A PLAN

FOR THE

COMPLETE AND FINAL SETTLEMENT OF THE QUESTION

AS REGARDS THE

Sale and Transfer, Mortgage and Registration

OF LAND,

AND WHICH PROVIDES FOR THE

TOTAL ABOLITION OF RECEIVERS EXCLUSIVELY OVER REAL ESTATE, EXCEPT IN THE CASE OF CHARGES, WITHOUT A POWER OF SALE OR OF ENTRY AND DISTRAINT,

APPLICABLE TO

ENGLAND AND WALES, AS WELL AS TO IRELAND.

BY

AN IRISH LANDOWNER.

DUBLIN:
PRINTED BY ROBERT CHAPMAN, TEMPLE-LANE, DAME-STREET.

1859.

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PREFACE.

The following statement, which I think unnecessary to change out of the form of a letter to the editor of a newspaper, pointing out a plan, as mentioned on the title page, contains the greater part of two former letters, with some variations and additions, the first of which I had intended to have brought under public notice through one of the London daily papers, last January; and the second, bearing date the 26th May last, through one of the newspapers in this city, prior to the meeting of the last session of Parliament, but in both cases was disappointed.

This statement shows, that this question—respecting which hitherto the most able lawyers have held directly opposite opinions—which Parliament has treated as if it was inexplicable, and could only be experimented on—is, in reality, one of plain common sense, perfectly within the comprehension of ordinary minds, and may be understood thoroughly, without being a member either of a university or an inn of court; and that the plan pointed out will be found to be what has never before been produced—namely, a complete solution of this question in every point of view.

Whenever the present Government or any of its members or measures are mentioned or alluded to, the late Government of the Earl of Derby is of course intended.

Although the last session of Parliament commenced on the 31st May, it in reality could not be said to have met for the despatch of business until the Prime Minister and several other members of the present Government took the oaths and their seats (after their re-election as members of the House of Commons) on the 30th June last, and during the short interval that elapsed between that period, and its being prorogued, was so very much occupied with other most important business, it would therefore have been quite useless under such circumstances to have repeated the attempt I made last May, by bringing forward my plan with any hope of having it passed into a law in the late session for Ireland alone; but I am now anxious without further delay

to make it public, in order that it can be properly considered in time to have that most desirable result secured for England, Wales, and Ireland in the next session.

I beg to direct particular attention to what I have stated with reference to the new securities I propose for loans on land, in pages from 19 to 26, both inclusive, and also in page 30,—I wish to add to what I have there stated respecting them, that the ease, facility and cheapness with which loans will be obtained on them, will completely obviate the necessity of, and do much more than, most amply compensate for the practice that prevails in England of obtaining loans on deposits of title deeds. This practice, at the utmost, as I understand it, only gives very partial relief; whereas, on the contrary, I believe it would be impossible to invent or produce any mode of borrowing money on the security of land which would give a greater amount of relief or confer a larger extent of benefit, than will be obtained from the securities in question, as I propose them.

In pointing out the evils of false plans for effecting the sale and mortgage of land, I have only very partially alluded to what may be said to be, if not the worst of all, at all events as bad as any others I have mentioned, namely, the old plan; but as so much has already been said and written to prove the abuses of this most enormous grievance, and as my aim was to keep the following statement within as narrow limits as possible, I therefore almost entirely confined myself therein to pointing out the dangers of false substitutes; but, on further consideration, I think it right to advert here to this old plan, as I feel the necessity for its complete removal cannot be too strongly urged.

A comparison of its evils, as stated in the Report of the Title Commissioners, and in the speech of Sir Hugh Cairns, on introducing the Landed Estates Bills for England into the House of Commons, on the 11th February last, with those of the false plans I have mentioned, will be quite sufficient, without citing any other evidence, in my opinion, to prove, that whether with or without a registry of deeds, it most justly merits the character I have above given of it.

THE AUTHOR.

Dublin, November, 1859.

A PLAN,

ETC.

Dublin, 26th May, 1859.

SIR—As Parliament will so soon assemble, I beg you will permit me, through the medium of your very influential journal, to call the attention of the landowners of Ireland to a question which concerns them and all persons having claims on or interests in land, *as well as capitalists and all parties having money to lend, directly*, and the public at large *indirectly*, far more vitally than any other—and that is the question with reference to the sale, mortgage and registration of land—with a view, at all events, so far as Ireland is concerned, of having such measures taken as will secure the passing of an act in the ensuing session for its complete and final settlement; and which, with a very moderate amount of exertion can, as I will point out, with the greatest ease, be accomplished.

The great benefit conferred by the Incumbered Estates Act, in my opinion, and which was undoubtedly the greatest improvement ever introduced in reference to dealing with land was the indefeasable title; and the great evil—which may be also termed the principle of the act—was confining this title exclusively to selling, and denying to owners the power to take advantage of it in borrowing directly on the security of their estates—which thereby placed selling and mortgaging land on exactly opposite principles.

Owners were consequently driven to the necessity of endeavouring to obtain the title by indirect means, or through the intervention of a sale; which practice has been so justly condemned, and in every instance, generally speaking, as I understand, where an incumbered owner whose estate was placed under the operation of the act, failed to procure the title in this last mentioned manner to enable him to

borrow or make a settlement of his affairs, it is clear he had to submit to let his estate be sold for whatever it brought, as borrowing on old or complicated titles became all but quite impossible; and it appears to me certain, that many estates, especially those in settlement, might be, and of course were so circumstanced, that they would not admit of the complications requisite to obtain the title by indirect means.

It will thus be seen that the introduction of the indefeasable title rendered all old or complicated titles, generally speaking, practically useless for either sale or mortgage—and then the act, by denying to owners the power to obtain the indefeasable title directly for the latter purpose, thereby forced the enormous quantity of incumbered land to be sold which was sold, and which reduced its value generally, and in many instances almost to confiscation in the period of depression which existed in the first years of the operation of the act, and thus caused all the serious and fatal consequences which happened to both owners and incumbrancers, and which consequences or any of them would not, or at any rate, need not, have happened at all, as I will presently unanswerably show, had owners been invested with the privilege of obtaining the new title directly for the purpose of mortgage.

