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TRANSFER OF LAND

AND

REGISTRATION OF TITLE:

AS THE QUESTION NOW STANDS

IN

ENGLAND AND IRELAND.

BY

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A Paper contributed to the Social Science Congress, Norwich, 1873.

LONDON : 1874.

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REGISTRATION OF TITLE.

ALTHOUGH the subject of land transfer and registration of title has on several occasions been brought under the notice of this Association, that subject has hardly received more attention than it merits. It is intrinsically a difficult one, requiring much time and many experiments for its proper elucidation. To state the mere history and present position of the question would be in itself no slight task, and therefore I shall assume that this department of the Association is not oblivious of the facts and arguments which have from time to time been presented to its notice. They will be found scattered through the annual volumes of "Transactions;" and many of them were clearly and ably brought to mind by Sir R. R. Torrens in his paper read before the Association so lately as the meeting of 1872.

As far back as the year 1859 some of the most eminent lawyers in England had come to the conclusion that the only mode of simplifying titles to real estates, and of facilitating the sale and transfer of them, was to establish a new register which should disclose the *actual ownership* of land. Registration of the contents of *deeds* had been introduced for certain English counties—York and Middlesex—early in the last century; also a central office of exactly similar character for the whole of Ireland, which is still in operation. It would have been strange if this legislation of the time of Queen Anne were found sufficient for the exigencies of modern times: suffice it to say that the principle of the registration of deeds has been condemned by all competent authorities, notably by the Royal Commissioners of 1857, whose Report, contained (with the evidence) in a ponderous blue-book, is a valuable repertory of information. In Ireland, so far back as the year 1849,

the complication of titles had become a public evil of the greatest magnitude; and the remedy was found in the establishment of the "Incumbered Estates Court," which, during the nine years of its duration under that name, absolutely and indefeasibly cleared the titles of lands of the aggregate value of twenty millions sterling. In 1858 this tribunal was rendered permanent under the designation of "Landed Estates Court," with enlarged jurisdiction. Power was given to give conveyances and declarations of title of land of all tenures, incumbered or otherwise. This court is now usually resorted to whenever an Irish estate is to be sold, for purchasers prefer that perfect guarantee of title which the court alone confers. On an average about 200 estates of various sizes pass through its hands annually, and of these the value may be roughly estimated at a million sterling.

In 1859 two bills, very carefully drawn by Sir H. Thring, were introduced by Lord Cairns (then Solicitor-General), whose elaborate speech on bringing them forward in the House of Commons (February 11, 1859) may be referred to as an admirable summary of the evils existing and of the remedies proposed. One of these bills was for the establishment of a Landed Estates Court for England, to be presided over by "Judicial Conveyancers," who, without assuming the dignity and state of vice-chancellors, would have gradually cleared off those complications of title which render many estates unsaleable, and render all estates only saleable under conditions more or less injurious, and at considerable expense. The second bill was to establish a register of the titles so judicially ascertained, in order that future complications might be impossible. Unfortunately these two bills (although favourably received) were dropped, and have never been re-introduced. Most of the advantages which they would have secured for English titles were about the same time secured for property in several of our colonies, under the system with which the name of Sir R. R. Torrens is so honourably associated. The "Real Property Act" of South Australia, prepared under his directions in 1858, was the beginning of a series of measures which, although at first meeting with strong opposition, have worked most successfully and beneficially.

The Act of 1862 (25 and 26 Vic., c. 53), known as Lord Westbury's, established, as is well known, a register of indefeasible titles open to such landowners as chose to submit their titles for examination. No judicial powers were conferred, and the absence of such powers appears to have militated against the success of this measure, which has not worked

extensively. Sir R. R. Torrens showed last year that there were other defects in the Act of 1862. Instead of simply stating the *ownership* of the land, this registry admits of deeds and instruments of any kind being brought in; from which it follows that many of the titles will in course of time become again involved in complication. Lord Westbury, who can no longer vindicate his handiwork, probably deemed it judicious to give latitude to the conveyancers, not imposing on them any new and inflexible method which might prove distasteful. Hence his Act allowed deeds of any kind to be registered, although the immense preponderance of authority then was, and more distinctly is now, in favour of a register of *simple ownership*, as in the case of Government stock and railway shares.

