy from that wonderful Norman race, who to the true instincts of feudalism united a perfect genius for legal quirks and quibbles, and who, having made themselves masters of the land of England, proceeded to write their laws upon it in characters which centuries of change and progress have not effaced. It

is not surprising that under such circumstances the technical knowledge, without which no law reformer ought to approach such a subject, should have become the monopoly of very few persons. How many, it may be asked, even among practising barristers, could pass the most rudimentary examination in the laws of perpetuity and entail? But experience shows that the priest who holds the key of the mystery is not always in a hurry to unlock the door. In justice also to the generation of real property lawyers which is passing away, it may be said that they were brought up in a school which regarded the fabric of our land laws as resting upon foundations as immutable as the law of gravitation or the rotatory movement of the planets. The mere suggestion that a man might, as in some of the States of America, pass land by the simple words, "I, A. B., sell to you, C. D., for £1,000 (the receipt of which I hereby acknowledge) the lands coloured pink on the map copied from the Ordnance Survey, sheet ———, number ———, and drawn at the foot of this piece of parchment, and I warrant you against the claims of all persons deriving title through me," instead of by a mass of half-mechanical jargon covering two or three skins of parchment, would in their eyes savour of something like profanity. As the late Mr. Joseph Kay, one of the few practical lawyers who have had the courage to discuss the question from a popular point of view, observes:—

"The subject of the Land Laws is surrounded by so many technicalities, the law is so difficult even for lawyers to understand, such a vast literature of rubbish has grown up around it, so many thousands of cases have been argued and reported upon its meaning, and lawyers are so unwilling to put their own hands to the work of reform, that it is not wonderful that the most singular mistakes should be made by many public speakers, and that the real reforms which are needed should still be wrapt in so much obscurity." [1]

The impatience excited by so apparently hopeless a prospect has given rise to a demand which has really done not a little to retard the progress of land law reform. Nothing is

(1) Kay's *Free Trade in Land*, p. 23.

more common than to hear people ask why land should not be as easily transferred as stock. A great living statesman once complained that if he wanted to invest £1,000 in Consols, he could do so in two minutes at a cost of 25*s.*; whereas if he wanted to invest the same sum in a farm, he might have to wait a couple of months for the completion of his bargain, and spend £200 or £300 upon the process. He forgot, of course, that land is a concrete and stock an abstraction; that stock possesses no boundaries, conceals no minerals, supports no game, pays no tithes, admits of no easements, is let to no tenant, and hampered with no adjoining owners. He forgot, too, that £1 of stock is as good as another; so that if half-a-dozen persons happen to be the joint holders of a given quantity of Consols, they can effect a partition of their interests by performing the simplest of division sums. The result of this inherent difference in the nature of the two things has been that, while stock is everywhere transferred by the simple expedient of substituting the name of the transferee for that of the transferor, the conveyance of land has usually required, or been supposed to require, the more cumbrous machinery of a deed or instrument setting out a more or less prolix history of the transaction, with the conditions to which it is made subject, and the guarantees by which it is to be accompanied. This fact should be borne in mind, because without doing so it is impossible to understand the conflict between the two rival systems of land registration which has so long divided the legal profession—the one recording each disposition of the land as it takes place, while the other aims at presenting the net result of those dispositions in the form of a simple certificate of ownership.

But though the transfer of land cannot, from the nature of the two things, be entirely assimilated to the transfer of stock, it is certain that much may be done towards effecting that object. For this purpose, however, two things are needed: first, the land itself must be capable of easy and certain identification; and, secondly, the title which it is sought to register must be itself clear and simple. In other words, the ownership of the land, or rather the right to deal

with it, like the right to deal with Consols, must be gathered up into one or two hands, and not, as is often the case in England, split up among a number of persons, each of whom is in a position, so to speak, to put a spoke in the wheel, and prevent or delay the proposed transfer. If, as not unfrequently happens, some of these persons are infants or lunatics, or in Honolulu or the Fiji Islands, or unborn or unascertained, the difficulty of making a title may become almost insuperable. But the first stumbling-block, and, strange to say, that which might most easily be removed, lies in what is called by lawyers the identification of the parcels. It is hardly credible that, owing to the loose and dilatory way in which the recent Ordnance surveys have been carried out, there are still many parts of England, such as the populous and important county of Worcester, which cannot be said to have been officially surveyed at all; and thus, for the sake of saving a few thousand pounds, the landowners of England are deprived of a benefit which those of nearly every other civilised country enjoy. In the meantime, it is evident that under such a condition of things as at present exists in England, to speak of assimilating the transfer of land to the transfer of stock is, to say the least, premature. On the other hand, in a newly settled country, like Australia, where both the requisites which I have pointed out are to be found, the process becomes comparatively easy. The land is officially mapped out in blocks, and every title starts with an unimpeachable grant from the Crown. Settlements are rare, entails unknown, and the devolution of title following upon the original grant consists mainly of simple transfers from one hand to another, either by way of sale or mortgage. It is obvious that such a state of things presents an exceptionally favourable field for the trial of the system of land transfer known as Registration of Titles, which is, in fact, little more than the application to land of the process used for transferring stock or ships. That such a system is in the abstract preferable to any other may at once be conceded. Instead of "dragging a lengthening chain" of title-deeds about with him, the fortunate