And it further appears to me certain that the same law, if made permanent, would continue to force an excessive quantity of land to be sold, which would always keep it under value; and in a period of agricultural depression, which at all events may happen again—as, without seeking for any other cause —an extensive failure in the crops could at any time produce it—the quantity of land which would be sold might be vastly increased, and the reduction in value might even go to the extent it did in the first years of the operation of the Incumbered Estates Act, and therefore owners and incumbrancers would be always liable to most fatal results happening to them; and all purchasers under the act, when the titles to their estates would become complicated by settlements or otherwise, as no doubt would be the case in time, and who would be to any extent in debt, and incumbrancers on their estates would be just as liable to be prejudicially affected by this law as the former proprietors and incumbrancers were at any time.

But while the act effectually prevented an owner from borrowing directly on the security of his estate, it permitted any person to purchase an estate and borrow the entire purchase money on its security to pay for it, and, as will appear from the following extracts from two very able speeches

delivered by the Marquis of Clanricarde, on the occasions stated, in the House of Lords, the first on the 18th July, 1856, and the second on the 13th February, 1857, as reported in Hansard's Parliamentary Debates, a vast portion of the estates sold were paid for with money borrowed on their security, and in some instances the entire purchase money was so raised.

On the third reading of the Incumbered Estates Act Continuance Bill, 18th July, 1856—"He knew that one-third of the property bought in the Incumbered Estates Court had been paid for by borrowed money, and there were some cases in which the purchaser had not paid a single shilling, and some in which they were giving eight per cent. for the money they borrowed. If this were so, it clearly defeated the object which the bill was intended to accomplish."

On asking a question and moving for returns with reference to the Incumbered Estates Court, 13th February, 1857, "The court was not working as it ought to do for the benefit of the country, and he defied contradiction when he said that at that moment the *Incumbered Estates Court had increased the number of incumbered estates in Ireland.* It was a notorious fact that people intending to procure a better title than the original owner could show, borrowed money in order to effect purchases through the court, and that thus in some cases the estates *became more heavily mortgaged than they were before the sale.*"

It is in the first place to be observed that the above quotations not only prove what I have advanced with reference to the vast portion of estates purchased with borrowed money, but also show that the act provided the readiest possible means for creating, and to a very great extent has laid the foundation of a proprietary far more incumbered than the former proprietors were, making allowance for the length of time the estates were in possession of the latter and their ancestors, and the many vicissitudes they underwent; and further, that the act had the effect of generating a system of the most reckless and ruinous dealing speculation and, I may add, gambling in land.

The object sought to be attained by passing the act mentioned by the noble marquis, as above quoted, is distinctly set forth in the following quotation from the speech of Sir John Romilly, then solicitor-general, as reported in Hansard, on moving the introduction of the bill into the House of Commons, on the 26th April, 1849.

"The feeling of Government, however, was—that it was not enough to liberate the land of Ireland from incum-

brances, but that it was necessary also to take advantage of its freed state to prevent its being again reduced to its former condition. *The bill, he trusted, would directly effect that object.*"

This quotation therefore shows that the object of passing the act was, first, to disincumber land; and secondly, to prevent it from being re-incumbered. If the act then had the power of effecting the former purpose, the quotations I have made from the speeches of the noble marquis *unanswerably prove that the facility with which it permitted land to be re-incumbered, far more than neutralized that power, and that for the latter purpose it was not only altogether nugatory, but had a directly opposite effect.* It is obvious, then, this power of permitting estates to be purchased with money borrowed on their security, as the noble marquis most truly observed, clearly defeated the object which the act was intended to accomplish, and besides which there was the most pernicious practice of owners obtaining the indefeasable title by indirect means for the purpose of mortgage or otherwise, which of course had the same effect.

I may here observe that this latter practice of obtaining the title by indirect means, as far as I can understand, must in every case cause complications, which in many may be most serious, and which may hereafter be productive of most fatal results, which could not happen if the title was obtained by direct means.

It follows therefore that while the act, as I have shown, totally failed in effecting the object for which it was enacted, it had at the same time in a very great measure all the effects of a law passed to dispossess and disinherit incumbered proprietors; and as all proprietors are liable to become incumbered, that it struck at the root of the very existence of them all, and was thus in reality a very great, if not the greatest possible means of breaking through entails or settlements, and the law or right of primogeniture—short of a direct law to abolish them—and was consequently a most serious inroad on the constitution. It is obvious there can be no reason for continuing a law which has such results.

You will at once perceive, sir, that without giving this view of the case its proper weight, and which as far as I know has never been done, that legislation on this question must go on in the dark, and hence all the ineffectual attempts at its settlement which have hitherto been produced.

The 51st clause of the Landed Estates Act has remedied the state of things just mentioned, so far as lands held in fee-simple and fee-farm, if held under the fee direct, the owners

of which are enabled under it to obtain the indefeasable title for any purpose; but all lesser tenures than these, as I have learned, as well as all settled estates of all tenures, whether owing or having power to create debts on the fee, are excluded.

It is obvious then that incumbered owners of these latter tenures so excluded (and which tenures, as I consider, include by far the larger part of the property in the country), are still precisely in the same victimized position in which they were under the Incumbered Estates Act, as I have described.

I have no hesitation in saying, sir, that this is most unjust as well as most impolitic—there can be no reason given for it. I think you will agree with me, sir, that it ought to be forthwith remedied; and the relief to be complete, will require in order to place selling and mortgaging land exactly on the same principle, and nothing short of this can answer—that every owner who can apply for the sale of real estate or land, shall have liberty, if he so desires, instead and free from all controul, to apply to obtain the indefeasable title for the purpose of mortgage.

Had the 51st clause of the Landed Estates Act passed into law in the form in which it originally stood as the 50th clause in the first bill introduced into the House of Commons last year by the Attorney-General for Ireland, it would, as I believe, have effectually provided for this purpose. It certainly might have required some slight alteration in the way of more accurate definition, which could have been easily done; but this very obvious, reasonable, sensible, and just course was not permitted—the clause was altered, and when passed into law, its effects have been as I have just described.

It may, therefore, be held, that this clause is almost nugatory. I will just add, that Sir Hugh Cairns, the Solicitor-General, on introducing the Landed Estates Bills for England, into the House of Commons, on the 11th of February last, showed that the granting of the indefeasable title for the sale of encumbered estates, necessarily ultimately involved the granting it for all purposes, and then added by the *Times'* report—"The result was, the House came to the conclusion in the bill of last session, that the Landed Estates Court, before called the Incumbered Estates Court, should have the power of giving an indefeasable title in all cases of sale by the court, and to any owner of an estate who could prove his right to possess it." By this it appears the intention of Parliament was, at all events, to go to the extent I

require, but the means supplied have been quite inadequate for the purpose.