All who are familiar with this enquiry will remember that other defects were brought to light by the latest Commission of Enquiry, that which reported in 1870. The blue-book issued by those commissioners contains a mass of information on the working of Lord Westbury's Act, and the hindrances of all kinds in the way of its working. It also contains proposals for remedying the defects, and greatly enlarging the scope, of the land registry.* It is not too much to expect that for many years to come any legislation on the subject will be devised with a view to carrying out these recommendations.

It is observable that by the learned and acute persons who conducted this enquiry, as by Sir R. R. Torrens, the *simplicity* of the register is held to be a matter of supreme importance. Trusts should (they consider) be altogether excluded: property in settlement should be transferred into the names of the trustees: if any improper dealing is to be guarded against, this must be done by a *caveat*. Only short statutory forms of deeds are to be accepted for registration, as in the case of Government stock. Special clauses must be embodied if they are required in separate instruments, of which the Registrar will make no note on the register, although they may be deposited for safe custody.

These recommendations, and many others which cannot here be noticed, have been kept in view in the preparation of the bill by the present Lord Chancellor, which proposes to repeal Lord Westbury's Act, re-enacting many of its clauses, and making such changes in the land registry as long ex-

* The proposed enlargement of the Registry by admitting titles not certified or guaranteed, is considered in a Paper read by the Author before the Statistical Society of Ireland, December 1873.

perience and full consideration have suggested. The Lord Chancellor's bill, after being read a first time in the House of Lords in April 1873, made no further progress, but it can hardly be doubted that it will be re-introduced; and in the meantime it is most desirable that the intelligent criticism of legal minds, conversant with the difficulties which surround this question, should be directed towards it, with a view of perfecting a measure the importance of which can hardly be over-estimated.

This is no fitting opportunity for examining the details of a bill containing 173 clauses; some of them seem to require amendment, and the scheme as a whole ought to be carefully revised in view of the experience lately gained in Ireland under a system which now calls for a brief notice.

In the year 1865, after many year's working of the tribunal which has jurisdiction over titles to land in Ireland, a bill was passed opening, for the use of such as chose to avail themselves of it, a register or record of indefeasible or parliamentary titles. The project was of a very limited and tentative kind. The Government of that day refused to establish any new department: and required certain of the existing officials of the Landed Estates Court (who are thereby placed in a worse position as regards vacations, &c., than the rest) to undertake the duties and responsibilities imposed by this Act. Evidently this was inaugurating a new system under conditions as unfavourable as could well be imagined; and there were many other discouragements in addition to active opposition. Perhaps there is no such instance on record of a new and most important function thrust upon a public department already occupied with other business, and without adequate machinery of any kind. If the Government had ordered the Trinity House to conduct a deep-sea exploration, or had ordered that Armstrong guns should (for economical reasons) be cast in the workshops at Woolwich, in which the anchors are forged, the absurdity would have been obvious. The public mind acknowledges it as axiomatic that new and important work shall be committed to willing as well as to competent hands, furnished with all things necessary for the undertaking.

Law reforms have little interest for the general public; and amongst the ranks of the lawyers, where there is a better comprehension of the matter, there is much silent repugnance to simplification of processes. Far be it from me to say that complication and consequent expense are preferred for their own sake by lawyers, or valued from any motive arising out of self-interest. The truth is, that old and well-known paths are

as a rule preferred to such as are untrodden; and that from tradition, usage, and *vis inertiæ*, the profession is for the most part found arrayed against even so evident an improvement as registration of title to real property.

Recurring to the experiment now for some years past in trial in Ireland, it is found that the legal practitioners prefer the old system of registering deeds under the statute of Anne, because they understand it. The purchasers of land in the Estates Court are (with very rare exceptions) wholly ignorant of the points of difference between the two rival systems, and they place the matter entirely in the hands of their solicitors. The solicitors, willing to go in the groove to which they are accustomed, and in some instances not even making themselves acquainted with the new Act, send the clients for signature a form of "*requisition excluding the Act.*" Hence it follows that in about nine instances out of ten the new proprietor shuts himself out of the advantages which the Act was designed to confer upon him.