purchaser of land under such a system is told that he may commit his parchments to the flames, and rely for his evidence of ownership upon a certificate which may be carried in his waistcoat pocket. For many years its advantages have been tested in Australia and New Zealand, where it is generally known as Torrens's System of Land Transfer, from the name of its distinguished author. A man wanting to borrow money or sell land, accompanied by the intending mortgagee or purchaser, walks into an office in Adelaide or Sydney with his certificate of title in his pocket. He employs no lawyer, and executes no deed. An official is summoned, an entry is made, and a small fee paid, and at the end of five or ten minutes the transaction is complete, the land effectually pledged or sold, and the money in the borrower's or vendor's pocket. No wonder that such a process should excite the admiration and envy of an English landowner, who, if he wants to borrow £2,000 on Dale Farm, has to submit to a hostile investigation of his title, which may last two or three months, and to pay two solicitors' bills into the bargain.

The success achieved by Torrens's Act led to the trial of a similar experiment in England. In 1862 Lord Westbury brought in a Bill for the establishment of a Register of Land Titles, which afterwards became law under the name of The Transfer of Land Act, 1862. As might have been expected from the marvellous power of elucidation possessed by that remarkable man, his exposition of his own scheme was a masterpiece of clearness. Before his magic touch difficulties melted away like a compound substance under the influence of a strong dissolvent. Conveyancers trembled at the prospect of a state of things in which deeds and parchments were to become things of the past, and the House of Lords gazed spell-bound on the picture of a great nobleman walking about his estates, and refreshing himself from time to time with the perusal of a *résumé* of his title-deeds reduced to the size of a *carte de visite*. But the measure was a success on paper only, and in little more than five years Lord Westbury was called upon to preside over a Royal Commission

charged with the duty of inquiring into the causes of the failure of his own Act. Those causes, indeed, were obvious enough. The Act, unlike Sir R. Torrens's Act, provided not merely for the registration of the simple fact of ownership, but of all the various charges and incidents which might affect the property. Thus the register, instead of containing a plain statement of ownership which everybody could understand, came to resemble an old palimpsest, in which a dozen different titles met and intersected each other at every turn. Such a system obviously failed to meet the very first object of land registration—simplicity of title for the purposes of disposition, a fact which was clearly pointed out by the Royal Commission in their able and comprehensive report. Warned by the failure of Lord Westbury's Act, they undertook to recommend the establishment of a new kind of register of titles, more nearly allied to that which had succeeded so well in the Australian colonies; and in 1873 a Bill, mainly based upon that report, was introduced by Lord Selborne into the House of Lords. The Bill may be roughly described as an attempt to enforce, by a sort of mild compulsion, the gradual registration of all English titles. As might have been expected, it was vehemently opposed, and it is at least doubtful whether the country was ripe for so sweeping a change. Perhaps, too, even so courageous and skilful a law reformer as Lord Selborne has shown himself to be, might in future hesitate to impose upon every purchaser and mortgagee in this country a mode of dealing with his property which recent experience shows that not one such purchaser or mortgagee in ten thousand adopts of his own accord. Be this as it may, when the measure was reintroduced by Lord Cairns in 1874, it was thought necessary or judicious to exempt from its compulsory operation all lands whose value did not exceed £300. To maintain such a halting-place was obviously impossible, and when the Bill reappeared in 1875 it had become a purely permissive measure, and in that shape it passed through Parliament, after a great deal of criticism and with very few amendments.

The Land Transfer Act, 1875, was an ingenious attempt

to adapt to England the South Australian system, the principle of which was, as we have seen, to give to every registered owner of land the powers of disposition possessed by a registered owner of stock or ships. But here a preliminary difficulty presented itself. To subject every claimant for registration to a thorough examination of his title would have involved the very delay and expense which it was the object of the Act to obviate; while, on the other hand, to give a Parliamentary title to any person who claimed to be registered as owner, even if his claim was fortified by apparent or actual possession, would in a country like England, where possession is one thing and title another, have amounted in many cases to virtual confiscation. To meet this difficulty, the Act of 1875, like Lord Selborne's Bill, provided for the registration not only of indefeasible titles, but of titles depending upon mere possession, which, it was to be hoped, might in the absence of hostile claims ripen in the course of some thirty years or more into indefeasible titles. Unfortunately the public failed to appreciate a boon, the benefits of which were more or less problematical, and could only be fully realised by a somewhat remote posterity. The maxim, *Arbores serat quæ alteri sæculo prosint*, is one which has never commended itself to the practical Englishman, who likes to see a return for his money, and the number of "possessory" titles registered under the Act might be counted upon the ten fingers of the Registrar. Nor was the Act in other respects more successful. The total number of titles of all kinds registered under it has barely exceeded fifty, and the latest return shows that the applications to the Office at present do not average one in two months, a number absolutely infinitesimal when compared with the titles which are said to change hands in England and Wales in a single day. In a word, the Act, though as a piece of Parliamentary draughtmanship well-nigh perfect, has been from the first to all intents and purposes a dead letter. It has failed because it was an attempt to put a new patch upon an old garment; to transplant into a soil choked by the weedy and tangled growth of centuries of feudalism

and pedantry, the product of a democratic community, without a history, without ancestors, and without lawyers.