I admit the Landed Estates Act, by legalizing the true principle, although to the very limited extent stated, is a vast step in the right direction, and the present Government deserve great credit indeed for it; but you will observe, sir, it falls very far short of what is required.

The general impression in the public mind, as far as I have observed, has been, that the dire consequences produced by the Incumbered Estates Act in Ireland, in the first years after its enactment, were caused by the extensive powers given to incumbrancers under it. Lord Cranworth's Transfer of Land Bill introduced into the House of Lords, for England, last year, on the part of the late Government, appears to have been based entirely on this supposition—for under it incumbrancers had no direct power—and the privilege of obtaining the indefeasable title was confined to owners for the purpose of sale; and the noble and learned lord, on introducing it, distinctly pointed out that it was not a compulsory, but merely an enabling, bill.

But notwithstanding this high authority, and the fact that the House of Lords passed this bill, after its having gone through the ordeal of a select committee of their lordships, composed of some of the most eminent members of the House, both lay and law, I will easily show you, sir, that this supposition is a complete fallacy, and that this bill is or rather was, in reality, a mitigated Incumbered Estates Act in embryo. Had it become law, this state of things would have ensued. As it contained no power to borrow, in every instance to raise money under it, there should have been a sale. It would thus have had a direct tendency to lower the value of land, instead of raising it, by two years' purchase, as the noble and learned lord supposed. Then, judging from the example of Ireland, I am convinced that, generally speaking, no titles would have been acceptable to purchasers or lenders, but the indefeasable,—consequently, in every instance where a creditor required payment of his charge from an incumbered owner; and this would be sooner or later the case with every such owner in England and Wales, unless he would have been enabled to obtain the title by indirect means; and I have already pointed out that many estates might be so circumstanced, that they would not admit of the complications requisite to obtain the title in this manner; he might have been compelled to let his estate be sold for whatever it would have

brought, so that there might have been instances, and perhaps not a few—where consequences as fatal to both owners and incumbrancers would have happened, as any which occurred under the Incumbered Estates Act in Ireland. Besides this, there would have been the difficulties which owners, desirous to borrow, although not to pay an incumbrance, would have had to encounter.

You will thus perceive, sir, that even under that bill which was, I may say, the mildest possible form of the false principle of the Incumbered Estates Act, and applied to a class not in the state in which the Irish landowners were in 1849, '50, and '51, suffering after several years' potato failure, with losses of their incomes from the commencement of the failure, varying from a partial loss in some cases, to perhaps a total loss in others, and yet with heavily increased burdens in all; but applied to the landowners of England and Wales in the prosperous state in which they are at this day, that yet the serious and fatal consequences I have mentioned would have ensued; and that when such would have been the case, the supposition that the dire effects produced under the Incumbered Estates Act were caused by the powers given by it to incumbrancers, is a complete fallacy.

Then, again, on introducing the Landed Estates Bills for England on the 11th February last, Sir Hugh Cairns stated that the "particular objects for which the Incumbered Estates Court was in the first instance established in Ireland" were two, which were perfectly distinct—the first was to obtain the means of enforcing the compulsory sale of an encumbered estate; and the second, to give to the purchaser a parliamentary title—the last of which he proposed to extend to England; but the first he said he would be sorry to see introduced there, because there is no occasion for it; and added, by the *Times*' report—"The usual course of the law is sufficient to give incumbrancers opportunities to realize their securities whenever they are inclined." The meaning to be taken from this, as far as I can understand, is, that the honourable and learned gentleman believed that it was this first-mentioned element that caused all the dire consequences which occurred under the Act; and in this view, I take for granted, the entire House of Commons acquiesced, as not one of the members, so far as I saw, dissented, they all thus proving themselves to be as thoroughly impressed with this fallacy as Lord Cranworth and the House of Lords.

It is only necessary for me to add, in further and complete proof of what I have already shown to be the true cause of

these fatal consequences, and of the supposition just mentioned being a perfect fallacy, that it is manifest, that even with the compulsory power to sell — had the Incumbered Estates Act permitted owners to obtain the indefeasable title for the purpose of borrowing directly on the security of their estates, as readily as in case of sale, so that they could themselves have determined free from all controul whether they would mortgage or sell—this would have acted as a complete counterpoise to this compulsory power,—because the number of persons who would have borrowed, would have very materially lessened the quantity of land for sale; and thus, instead of falling, it would have been far more likely to have risen very considerably in value; then the facility of obtaining loans would have rendered unnecessary, if not have effectually prevented compulsory sales; and the high price of land, and the whole course of proceeding would, or at all events might, have secured both owners and incumbrancers from, it may be said, losses of any kind; and besides this plan of fair, intelligible, straight forward, and plain dealing would have prevented the plan of obtaining the indefeasable title by indirect means, which has been so justly condemned.

Besides this, it appears clear to me that had the Incumbered Estates Act contained the compulsory power only and not the indefeasable title, it would have proved as completely ineffectual as its predecessor—the first Incumbered Estates Act, passed in 1848, did—as, without giving any other reason, I do not believe purchasers would have been had for the estates on the complicated old titles.

From every point of view, therefore, the conclusion is arrived at, that the indefeasable title was the great moving power of the act, which by its incalculable superiority over the old title, rendered the latter, as I have shown, generally speaking, practically useless for either sale or mortgage; and then the exelusive application of the former title to selling, which was the principle and great evil of the act, was the cause of all the fatal consequences which occurred under it; and moreover, it is equally clear that the same principle at once embraced and effected the two objects, to effect which Sir Hugh Cairns stated the act was passed, as quoted; and further, that these two objects thus effected through or by this principle were in fact not the objects or ends at all, but the means provided, and which entirely failed to effect the *real object* sought to be attained by the act, as I have already shown, namely, to disincumber land, and prevent it from being re-incumbered.