Such is the practical working of a voluntary and permissive Act. The fact that it *is* voluntary and permissive militates against its success. Over and over again the question has been asked—If Parliament really approves of this system of registering titles, why is it not made general and compulsory? The permissive clause may be regarded as merely a weak-minded evasion of responsibility on the part of the legislature, and as imposing undue responsibility on individuals. The solicitor, therefore, declines the responsibility of advising his client to come within the scope of a new law, as to which the legislature has spoken in so doubtful a manner, and which has not been construed and expounded by the Courts of Justice. In short, both in England and Ireland, the question has hitherto (to use plain language) been unworthily dealt with, if not shirked. A vastly improved system has been sanctioned in such a feeble and half-minded way that people are afraid of it; and on the whole they prefer evils to which they are accustomed, to benefits placed before them in an unattractive and inadequate manner.

The Report of 1870 shows that there was a notion abroad that Lord Westbury's Act "was not intended to work;" and in Ireland, when the legal profession saw that even offices and clerks—the ordinary machinery of business—were denied, they refused to believe that the new system was really intended to supersede the old registration of deeds, and many thought it unnecessary even to enquire into its merits. In short, the limited operation of the Act is distinctly chargeable on the unfavourable conditions under which it was introduced. Yet I

must emphatically deny that the Acts introducing registration of title in England under the Act of 1862, and in Ireland under the analogous Act of 1865, have proved to be failures. It is true that not more than five or six hundred separate properties altogether have been registered under each of those Acts. It is true that the rate of progress is so slow that centuries would be required for bringing the landed property of the country generally under the new system. What has been effected is little more than experimental, but the experiment has been tried and is found successful. If a new steam-plough is found effective in its working over an area of 50 acres, the conclusion naturally arrived at is that similar machinery would prove effective over the entire county. Large quantities of material are not regarded by chemists and other scientific enquirers as necessary for the purposes of experiment. As regards the Irish registration of title (that with which I am most intimately acquainted), it can be shown that, notwithstanding some defects in the Act, and many difficulties thrown in the way of its working, the result is highly promising. The machinery is found to work smoothly and satisfactorily, and so far it fulfils the hopes of its inventors. A parliamentary return of the session of 1872 shows that ordinary dealings with land may by its means be enormously simplified. A sale or mortgage may in ordinary cases be begun and completed within the space of one hour, and with absolute security to the purchaser or mortgagee. The new register even now is almost as simple in working as the bank register of Government stock. A few formalities as to due execution of instruments, identification, &c., are strictly observed, and very brief and simple forms of transfer and of charge may be used. I say *may* be used, because as the Act stands the parties are at liberty to draw up their instruments in any form which they may prefer. Sometimes long and complicated deeds are brought to the office, and as the officer is obliged carefully to read them over, in order that he may make a correct note of their contents and legal effect, delay is in such a case unavoidable. But where the short statutory forms are used, transactions are completed with hardly more delay than is involved in the transfer of Three per Cent. Consols, or of the stock of a railway company.

After careful consideration, extending over some years and aided by practical knowledge, I have come to the conclusion that Sir R. R. Torrens is right in requiring that simple forms of transfers, &c., should *alone* be accepted. Experience has shown that the business of a transfer office cannot be readily got through if the conveyancing forms are uncontrolled. Last

month, *e.g.*, a deed dealing with an estate on the Irish record of title, and which occupied fourteen folio pages of parchment, was brought for registration. It was in fact a settlement of no simple kind, and to any officer who had not been legally trained it was all but unintelligible; while the trained lawyer would hardly undertake to read and make a correct abstract of such a deed in much less than an hour. Such an incident would impede all the business of a public office, in which arrears must not be allowed to accumulate.

This option of bringing in deeds of any length, and in any form, is therefore one of the main defects of the system, as it is now in operation both in England and Ireland. The permissive character of the legislation hitherto effected is the other important defect. There are minor defects: but it is unnecessary to prolong this paper by entering into details which involve no principle, and which are only intelligible to such as are perfectly conversant with the existing Acts.

LONDON: PRINTED BY
SPOTTISWOODE AND CO., NEW-STREET SQUARE
AND PARLIAMENT STREET