To ascertain and report upon the causes of this failure was the first duty of the Select Committee, over which I was called upon to preside. They sat for upwards of a year, and examined nearly forty witnesses. The result of this part of their labours may be summed up in a single sentence of the Report adopted by a majority of the Committee:—"Simplicity of transfer to be of any value presupposes simplicity of title, and to legislate for the registration of titles without as a preliminary step simplifying the titles to be registered, is to begin at the wrong end." If any proof of this self-evident proposition were needed, it would be found in the fact that in the case of what are called "known titles," sales of land may be effected in England almost as quickly and cheaply as in Australia. It was in this direction therefore, towards which some progress had already been made by the two Acts to which I have referred, that the labours of the Committee were turned, and they ended with several recommendations which, if they have no other merit, have at least that of directness and simplicity. To complete the all-important work of surveying every county in England, so as to make each house and field capable of immediate and unquestionable identification—to clothe instruments relating to land in the simple language of every-day life, instead of disguising them in that of Henry VIII. and Elizabeth—to pay solicitors upon a principle which would no longer put a premium upon mere verbiage—to vest the freeholds, like the leaseholds, of a deceased person in some ascertained person, instead of leaving them at haphazard to devolve upon a child in the nursery, a lunatic in an asylum, or a gold digger in Australia—to substitute simple charges upon land, defeasible in case of repayment, for the unwieldy machinery of mortgages and reconveyances—to reduce still further the time fixed for the commencement of titles—to get rid of "constructive notice" and the abomination known as the Middlesex Register—and to establish in convenient centres really well-arranged registers of all dealings with land, furnished

with indexes enabling a person of ordinary intelligence to pick out all the charges affecting the title in a few minutes, with proper provisions for utilising the result of previous searches, so as to obviate the necessity of repeating the same process upon every fresh transaction: all these are suggestions so homely and obvious, that they are hardly likely to find favour with a generation of law reformers, who have expended as much energy upon impracticable schemes of land registration as any mediæval alchemist ever bestowed on the discovery of the philosopher's stone. Yet, according to competent witnesses, one of these suggestions alone, the substitution of simple charges for our present "legal mortgages," would effect a saving of several millions a year. And I may be permitted to doubt whether, until the day when some steps have been taken in the direction pointed out by the Committee, any register of titles can be successfully worked in England, while, perhaps, if that day ever arrives, it may be found that such a register is no longer wanted. On the other hand, the stock objection so often urged to the registration of deeds—that it would stereotype complexities of title—would disappear if there were no complexities to stereotype.[1] Meantime it cannot be too often repeated that the first step towards making a register of titles practicable is to make a clean sweep of our present real property laws, and that until this is done any further attempt to put Australian wine into English bottles, like all other legislation which ignores existing facts, will end, as such attempts have hitherto done, in failure and disappointment.[2]

But behind these questions lies another closely allied to them, though much more difficult to grapple with, which the Committee did not venture to approach. Let it be

(1) It is singular that in the United States of America, where registration of deeds is almost everywhere compulsory, and all dealings with land are exceedingly cheap and simple, no complaint is made that such registration makes the transfer of land more difficult or expensive.

(2) It must not be supposed that the amendments here pointed out embrace all the reforms of which our conveyancing laws would admit. See the whole subject very exhaustively treated in an able article in the *Westminster Review* (Oct. 1879) on "The Law of Real Property," which contains several very useful suggestions on the subject.

assumed that every acre in England which is held in fee-simple could be made as easily transferable as a block of land in South Australia, there would still remain a very large proportion of land in the country which has as little chance of coming into the market as Blenheim or Strathfieldsaye—I refer to what are called family estates.[1] By this I do not mean that such estates are in the strict sense of the word unsaleable. It is a fact, too often ignored by writers and speakers on the subject, that every well-drawn settlement contains full powers enabling its trustees (with the consent of the life-tenant if of full age) to sell, or let, or otherwise deal with the settled property, and where such a power does not exist it can be readily supplied on application to the Chancery Division. But to possess a power is one thing, and to exercise it another. A sort of educated instinct, as imperious as law itself, has, for the most part, impressed upon such trustees a notion, amounting almost to a religious belief, that they are placed there rather to preserve than to alienate family property, and the very idea of selling old acres for so vulgar an object as that of increasing the income or relieving the embarrassments of a crippled tenant for life, would strike most of them as little short of treason or sacrilege. Moreover the settlement almost invariably requires the proceeds of the land sold to be re-invested in other lands; so that practically the interposition of a power of sale amounts to little or nothing, and the family estate devolves from father to son with almost as much regularity as if it had been made inalienable by law. As, however, a great deal of misconception prevails on this subject outside the legal profession, it may be well to explain how this result is brought about.