Another proof of the very great misconception which has hitherto prevailed with reference to this most important question, is to be found in the report of the Title Commissioners, published in May, 1857. The plan recommended therein goes to the full extent of curing the great evil I complain of, inasmuch as it permits any owner to get his title made indefeasable, and then either borrow or sell, whichever he wishes. But although the true principle is thus embraced, the report does not give any reason for it being done, and the great anomaly is thus presented of the Report and of Mr. Lewis's bills to carry the plan recommended therein into effect, and which is represented as being peculiarly applicable to Ireland, being in direct opposition on this most vital principle to the principle of the Incumbered Estates Act, and also to the report of the Commissioners thereon, to the bill of the late Government, grounded on such report, to the Chancery bills introduced by the present Attorney-General for Ireland, providing for the sale of real estate, and to the resolutions of the Chancery Committee of the House of Commons of 1856, all these latter having for their object the making of the principle of the Incumbered Estates Act, that is, confining the indefeasable title exclusively to selling, (the extension of the principle to unincumbered estates, as nearly all these propositions, as I recollect, provided for or recommended in no way, as I consider, changed its nature in respect of being confined exclusiuely to selling) permanent in Ireland, and all this without any reason or cause being assigned, at least so far as I have observed in the report; and the conclusion is, therefore, at all events, apparently inevitable, that the Commissioners were not even conscious of there being any difference at all between these two directly opposite principles.

This great omission, you will perceive, sir, I most amply supply, in other words, I show why mortgaging and selling land must be placed on the same principle, and this the report has not done, although the plan of the Commissioners does so place them.

In the *Times'* report of the debate which took place in the House of Commons on the 2nd of March last, on Mr. Locke King's motion to apply the same rule to real which is now applied to personal property in cases of intestacy, Sir Hugh Cairns concluded a long and able speech in opposition to the motion, as follows:—

"No doubt the hon. gentleman had read with the pleasure, which all who had perused it must have felt, the work of that eminent authority, M. de Montalembert, on the FUTURE OF ENGLAND. In a very interesting chapter, the author treated

of the effects of the law of settlement and entail, and the right of inheritance in this country, as contrasted with the contrary system in France; and pointed out with singular felicity the operation of our law in preventing on the one side the impulse of democracy, and in checking the influence of despotism on the other. M. de Montalembert wound up his chapter in these words:—

"The tempest will pass harmless over England until the day arrives when the force of public opinion shall declare itself against this system. Then, and not till then, she will have taken the first step on that incline which precipitates a nation through the shocks of revolution into the abyss of despotism. Up to the present time there has been but one premonitory symptom of this—the proposal made in the House of Commons in 1854, by the hon. member for Surrey, for an inquiry into the law of descent. Rejected by a considerable majority, this proposal appears neither to have found an echo nor to have left a trace. But it is an omen which far-seeing men, which all true friends of liberty will do well not to forget, for it is through this approach that the enemy will penetrate the fortress."

I make this quotation to show what has for many years been my own opinion—that this system is the chief corner-stone or great mainstay of the mixed form of government which exists in this empire, and if removed, Constitutional monarchy would become as impossible in the United Kingdom as it has proved to be in France.

This is explained by the fact that the House of Lords rests on this system, and if abolished, the estates of their lordships (in addition to those of all other land owners) would very soon become cut up and subdivided, so that their rank, station and independence would cease to exist, and the impossibility of their continuance as a distinct branch of the legislature would soon after follow as a natural consequence. This most essential element being thus removed, constitutional monarchy would, as a matter of course, become impossible—the choice then would lie between some form of a republic and absolute monarchy. But, as appears to me, what would be most likely to happen, provided the nation remained united and independent, would be—that it would be subjected to repeated revolutions, and to governments alternating or varying between both the forms just mentioned, to some extent, as was the case in France from 1789 to 1814, when, I may say, by the might of all Europe, a constitutional monarchy was established there, and then subsequently from the final destruc-

tion of the latter in 1848, up to the present time. Permanent, fixed and settled government in any form would be found to be quite impossible; a republic—however it might go on for a short time—would surely end in anarchy or despotism; and the only hope for anything like order would be in an absolute monarchy. And there cannot be the slightest doubt that the people would hail with joy the advent of a powerful monarch, like the greatest master-mind of the present age, and I believe I may say, as great as ever appeared in any age—His Imperial Majesty, the Emperor Napoleon III.—to save them; or, at all events, as the best possible means of giving them some respite from anarchy and chaos.

It will thus be seen that the destruction of the system would, indeed, "precipitate the nation through the shocks of revolution into the abyss of despotism," agreeable to the statement of M. de Montalembert, above quoted. In fact, I may add, that the consequences of the forced subdivision of land which would be the certain result of the destruction of the system in the United Kingdom, would be even more serious and fatal than any effects which the forced subdivision of land in France, and I may add, all other causes, have produced in that country up to the present time.

The limits of this letter will not permit me at present to go into detail to prove and develop all this; but I am fully prepared to do so in the most unanswerable manner, and the statement I can make, by showing the plain and abvious consequences that could not fail to result to ALL CLASSES in the empire, will, I have no doubt, by being properly put forward, always keep the public mind sane with reference to this system, and, humanly speaking, prevent the day from ever arriving when the force of public opinion shall declare against it.

But although it may be, or may be made, perfectly secure from outward or direct attack—such as Mr. Locke King's motion, or otherwise—I think, sir, the detail I have given of the action and effects of the Incumbered Estates Act, and the consequences that would have resulted from Lord Cranworth's Transfer of Land Bill, had it passed into law, as well as the following extracts from the speeches of Lord St. Leonards and Lord Cranworth, with reference to the plan of the Title Commissioners, sufficiently shows, without bringing forward any other proof, that the system may be so sapped and undermined by a false plan for effecting the sale and mortgage of land, that its complete destruction may thus indirectly be rendered quite certain.

Lord St. Leonards on the introduction of his bill to simplify the transfer of real estate, and to relieve purchasers, into the House of Lords, on the 21st July, 1857, as reported in *Hansard's Debates*, stated—"Another effect of the proposal of the Commissioners would be to strike at the root of all settlements for family purposes; for, from the very nature of the case, no settlement could ever find a place on the registry. In order to guard against fraudulent sales, a system of caveats had been invented, by which the person who was put upon the registry might be prohibited from acting as owner of the property until the caveat had been disposed of, either by order of the Court of Chancery, or in some other way; but the result of such a system would be, in every case of a settlement, to call in the aid of the Court of Chancery, thereby greatly adding to the expense. The real history of the transaction was—that in order to render land saleable with as great facility as stock or railway shares, it was proposed to sacrifice all the advantages derived from the power of making family settlements. Again, in addition to its being impossible to include settlements in registrations, the effect of the registration would be to take away the authority of exercising powers created under the settlement; for if the whole fee-simple of an estate was vested in the person who was registered, it was impossible that any one else could concurrently claim the exercise of any powers connected with that estate by settlement, so as to carry the legal estate.—Johnson tells us that sham is a vulgar word; but still he must say this plan of placing a stranger on the register as the real owner, is a sham; and yet with a terrible reality, for this sham owner may sell or mortgage the estate. Let any noble lord imagine his estate to stand in a public registry as the property of Thomas Jones or William Smith, and his own rights and those of his family, under the settlement ignored."