It is commonly believed by persons who ought to know better that—owing to the operation of our law of entail—land in England is subject to fetters from which personal property is free. Except to a limited extent this is not the

(1) Before Mr. Pusey's Committee it was stated that two-thirds of the land in England were in strict settlement.—Sir A. Hobhouse's *Dead Hand*, p. 174.

case. A tenant in tail in possession may acquire the absolute ownership of his estates by the simplest possible process —that of executing and enrolling what is called a Disentailing Deed. Even if he be only the expectant, instead of the actual, owner, he can by a similar process defeat the claims of his own issue; though in this case the rights of the person popularly called "the next in the entail" can only be got rid of by the aid of the previous tenant for life, or, as he is called in legal language, the Protector of the Settlement. To illustrate this: if Lord A. is life-tenant and his eldest son George is the next tenant in tail, and in default of issue of George the estate is given over to John, the second son, and his issue, and so on to the other younger sons and their issue in succession, George, in the way I have pointed out, can, the day after his father's death, sell the estate out and out to a stranger; and even during his father's lifetime can, without the latter's consent, dispose of it in such a way as to defeat the rights of his own issue. But he cannot without that consent get rid of the rights of John and his remaining brothers, and their descendants. With this single exception, however, the restrictions upon the indefinite limitation of real and personal estate are exactly the same. The law of England only allows either kind of property to be tied up during the life of some person actually in existence, and for twenty-one years after his death. How then, it may be asked, does it happen that while personal property is constantly changing hands, land is preserved in the same family for generations, if not for centuries?

Let us take the case which I put just now. A nobleman, or other great landowner, is, under his marriage settlement, tenant for life of large estates, which at his death will devolve on his eldest son, as tenant in tail. If events were allowed to take their natural course, this son would, at his father's death, subject to any charges which the latter might have had power to make, be practically as free to deal with his ancestral acres as a barrister with his savings, or a Manchester manufacturer with his stock-in-trade. To

avert so terrible a catastrophe, his wings must be clipped before he has an opportunity of using them. Immediately on coming of age, or at latest on his marriage, the expectant heir, lured by the prospect of an immediate and certain income, or, it may be, already alive to the maxim that *Noblesse oblige*, is induced to concur in what is called a re-settlement, by which he is himself reduced to the position of a life-tenant, and the estate is reloaded with fresh charges in favour of all manner of persons born or unborn. The practical upshot of this is, that on his father's death the son succeeds to a diminished income, as well as to a curtailed interest. But the great object of the family is attained, and the estates are tied up for another generation until the next tenant in tail comes of age, when the same process is repeated, and with the same result.

It is not my present intention to discuss at length the merits or drawbacks of a custom which is alternately extolled as the mainstay, and abused as the bane, of English society. Perhaps the most forcible exposure of its mischievous consequences is that lately given by Mr. W. E. Baxter, who has announced his intention of bringing the whole question before the House of Commons next session.

"Under our system of entail," he says, in a recent speech on the subject,[1] "the ostensible proprietor of land is merely a life-renter: the real owners are his descendants—most of them still unborn. He draws the rental, but he cannot sell a single acre or in any other way exercise the rights of ownership; he is only a pensioner for life on the property. He has scarcely a motive to improve the land; the ordinary operation of the law leaves him without the means. This unnatural system cramps industry and hinders development. It is hurtful to the people at large, for it keeps them from investing their savings in land; it limits the increase of production and of the material wealth; it increases pauperism; it prevents the improvement of the miserable dwellings of the labourer, which are too often a source of grave moral evils. It is hurtful to the proprietors themselves, leading often to extravagant expenditure, weakening paternal authority, inflicting gross injustice upon the younger members of the family, tempting the heir into pernicious relations with money-lenders, and securing for him the envy and hatred of his younger brothers."

(1) Speech of Mr. Baxter at Brechin, December 12th, 1879, as reported in the *Times* of December 13th, 1879.

Even those of us who would find this picture too one-sided or too highly coloured, must be familiar with instances in which the practical working of the system has been most disastrous. Mr. Kay gives a lively sketch of a case which came within his personal knowledge. A great nobleman was the tenant for life of a large and valuable estate. He took to reckless and extravagant courses, gambled, lost money, and eventually fled to the Continent, where he lived between forty and fifty years. During all that time the property was in the hands of a money-lender, who, knowing that he would lose all as soon as his debtor died, cut the timber, ground down the tenants, and let the mansion-house go to rack and ruin.

"The estate," he adds, "was damaged more and more, year by year. The farmers had no leases and no security for any expenditure; there was no one to support the schools or the church, or to look after the large village of labourers upon the property. All social progress and all social prosperity upon the estate were put an end to. The farm buildings fell into decay, the land was not properly drained or cultivated, the plantations were injured, the mansion became dilapidated; and all this was caused by the deeds which the law had allowed the lord and his heir to execute."[1]

There are few of us, I suspect, whose personal observations will not enable them to verify this picture. Nor is it true to say, as is often done, that such a man is only his own enemy. It is an axiom which no practical agriculturist will controvert, that the returns which can be obtained from any given quantity of land are in exact proportion to the amount of capital expended upon it. But as it is obviously for the interest of the community that every acre should be made as productive as possible, it follows that no system can be really beneficial which hands over a large proportion of the land to the tender mercies of a limited owner more or less crippled or impoverished, or still worse, of some usurer or loan society, whose interest it is to spend as little and get as much as possible during their precarious period of tenure.

Now, nothing is more certain than that a period of

(1) Kay's *Free Trade in Land*, pp. 30, 31.

agricultural depression, such as that through which we are passing, will both multiply and aggravate the evils of which I speak; indeed, if they had not been brought into prominence by that depression, they might, like so many other blemishes in our political and social system, have remained unheeded for generations. When, however, we point to the probable growth of the mischief as a ground for an immediate change in the law, we are met by the answer that if our present territorial system imposes upon us some landlords who are gamblers and spendthrifts, it gives us a much larger proportion of men of wealth and intelligence, and that, as a matter of fact, under that system far larger returns are obtained from each acre of our soil than the poor and uneducated peasant of Normandy or Picardy, with all his thrift and industry, is able to extract from his narrow strip of tillage. But this is a matter—involving as it does the comparative advantages, from a purely commercial point of view, of large and small proprietorships, upon which such conflicting opinions have been and are daily expressed—far beyond my present limits, nor, perhaps, am I competent to discuss it. No man, however, of ordinary sense and fairness will deny that such cases as those which Mr. Kay instances do occur, and that when they occur they are a disgrace to the country. Nor, in dealing with the general question, ought we to forget that it has its social as well as its economical side. Indeed, of late years, that large and increasing body of Englishmen who believe that the prosperity of a nation is bound up with "the greatest happiness of the greatest number," and who for years have been contrasting the lot of the thrifty and self-reliant peasant of Switzerland or Belgium, and that of the Dorsetshire labourer, with no solace but the beershop, and no refuge in old age but the parish workhouse, have been steadily coming round to the conviction that the real hope of England lies in the growth of small proprietorships. Those who, like myself, have seen the difference which the possession of a freehold cottage and half an acre of garden makes in the habits and character—nay, in the very expression and

bearing of a Denbighshire collier, or a Merionethshire quarryman, will need no additional arguments to convince them of this great social and political truth. But to say that you do not interfere with the multiplication of small proprietorships by tying up half the land in England for the exclusive benefit of a few thousand families, is as absurd as to contend that the circulation of money would not be impeded by making it impossible to get change for a five-pound note. Nor can the fact, so often repeated, that millions of acres are sold annually in Great Britain, be deemed a conclusive answer, so long as whole tracts of country exist where, from the fact of every square yard being in the hands of two or three great families, a working man would find as much difficulty in buying land as in buying Imperial Tokay.[1] Indeed, the experience of the Irish Encumbered Estates Court and the Irish Church Commission, as well as that of nearly all foreign countries, to say nothing of the reason of the thing, shows that the effect of bringing large quantities of property into the market is to give a chance to small capitalists, and to stimulate that appetite for the acquisition of land which is natural to all classes of men. In other words, the first step towards bringing small properties within reach of the poorer classes is to make sales easy and transfers cheap.

But it is scarcely necessary to pursue this part of the question any further. Hardly any one seriously desires to see a compulsory subdivision of property, such as the law enforces in France, introduced into England. But surely it is quite another thing to advocate the removal of those artificial barriers—the bulwarks of a society long since passed away—which prevent or impede what I may, perhaps, be permitted to call the free circulation of English land. Remove these restraints and I believe that land would, by a sort of natural process, gravitate to the owners who would be best qualified to hold it and most likely to turn it to the best account; and that the question of large

(1) See an interesting statement on the subject in Sir Arthur Hobhouse's *Dead Hand*, p. 175.

or small proprietorships might safely be left to take care of itself.