Lord Cranworth on moving that his Transfer of Land Bill and Tenants for Life Trustees, &c. Bill, be read a second time in the House of Lords, on the 23rd March, 1858, as reported in *Hansard*, stated — "That commission was issued to gentlemen of great eminence, including among their number the right hon. gentleman the present Secretary of State for the Home Department (Mr. Walpole), and the subject was considered with great attention; and in May last year, the commission issued a report, which recommended an elaborate system of registration, having for its object to convert the whole system at present in use for the transfer

of real estate into a system bearing a close analogy to that by which shares in public companies, such as railway shares, were transferred. He felt it to be his duty to consider that report with the utmost attention, and he confessed that the result had been that he had come to the conclusion that such a course would not be safe or prudent, even if it were practicable, which he very much questioned."

It will be observed that this unqualified condemnation of the plan of the Title Commissioners, who included amongst their number some of the very first lawyers in both England and Ireland—took three years and nearly four months to determine this question, and made a most elaborate report, substantially amounts to this—that the plan is, in reality, impracticable; and, even if practicable, that it would completely take away the security which the system of entails and primogeniture requires, open a wide door for most extensive frauds, and greatly increase the expense of the transfer and mortgage of land; and this opinion must be admitted to come from the very highest legal and judicial authority in the empire. Lord St. Leonards I have always understood is the most able equity lawyer in either England or Ireland, and filled the office of Lord Chancellor in both countries; and Lord Cranworth occupied the same position in the former country, and was therefore virtual minister of justice in two successive administrations, and for a period of between five and six years; and moreover as those two noble and learned lords differ perhaps almost, if not altogether, as much from each other on this question as they both do from the Title Commissioners, as the objections of Lord St. Leonards in his speech in the debate on Lord Cranworth's Bills, on the 23rd March, 1858, will, I think, without bringing forward any other evidence, sufficiently show; it may therefore be held that their unanimity of opinion with reference to the plan of the Commissioners, proceeds from opposite points of view, which, of course, makes it much stronger.

It is obvious, therefore, that in removing the old plan for the sale and mortgage of land—which is an absolute disgrace to the very name of justice—and substituting a new plan in its stead, the greatest care should be taken that the latter plan should be provided with a complete safeguard for the system, or in other words, the plan must be placed in perfect harmony and not at enmity with the system.

Now, sir, as far as I know, no royal commission or parliamentary committee has ever produced such a plan—

neither has the like ever been proposed on behalf of any party or by any person in or out of Parliament. But the possibility of false legislation producing, at all events, most fatal results in the state of great misconception which I have shown to exist in the public mind with reference to this question—and consequently the very great danger of leaving the country unprovided with such a plan any longer—is, I think, abundantly proved; first, by the strenuous efforts made, I may say, by all parties to make what I have shown to be the utterly false principle of the Incumbered Estates Act permanent in Ireland, as already mentioned; secondly, by the great defect in the Landed Estates Act, already pointed out, without any attempt being made to remedy it; thirdly, by the Transfer of Land Bill introduced by Lord Cranworth, and quietly passed by the House of Lords, *with a complete absence of even the slightest pressure from without;* although, it is plain from the description I have given of its effects had it become law, it might actually have deprived some of their lordships of their estates, and would have been a most serious inroad on their order and on the constitution; and lastly, by the fact that although the plan of the Title Commissioners has been characterized by Lord St. Leonards and Lord Cranworth as I have already quoted, it has nevertheless been made the basis of the measure introduced for England, on the 11th of February last, by Sir Hugh Cairns; and which latter, although approved and sanctioned by Sir Richard Bethell, the late Attorney-General, was most violently opposed: and in the speech of Mr. Hadfield, the member for Sheffield, against it on the 14th March, he stated—by the *Times'* report—"In the opinion of the profession this bill would not diminish but would rather increase the expenses attending the transfer of real property, while it would multiply to a vast extent the opportunities of fraud."

Being myself a tenant for life to an incumbered estate, and being deeply interested in this question, and seeing no hope of a correct settlement of it from any quarter, and the matter appearing to me quite plain and simple, I some years ago prepared a plan myself, and have altered the Securities for Advances Bill (which was introduced into the House of Commons by Sir John Romilly, in 1850, and afterwards abandoned), and have drawn some additional clauses to supply the required aid in carrying it into effect. This plan I have been endeavouring for a very long period to bring before Parliament and the public, but hitherto without suc-

cess. It is just such a one as I have mentioned — goes directly to the cure of the great evil I complain of—extends the indefeasable title to borrowing—makes all sales and loans judicial acts—and gives to every owner who shall be authorized to apply to the Court to sell real estate, otherwise land, the power, if he shall so desire, instead and free from all control, to apply to the Court to obtain a loan of money on the security of such estate or land, and thus places selling and mortgaging land on precisely the same principle. Moreover, it is equally applicable to England and Wales as well as to Ireland, and will be found to answer in every possible point of view.

It has the singular merit of being in strict accordance with the rules laid down by the Title Commissioners in their report, as those which ought to form a correct plan* on the one hand, and steers entirely clear of the objections of Lord St. Leonards and Lord Cranworth to the plan of the said Commissioners, as well as of all the objections charged against the Government measure for England, introduced by Sir Hugh Cairns, on the 11th of February last, on the other.

In fact, the benefits it would confer on landowners, persons having claims on or interests in land, as well as on persons desirous to lend money on the security of land, COULD NOT BE EXCEEDED. By giving to every owner the power to determine himself whether he would borrow or sell, and then, by giving to every purchaser and lender an indefeasable title direct from the court, owners would always be certain of obtaining the very highest price for their land, and loans at the very lowest rate of interest; and purchasers and lenders, on the other hand, would always be equally certain of obtaining titles which would be free from all doubt.

It is manifest the effect of these incalculable advantages could not fail to be to raise the price of land several years' purchase. It is, of course, out of my power to state the exact rate of increase; but I think I may in reason and with safety fix it at from six to ten years' purchase, at the very least; while a corresponding fall in the rate of interest on loans on land would be produced, of from one half to one and a half per cent.

The new securities—certificates of charge—which I propose, shall supersede all those now in existence for loans on land, will be of such a nature, as that while they can remain

* See Postscript, page 27.

outstanding for any number of years or generations that mortgagors, or their representatives, may require, may, notwithstanding, be converted into cash in one day, perhaps one hour, at any time a mortgagee may wish; and in case of enforcing payment, while I make it impossible for a mortgagee to be kept out of payment of his charge beyond a certain fixed time, up to that time the mortgagor or any person interested in the land, or any person or persons on his, her, or their behalf, can redeem at a merely nominal expense, and perhaps in a day or less, as there will be no difficulty in getting a banker or capitalist to take an assignment of the charge. This is at once explained in this way—these securities being direct from the court, the question of title would never arise at all; the only question that could come between the parties would be that of value, and I provide for this in such a manner, that it might be ascertained in perhaps one hour. Further, they will be transferable by endorsement, free from all duty, without any application to the court, and at a merely nominal expense, and will thus possess in reality all the negotiability of a bill of exchange, and all the stability of the very best mortgage.

As all sales, loans, and other disposals of property by the court would be judicial acts, which should be registered, this would render unnecessary the registering of any other acts or deeds having reference thereto, and thus the great departmental question of Registration would get a complete and final settlement.

Again, sir, this plan would provide the most certain means of making a court to carry it into effect self-supporting; because, as I have just shown, owners would be always sure of obtaining the very highest price for their land and loans at the very lowest rate of interest, and after an indefeasable title was once conferred on an estate, all the subsequent dealings therewith would be quite simple, and the law expenses merely nominal. A small duty therefore on each sale and loan would in reality not be felt by owners; then by making loans as well as sales judicial acts, and taxing them, (the duty in the case of loans to be charged only on the sum borrowed, and not on the value of the estate or land given in security,) the frequent applications to the court, and vast diminution of work to be done in each case, would not only enable the uniform maximum rate of duty to be fixed at one half per cent. on all disposals of property by the court, whether by sale, loan or otherwise, but will, I am satisfied, in this way provide a far more ample fund to make

the court self-supporting, than a fund created in the manner provided by the Landed Estates Act, even if the 51st clause of this Act should be amended, so as to include all tenures.

In fact, I am of opinion, that even at this low rate of of duty, this plan will provide a fund not only sufficient to carry it into effect, but also to give a surplus to the *general* revenue of the empire, and which will amply compensate for the loss of the stamp duty on *assignments* of mortgages, and of all securities in the nature of such, consequent on exempting *transfers* of certificates of charge from all duty.

As the means of paying incumbrances which would be placed in the hands of owners, whether by sale or loan, would be so prompt and ready, and as the means of enforcing payment thereof in case owners would be so unwise as to render such a course necessary, would also be so prompt and ready, it would follow that this plan would of itself put an end to the appointment of Receivers exclusively over real estate on foot of any charges thereon, except, as I consider, in the case of an annuity or jointure, or other charge, without a power of sale, or of entry and distraint, because it would remove the necessity for such appointment; and this is independant of the fact, that on foot of a certificate of charge, no receiver could be appointed. It is obvious then this plan will render quite unnecessary the bill for the abolition of receivers, introduced by the Attorney-General for Ireland in the last session of Parliament, because it will provide a far more effectual method for keeping that system within just and proper limits than that bill does.

Under this plan an owner could not be deprived of his estate for debt without his own consent; because the power to borrow on the certificate of charge would always enable him to prevent a sale, if he thought proper, and thus secure his estate from being lost to his heirs. And this could be done without the slightest injury to an incumbrancer, but the reverse, for it would not require a longer period to raise money to pay the latter by a loan than by a sale; but on the contrary, in the great majority of cases, a much shorter period, and in the remainder (which would certainly be very few, if any at all) at least as short as by a sale. Further, this plan would make it impossible for the legal or equitable owner of an estate to sell or mortgage, or for a sale to take place at the suit of an incumbrancer under deed or will, or of an executor or administrator, or of any other party, without the best possible care being taken of the interests of all

persons having claims thereon, however remote or contingent. To explain this, it is sufficient to say that the investigation of title would be judicial—the superiority of which (with its adjuncts of power to examine parties and their agents, and publicity) over private investigations, has been shown by Sir Hugh Cairns in his speech on the 11th of February last, already referred to. Then, as I have before stated, when once an indefeasable title was conferred on an estate, all the after dealings therewith, whether by sale or loan, would be quite simple. In no case would the investigation of title extend farther back than the last preceding sale or loan, as the case might be. Statements of title would be quite short, so that a judge would have no difficulty in determining (in the great majority of cases in perhaps one hour) whether or not he would be authorized in sanctioning a new sale or loan ; and also in ascertaining and providing for the rights of parties who might derive under settlements, whether absent or present, born or unborn. Then again, the time occupied to raise money to pay a charge, or for any other purpose, would be so short, and the expenses so small, that an estate never could become engulphed in debt by such an enormous accumulation of law costs, and perhaps other incidental or consequential charges or losses, as that its redemption from this cause alone—as under the old plan—would become almost, if not altogether, impossible.

Further, in enforcing payment of certificates of charge, there would of course be no necessity for an investigation of title, as that would have taken place before the certificate was issued—there would then be nothing to do but to sell. But I have provided that the fullest publicity shall be given, and that all necessary proceedings, as in case of other sales, shall be adopted ; but that no sale shall take place before a given time after the application to the court for a sale, unless with the written consent of the owner, and all parties interested in an estate. This will give those parties, or any of them, ample time to redeem many times over, if they think proper, so that it will be always in their power to prevent a sale ; and if such should take place contrary to their wishes, they will have themselves to blame only, and no other party. On the other hand, if a sale must go on, it can be effected and the whole debt paid over to the party entitled to receive it in as short a time as—if not a much shorter time than—by any other just plan yet produced, or which can be produced, and, generally speaking, in as short a time as any part at all could be got through a Receiver, and in most cases probably