But by what process is this removal to be effected? The popular notion which used to find expression in working men's meetings and Trades Union Congresses, that the law of primogeniture is at the root of the evil, and that all that is wanted is that the land, like the money, of a man dying without a will, should be divided among all his children, is based upon a partial misconception. That law, it may be observed, is rather the embodiment of the prevailing sentiment of the country than the cause of the concentration of land in a few hands. As a matter of fact, too, if Mr. Potter's Intestacy Bill were passed to-morrow, it would not affect one large family estate in a thousand, for the owners of such estates seldom or never get a chance of dying intestate. Indeed, this very fact makes the maintenance of the present law more unjustifiable, for its operation is practically confined to persons in the middle or lower middle classes of life, who have no ambition to found a family, and who, if they could be consulted as to the destination of their land, would almost certainly desire that it should go, like their personal estate, to the support of their wives and children. At the same time, as was shrewdly remarked by one of the speakers during the recent debate on that measure, we hardly know how much the habits of a nation are indirectly influenced by its laws, and it is at least possible that if Parliament were to make an inroad upon the present law of primogeniture, testators and settlors might gradually become inclined to follow the lead of the Legislature. The truth is, that in such matters law and custom act and re-act upon each other, and that you cannot change the one without insensibly affecting the other.

Another palliative of a different kind is that suggested by the President of the Incorporated Law Society, Mr. Tertius Lawrence, in the able and interesting address recently delivered by him at Cambridge. Mr. Lawrence, though disposed to take an optimist view of our land laws, suggests several valuable reforms, the most important of which,

perhaps, is that the Chancery Division should have power to order the sale of settled estates on the application of the tenant for life only. He further proposes that every settlement of land should be treated as giving the trustees by implication a full power to sell the land. But, as I have already pointed out, such powers are inserted in ninety-nine settlements out of a hundred, but at present with very little result; and it seems idle to create powers unless you can insure their exercise. For my part, I believe that a far more drastic remedy is required; but before discussing it seriously, it will be well to calculate the cost. In plain English we cannot eat our cake and keep it. We cannot combine "free trade in land"—to use a somewhat inaccurate expression, but one which has acquired a popular and intelligible meaning—with that old doctrine about the sanctity of ancestral acres, which for centuries has been viewed as the groundwork of English aristocratic society. It will be for Parliament and the country to decide which of these two things they prefer to have, for it is certain they cannot have both.

When, however, people speak in a general way about "abolishing entails and settlements," it is important that we—or perhaps I should say that they themselves—should know exactly what they mean. For I need hardly point out that the two things which are thus somewhat unceremoniously bracketed together, raise two different questions. Indeed, the abolition of entails, strictly so called (if by this is meant the conversion of estates in fee tail into estates in fee simple), would be a very small measure indeed. It would simply involve the destruction of "base fees;" or, in popular language, would enable an expectant tenant in tail to do what, as I have already shown, a tenant in tail in possession can do now, that is, defeat the rights not only of his own issue, but those of all other persons claiming subsequently to himself. This fact should be borne in mind by those who forget that the mischievous results of which they complain are due to custom rather than to law, and that the fetters which a landowner finds it hardest to bear or shake off are those which he has forged for himself.

When, however, we come to the abolition of settlements we approach different and much more delicate ground. Nearly every marriage between persons possessed of property has hitherto been supposed to involve, at least on the part of the wife or her relatives, the execution of a settlement, and it is scarcely too much to say that to a good many people a proposal to abolish marriage settlements would be little less startling than a proposal to abolish marriage itself. Even "grandfathers" have their feelings, nor are fathers or husbands always to be trusted, and few country gentlemen would regard with complacency a measure of law reform which might, in certain eventualities, consign their daughters or their daughters' offspring to the workhouse or the streets. A large proportion, too, of the wills which are made both by rich and poor, are really "settlements." Indeed, any provision, out of any kind of property, limited to take effect or to come to an end on the occurrence of a given event, whether by way of life estate, demise, or rent-charge, is in reality a "settlement;" and, as regards the question we are now discussing, it can make no difference whether such a provision takes the form of a jointure which swallows up three-fourths of the rents, or of a life interest which exhausts the whole. A law, therefore, which would permit no limitation of land, except in fee simple—for this is what the abolition of settlements pure and simple really means—would render it very difficult for a landowner to make a suitable provision for his family after death. Under such a law a country gentleman could not give a life interest or a jointure to his widow—he could not make a proper provision for the event of one or more of his children dying under age; he could certainly not protect his daughters or their issue against the rapacity or extravagance of an unprincipled or thriftless husband or father. It is easy to see that such a change, simple as it sounds, would amount to a social revolution. Its consequences would be absolutely incalculable. It would, unless extended to all kinds of property, introduce a fresh element of difference into the law of real and personal estate which every sensible law reformer desires to see assi-

milated as far as possible.[1] It would certainly place a landed proprietor in a distinctly worse position than a merchant or professional man (who is allowed to tie up his Consols or his railway stock for the benefit of his wife and family), and would thus constitute a new piece of class legislation quite opposed to the spirit of the time and the genius of true Liberalism. Indeed, it might indirectly tend to depreciate the value of land, for a father of a family, in view of his own death, or in contemplation of his daughter's marriage, might be tempted or forced to part with his land in order to make, out of the proceeds, a family provision which the law did not allow him to make out of the land itself.

Such a measure, moreover, would have to be either prospective only, or retrospective also. If it were made prospective only, its operation would scarcely be felt for years to come. If it is to be retrospective, how are we to compensate or deal with the innumerable "vested interests" which would be confiscated under a measure of "disendowment" extending to more than half the kingdom, and affecting at least one family in every parish in England? This surely is an aspect of the question which deserves some little attention, though it is one which, as far as I know, has scarcely been noticed by any writer or speaker on the subject.

Of course I may be told that a beginning must be made somewhere, and that if the interests of the community demand an alteration in the law—and in this case I am far from saying that they do not—the inconvenience, or even the mischief, which it may inflict on particular individuals ought not to stand in the way of that alteration. Doubtless, too, objections may be urged against the settlement of land which do not apply to the settlement of stock or other personal property. It is no doubt true that the settlement of stock does not affect its saleable properties; nor would the withdrawal of a large quantity of that article from the

(1) See some interesting remarks on the subject in the article on Real Property Law in the *Westminster Review* already referred to, p. 360 *et seq.*

market sensibly influence any particular area or locality. It is no less true that no considerations of public policy make it undesirable that stock should be indefinitely locked up during the life of a spendthrift or for the benefit of a money-lender. The ownership of stock confers no special privileges, involves no special duties, and necessitates no special outlay. Still, before we commit ourselves to a project which would give so violent a shock to the habits and feelings of a very large body of our countrymen, we ought to be certain not only that the evil is as great as it is represented to be, but that it admits of no other remedy. It is as well, too, to remember that the problem to be solved is, How to free the land and its proprietors from the fetters by which they are at present weighed down, without interfering more than is absolutely necessary with the family provisions which prudence or affection has hitherto dictated, and which from long usage have, in the eyes of a large body of Englishmen, become almost as obligatory as if they were enforced by law. In the meantime a measure which, if thoroughly carried out, would necessitate an entire reconstruction in the arrangements hitherto made in view of the two most important events which affect the human family—death and marriage—can scarcely, for the present at least, be regarded as coming "within the range of practical politics."

A sense of these objections to the total abolition of settlements of real estates—objections which will be ignored only by those whose main qualification to discuss the subject is that they know nothing of its practical difficulties—has induced many advanced law reformers to content themselves with a middle course. Treat land, they say, exactly like Consols. Place the legal ownership, in other words the power to dispose of it, in some definite person or persons authorised to make a title to a purchaser or mortgagee, leaving the successive or co-ordinate rights of the beneficial owners to assume the form of equitable or trust estates, protected only by such safeguards as are found sufficient in the case of Government stock. Under a system, it is urged with some force, which would vest every acre in some person

who could give a good title to it, the registration of titles would become not only practicable but easy, and thus an important step would be gained towards the consummation so devoutly wished for by an important school of Liberal lawyers. My objection to the project, independently of the enormous difficulty of starting it,[1] and of the opportunities which it would offer for fraudulent dealing with the land, is that while it seems to go very far, it really would not go far enough. Experience has shown that in nine cases out of ten a sale is the last thing which a trustee with a power of sale thinks of; and the probabilities are that, if all the lands in England were vested in such trustees, the real succession to them would continue to devolve from one beneficial owner to another, just as if no trustee for sale existed. The proposed system would moreover perpetuate that distinction between legal and equitable estates, between fiduciary and beneficial ownership, which lies at the root of half the difficulties and complications overlying our real property law.

But, if settlements cannot be abolished, to what extent can the power of settling property be restricted? Of the various suggestions which have been made on this subject, the most popular, perhaps, is the proposal to prohibit the giving of any interest in land to an unborn person. Such a measure would of course put an end, so far as it went, to marriage settlements in their present shape, though it would enable a parent to provide, either by deed or will, for his children, the moment they were born. But it is obvious that if this provision were made by an irrevocable instrument on the birth of a child, twenty-one years would still have to elapse before the property became alienable, while if it were made by a revocable instrument, such as a will,[2] the provision

(1) The history of the Land Transfer Act, 1875, forcibly illustrates these difficulties.

(2) Even if the provision were made by deed, instead of will, it would, unless the law were altered, be revocable; for being made on the birth of a child it would necessarily be *post-nuptial*, and might, therefore, under the statute of Elizabeth against fraudulent conveyances, be avoided by a subsequent conveyance from the settlor to a purchaser for valuable consideration. It is singular that this point should have excited so little attention.

would really be no provision at all. Upon the whole I much prefer the plan embodied in a Bill which Mr. Shaw Lefevre introduced into the House of Commons in 1878, the main feature of which was to prohibit for the future all limitations of real and personal property to unborn persons, unless overridden by a power of appointment over the whole property given to the parent of such unborn person, a power almost invariably introduced into settlements of personalty. The practical effect of this measure,[1] which contains other important provisions, would be to give the parent the option in each case of saying to which of the children the property was to go, or in what proportion they were to share it. It would not indeed satisfy the demand for what is called "free land"—a demand which I propose to meet in another way—but it would bring settlements of land into harmony with settlements of personalty, and would make the former, what the latter usually are now, a provision for the settlor's family and not a mere mode of ministering to his posthumous vanity. At the same time it would preserve intact that "paternal authority" which, as Mr. Baxter points out, is now so much weakened by family arrangements which not only put the eldest son's interest out of the father's control, but place the two in a position of virtual antagonism to each other.