in a much shorter. Then, again, as the owner of a certificate applying for a sale might not be the first incumbrancer, and as it would of course be unjust to the latter party, by weakening the security upon which his charge rested, if a sale took place, to pay a subsequent incumbrancer, I have further provided, that on every application for a sale on foot of a certificate of charge, that all or any prior incumbrances being principal sums, having a power of sale, but not otherwise, shall become due and payable, if the owners wish, and notwithstanding any unexpired agreements between them and the owner of the estate—annual or other charges, without a power of sale, need not, I believe, be included, inasmuch as the land should be sold subject to them—but on the redemption of the certificate in respect of which application is made for a sale, by or on behalf of any of the parties I have mentioned, and which can be effected at an almost nominal cost, a complete stop is put to the whole proceedings, and all parties are replaced in exactly the same position as if no application at all had been made for a sale, with the single exception of any new arrangement which may have been made with reference to the last mentioned certificate as to extension of time or otherwise. On the whole, therefore, it follows from every point of view, first, that this plan would provide a complete safeguard against fraud or unfair dealing of any kind, to as great an extent as would be possible; and secondly, that it would be in perfect harmony with the system of entails and primogeniture, which would, consequently, be placed by it not only in a much more secure position than ever before, but also in the most secure position in which this system can by human means be placed.

Moreover, sir, this plan when passed into law, would be complete and final in every point of view, and would never require any after legislation; because it could not break down, become complicated or ineffectual, inasmuch as a court would be provided to determine every distinct sale, partition, exchange or division of and loan on every distinct estate or part of an estate; and because the other results I mention would be secured. Had it been law in Ireland in 1847 it would not have broken down, and become practically ineffectual as the old plan did—and thus proved the necessity for fresh legislation. But, on the contrary, it would have carried this country triumphantly through the famine and its consequences, and the Incumbered Estates Act, I am convinced, would never have been thought of.

I know Ireland has improved since the latter Act was

passed, but I deny that this improvement has been effected by this Act. It has, in my mind, arisen from causes entirely unconnected therewith, and which the authors of the Act could never have foreseen. The first was the vast emigration to America, carried on by funds supplied from thence, which lightened the poor rates, and made properties saleable which otherwise would not have been so. Secondly, the discovery of gold in Australia, which gave a great impetus to commerce, and made money abundant; and, lastly, the late Russian war, which materially enhanced the value of agricultural produce. Had these causes not arisen, the Act could not fail to have broken down, as purchasers would not have been had for many of the estates sold, and then there would have been no proper solution of the difficulty but in my plan. There is no doubt many of the new proprietors have materially improved their estates, but these parties might not have purchased at all, had the causes I have mentioned not arisen, or had they done so, they would have been so clogged with low prices and high rates, that they could not have acted as they have done. Their acts, therefore, have no right to be taken into account.

I am of opinion, sir, there is one consideration distinct from every other I have mentioned, that should make it a matter of the most paramount importance with Parliament to have the certificates of charge created with the least possible delay—and that is the terrific calamities which have occurred with reference to joint stock banks. These have made a deep impression on the public mind, and it must now, I think, be quite apparent that such establishments do not and cannot afford complete security for the investment of money. It is not, as I conceive, in their nature to do so, because they are mercantile concerns, which are always more or less exposed to risk, and because the whole property must be handed over to the sole control and jurisdiction of a few individuals, and the entire security depends on the manner in which these persons perform the trust thus reposed in them; or, in other words, not on the amount of property a company may possess, but on the use the directors may make of it.

Although, in the great majority of cases, the trust thus reposed has providentially been most honorably fulfilled, yet it is plain, from the examples of the Tipperary Bank, the Royal British Bank, and, I may add, the Western Bank of Scotland, that when an opposite course is desired, it can, or at any rate will now, be carried into effect as well as at any

former period, and it does not appear to me that any legislation can effectually cure this state of things. Under such circumstances I say, sir, and I think you will agree with me, that it is the bounden duty of the legislature to have these certificates of charge brought into existence, which it is clear, as I have shown, will be entirely free from all defect.

With reference to a court to carry the plan into effect, so far as Ireland is concerned, there will be no difficulty at all, because the Landed Estates Court will answer in every respect; and the simplification of title which will be produced will be so great, and the consequent vast diminution of work to be done in each case, that while there may be some new or additional officers required beyond what are or may be necessary to carry out that Act in its present form, I do not think there would be many; but whatever the number might be, the plan will, I am of opinion, provide ample funds to pay him or them, and yield a surplus after, as already stated. The clauses I have drawn, which are, of course, unprofessionally done, were prepared under the impression that the Court of Chancery would be the court fixed on to carry out the plan, aud they are all but two fitted for that court. But it will be very easy to make the required alterations, so as that these clauses can be made to suit the new court, either by incorporation in the Landed Estates Act, or by passing them in a separate act.

You will thus perceive, sir, there would not be the slightest difficulty in having an act, in one or other of these forms, passed in the ensuing session—short, as no doubt, it will be—and therefore there can be no reason whatever why this should not be accomplished.

With reference to England, there can, of course, be no difficulty in creating a similar court, with an additional number of judges, and also in establishing one registry office in London for all England and Wales—the Government measure introduced by Sir Hugh Cairns last February, already mentioned, contained a somewhat similar element.

It appears to me, sir, to be of vast importance to place England and Ireland as nearly as possible under the one law on the subject. Such a course will, I think, secure both countries more completely from false legislation in the matter.

You will further perceive, sir, that my plan fully warrants the character I have already given of it, and that it will effect what has never yet been done—namely, a complete and final settlement of this most important question, taken

in every possible point of view; and that, even if the 51st clause of the Landed Estates Act should be amended so as to include all tenures, it would still be very far inferior to my plan.

I cannot conclude without saying, that while I am of opinion, as already stated, that a duty of one half per cent. on all sales, loans, and other disposals of property by the court, would create a fund which would not only carry the plan into effect, but would also yield a surplus which would amply compensate for exempting transfers of certificates of charge from all duty, and for, as appears to me, the very sufficient reasons I have given, and which may be shortly summed up as follows, viz.—first, the vast simplification of title which would be produced; secondly, the consequent great diminution and small amount of work which would require to be done in each case; and, thirdly, the numerous applications to the court—and therefore large amount of property which should pay duty. Yet, when I consider the enormous benefit this plan would confer on landowners—the very great increase which could not fail to take place in the value of their properties—the fall in the rate of interest on loans on land—the fact that after an indefeasable title was once conferred on an estate, all the subsequent dealings therewith would be quite simple, and the law expenses merely nominal, so that the duty, in addition to the stamp duty, would be very nearly the only charge—that although certificates of charge on being issued, should pay the correct duty, all transfers or assignments of the same would be entirely free, I am, therefore, further of opinion, that if Parliament should, for the purpose of revenue, add another or an additional one half per cent., and thus make the duty one per cent., that this could not and ought not to be objected to, inasmuch as it would be a very small charge indeed in comparison to the vast advantages the plan would confer.

POSTSCRIPT.

THE foregoing was the limit I had assigned to myself at present, but as I have stated in page 19, that this plan is "in strict accordance with the rules laid down by the Title Commissioners in their report, as those which ought to form a correct plan," it has occurred to me, that it is necessary to add the proofs of this, I am therefore compelled to make a further extract from the papers I have now for some years written in support of my views, with some alterations.

The 13th section of the report states—"From what has been said, we think it may be concluded that the great objects which the reform of this branch of the law ought to have in view, range under the following heads, viz.—

1—Security of Title.
2—Simplification of Title.
3—A Record of the actual Ownership.
4—Simplification of the Form of Conveyance, and general facility of Transfer.

"We do not conceive, indeed, that it is necessarily an objection to any proposition for a system of registration that it is not adapted to accomplish all these objects. It may be sufficient for us to say, that if different systems of registration be proposed for consideration, that system which is found to secure these objects in the fullest extent, will best secure the interests of landowners and the public generally, and furnish the surest remedy for the evils out of which the demand for a registry of assurances arose."

With reference to the first of the above heads: as every purchaser and lender, as well as all persons who would partition, exchange, or divide their estates, would get an indefeasable title direct from the court—of course it would be

impossible to effect greater security of title. Then, as to the second, I have shown that when once an indefeasable title was conferred on an estate, all the subsequent dealings therewith would be quite simple, so that a judge would be enabled, in the great majority of cases, in perhaps one hour, to determine whether or not he would be authorized in sanctioning a new sale or loan. In fact I do not see what could then affect titles, except the construction of a difficult settlement or will, which certainly might be of rare occurrence, but even in a case of this nature, the plan would be by far the best, because the difficulty never could arrive at a complication, inasmuch as an estate in any way so circumstanced, never could be sold, or mortgaged, and, I might add, partitioned, exchanged or divided, without the real intentions of the settler or testator being as correctly as possible ascertained, and finally fixed and determined, in so far at all events as might be requisite for these purposes, or any of them, by the machinery of a judicial investigation of title, the benefits of which I have already pointed out. I therefore do not believe any better means can be invented to effect simplification of title.

With reference to the third head. A record of the actual ownership would not be requisite under this plan at all, because the object of keeping such a record would be done away with altogether, inasmuch as not only a far superior but the very best possible means would be supplied to effect the real and substantial purpose for which it was proposed, namely, to provide a proper party to grant an indefeasable title, and which means would be entirely free from all the objections charged against the plans produced in accordance with this recommendation of the Commissioners, as I have shown, namely, their own plan and the Government measure based thereon.

Lastly, as to the fourth of the above heads. I think it would be difficult, if not impossible, at any rate quite unnecessary to frame any more simple forms than the Incumbered Estates Conveyance and the Certificate of Charge, as I propose it; and consistently with providing complete safeguards for the system of entails and primogeniture, as well as against frauds or unfair dealing of any kind, I believe that it would be quite impossible to produce a plan that would be better calculated to effect general facility of transfer.

It will thus be seen, that by rejecting the means proposed by the Commissioners in the third of the above heads, and following the course I have taken instead, I have produced

a plan in the strictest accordance with the rules laid down by them, above quoted, as those which ought to form a correct plan, or, as they call it, system of registration, viz.—"If different systems of registration be proposed for consideration, that system which is found to secure these objects [the four above heads] in the fullest extent, will best secure the interests of landowners and the public generally." But, on the other hand, had I adopted the means proposed by them, I could not have done so, because it is clear, that where the whole fee and inheritance of an estate would be vested in the registered, or, as Lord St. Leonards aptly styles him, the sham owner, and where in consequence he would be the proper party to make an absolute conveyance and grant an indefeasable title of the same, and when to control him recourse should be had to disabling acts—inhibitions, distringases, or caveats—it would be utterly impossible to produce a plan, with these elements as ingredients, which would be free from, at all events, the main and substantial or most objectionable part of the charges which Lord St. Leonards and Lord Cranworth have brought against the plan of the Commissioners, as already quoted, and which would not be justly liable to the charges which the profession in England, according to Mr. Hadfield, have brought against the Government measure, as also already quoted.

It is manifest, therefore, that a plan with these elements, or, in other words, the means proposed in the third of the above heads included, would not "best secure the interests of landowners and the public generally;" but on the contrary my plan, by providing that no party but a judge can make an absolute conveyance of and grant an indefeasable title to an estate, after having passed such title through the machinery of a judicial investigation, thereby steers entirely clear of the charges I have mentioned altogether.

The 82nd section of the Report states—"That there is no feeling more strongly rooted in the public mind than dislike of official interference with their private affairs, and any system must be considered practically impossible, however theoretically perfect, which would render the approval or sanction of a registrar necessary for the completion of transfers, or would give him any discretionary power to prevent them." In compliance with this, it will be seen, that while my plan would confer the indefeasable title by a judicial act, it would, at the same time, leave every owner free to do what he pleased with his own. Any owner might either borrow or sell, and the court would have no power to con-

trol him ; but an able judge (aided by the most approved machinery) would be provided, to determine that he really was dealing with his own, and not with what belonged to any one else. Besides this, I have already shown that an owner could not be deprived of his estate for debt without his own consent, because the power to borrow on the certificate of charge would always enable him to prevent a sale if he thought proper, without the slightest injury to an incumbrancer, but the reverse. It would therefore, I think, be quite impossible to produce a plan in more strict accordance with the above quotation.

Again, as this plan would provide for the registration of all sales, mortgages, and other disposals of property by the court *only*, and not for any other acts or deeds having reference thereto, I therefore submit it may be held to obviate all the objections which the Report brings against the registration of assurances.

It will thus be seen, I am fully warranted in asserting, that my plan is in strict accordance with the rules laid down by the Commissioners in their Report, as those which ought to form a correct one.

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