To sum up, I would begin by repealing the present law of Primogeniture. Its abolition would, it is true, in the case of large estates, have little or no operation. But, in the case of small ones, it would prevent some glaring, if not very frequent, instances of injustice. I would sweep away entails altogether. Such a measure, though not nearly so violent as is generally supposed, would be a step in the right direction. It would remove an important distinction between the law of real and personal property and a fruitful

(1) The Bill, bearing the names of Mr. Shaw Lefevre, Mr. W. B. Beaumont Mr. Osborne Morgan, Mr. Herschell, and Mr. (now Sir Julian) Goldsmid,, was first introduced in the session of 1877, but has never reached a second reading. It prohibits the exercise of the power in question in favour of any child not born at the date of the appointment, or if made by deed, in favour of an infant, except on the infant's marriage.

source of delay and expense in the investigation of titles.[1] I would prohibit all instruments and obligations tending in effect to perpetuity, such as very long leases and covenants, running, for an indefinite period, with the land. I would adopt, as the basis for future legislation on the subject of settlements, the principle of Mr. Shaw Lefevre's Bill. There could be no objection also to adopting Mr. Lawrence's proposal to give implied powers of sale, with the consent of the tenant for life, to trustees in the very rare cases in which such powers are not given by the settlement itself. To be of any value, however, such powers ought to be accompanied by provisions giving far greater latitude as to the re-investment and application of the sale-moneys. But the measure which, in my judgment, is most wanted to meet the urgent requirements of the present day is a measure giving to every person of full age and sound understanding entitled to the beneficial enjoyment of landed property for his own life, and to every person who either by actual assignment (as a purchaser or mortgagee) or by operation of law (as a trustee in bankruptcy or an execution creditor) is entitled to stand in his place, the right to sell the land out and out, subject only to two conditions—first, that the sale be an honest one; and secondly, that the purchase-money be secured and applied for the benefit of all persons interested in the land itself. The absence of these precautions would enable A. or his creditors to appropriate the property of B. C. and D. To insure their observance, it might be found necessary eventually to establish an English Landed Estates Court.[2] But, in the first instance, I would allow any of the persons I have named to apply to the Chancery Division (in the case of a large estate), or to the County Court (in the case of a small one), to authorise the sale of the land. I would

(1) See as to this the evidence of Mr. Frere before the Select Committee of the House of Commons on Land Titles and Transfer. First Report, p. 61 *et seq.*

(2) As to the extraordinary effect which the establishment of such a court would have in raising the value of land all over England, see the remarkable statement made by Lord Cairns in the speech which I have already quoted. —*Hansard's Parliamentary Debates*, N.S. vol. clii. pp. 279, 280.

make it imperative on the Court to grant such application subject only to two conditions: (1) That the price obtained was a fair one; (2) That the clear proceeds, after discharging all encumbrances on the fee, were either invested in approved securities in the names of the officer of the Court or of trustees sanctioned by the Court itself, and held for the benefit of the parties interested under the settlement, or were, in a proper case, employed in the improvement of the unsold lands subject to the same limitations. I believe it would be impossible to overrate the importance of such a change in the law, and, at the same time, I cannot see that, even if made retrospective, it would inflict any real hardship upon any one. It would place the right to call for a sale, subject to reasonable safeguards, in the hands of the persons really interested in exercising it. It would set the land itself free. It would benefit the limited owner by increasing his income, or, as the case might be, by improving his unsold property; while the claims of all other interested persons would be either simply liquidated or transferred from the land to the purchase-money. Such a process, though clogged by conditions which reduce its value to a *minimum*, already exists, and is constantly put into motion, not only under the Settled Estates Acts, but in the case of lands taken by railway and other public companies, and I have never heard that it has caused any complaint or worked any injustice.

It is needless to say that the foregoing necessarily brief observations by no means exhaust the subject of which I have undertaken to treat. The law of charitable endowments—the whole of the law regulating the relations between landlord and tenant, including especially the laws of distress and fixtures, the law of rating, and the laws relating to game; all these are matters which no one who seeks to deal with the land question as a whole could safely ignore. But each of these is a subject in itself, and after all they are but the offshoots from the parent tree, whose branches have overshadowed and whose roots have struck deep into the congenial soil of English society. The difficulties of attack-

ing the growth of so many centuries are indeed great—to those who know the mass of prejudice, and the *vis inertiæ* which the most urgent and moderate of land law reforms have hitherto encountered, they may seem insuperable. But we know that in England public opinion, when it is once set going, moves with a force and velocity which no one could have predicted, and of the direction in which it is at present moving there can be little or no doubt.

THE END.

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