

REGISTRATION OF TITLE INDISPENSABLE

FOR

PEASANT PROPRIETORSHIP.

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## REGISTRATION OF TITLE INDISPENSABLE FOR PEASANT PROPRIETORS.



THE subject of this paper is a branch of the large and difficult problem which increasingly engages the attention of social and legal reformers; how, namely, to combine security of titles to landed properties with facilities for dealings with them. It is a branch, however, which in Ireland, and at the present juncture, possesses extreme and exceptional importance, a satisfactory and prompt solution being urgently needed. The question might with almost equal propriety have been brought before either the Juridical or the Economic sections of this Association. I have selected the former because, while a general consensus of opinion exists in favour of reforming the present cumbrous, dilatory, and expensive system of legal conveyancing, great differences prevail as to the mode and even the possibility of effecting this reform. These differences proceed mainly from members of the legal profession. I do not speak merely of the obstacles which routine, prejudice, and self-interest oppose. The opponents of Registration of Title include men who are not adverse to such a reform in principle, and as an ultimate goal, but who believe that it is not practically attainable without other and previous reforms. It is more especially urged that the entire social and legal system of settlements must be abolished, as a preliminary condition for placing Registration of Title upon a basis which can make it work effectually for the practical objects contemplated—namely, to promote sales and other commercial dealings with land by increasing facilities and removing artificial obstacles. Now I do not underrate the force of these objections so far as they apply to a general scheme for registering all titles to land in England or Ireland. Nor do I contest the paramount importance of substituting for the feudal law of titles, which still regulates land in these countries, simpler and juster principles, better adapted to the sentiments and wants of modern society. Still I am not convinced that these fundamental social reforms are indispensable as conditions precedent even to a general system of conveyancing, based on Registry of Title in the United Kingdom. The opposite view is supported by legal authorities of the greatest weight—by Lord Cairns and Lord Selborne in England; by the late Judge Hargreave and Mr. Hugh Law in Ireland.

It may be useful to state briefly the present position of the general problem of Registration of Title in these countries. In 1862 the late Lord Westbury procured for England an Act which professed to register titles, but really was a system for registering deeds. In 1875 an Act, sanctioned by Lord Cairns and Lord Selborne, was passed for England, which substituted for this defective plan a genuine but optional system of Registration of Title. The Select Committee on title and transfer of land reported in 1879 in favour of establishing a general Registry of Assurances for England, but did not recommend the repeal of the Act of 1875 permitting the registration of titles. In Ireland the

Record of Title Act, passed in 1865, provided for the optional registration of parliamentary or Landed Estates Court titles. This Act was, however, permissive only. It laboured, also, under the serious disadvantage of being modelled on Lord Westbury's Act of 1862 for England, and thus contained provisions which made it an incongruous compound, partly Registration of Title, partly Registration of Deeds. This would not have happened if the Act of 1865 had been passed for Ireland, in the shape originally proposed by Irish lawyers, with the valuable assistance of Sir Robert Torrens, and sanctioned by the late Judge Hargreave. It would then have been framed on a plan partly adopted in the later English Act of 1875, with modifications to suit Ireland, and a mechanism based on the Australian system, devised by Sir Robert Torrens. Registration of title, we know, as a general system, has never had a fair trial in Ireland. It is therefore less surprising that a majority of the Royal Commission for inquiry into the law of registry in Ireland should, in their report of 1879, have recommended the continuance, in an improved form, of the old-established Registry of Deeds, but the abolition of the Record of Title in Ireland. One of these Commissioners, however, has dissented strongly from the latter recommendation, for reasons which deserve a most careful consideration. I venture to think that the weight of reason, of evidence, and even of authority, support The O'Connor Don's recommendation, that the Irish Record of Title Act should be preserved and amended.

Under these circumstances the prospects of Registration of Title are not encouraging. Why, then, you may ask, bring forward the subject now? My reply is, that as a general reform, applicable to every kind of interest in land, Registration of Title is not only open to discussion, but can afford to wait. But as regards those interests in land which concern peasant proprietors, a reform of the present uncertain, dilatory, and costly system of conveyancing is socially urgent. On the other hand, Registration of Title, when limited to such interests in land, is not open to the objections urged against it as a general system, while it alone meets the requirements of peasant proprietors. A few facts will illustrate the vast practical difference between such small landowners and large proprietors, as regards the mischiefs caused by the existing methods of conveyancing in Ireland, based on abstracts of title, title deeds, and searches in the Registries of Deeds and Judgments. The number of Landed Estates Court titles which from 1865 to 1879 have been placed on the Record of Title was 681, amounting to the value of over £2,000,000 sterling. Their owners, in all cases where there was no marriage settlement, enjoy the advantage of dealing securely, yet cheaply and expeditiously, by way of transfer, charge, or lease. Since the year 1870 Irish Church lands have been sold to about 7,000 purchasers. Of these purchasers, it is estimated 5,000 were *bona fide* occupiers engaged in farming operations, and converted by sales under the Irish Church Act into peasant proprietors. By an omission, which is strange and regrettable, no provision was made for enabling the Church Commissioners to grant, either directly or through the Landed Estates Court, a Parliamentary title, which might have been entered on the Record of Title. The same remark applies to purchasers under the Bright clauses of the Land Act of 1870. Consequently these small landowners are left under the operation of the old system of conveyancing, although the practicability and importance of registration of title for peasant proprietors is not contestable or contested.

Now what will be the result of this position for them? They obtained, no doubt, at first from the Church Commissioners a title practically indefeasible. But observe the position of holders even of

Landed Estates Court titles, after a few years, when their original simplicity has not been preserved by registration of title. I quote the testimony of Mr. Urlin, lately Examiner in the Landed Estates Court. Mr. Urlin observes (*Journal of the Statistical Society of Ireland*, part xlv. April, 1874, p. 332):—"It must occur to anyone acquainted with the legal history of Ireland that there is a large class of titles especially calling for registration—the by-gone conveyances granted since 1850 by the Incumbered and Landed Estates Court. These were all perfectly clear titles which, year by year, are now deteriorating. The benefit so attained is slowly fading away, as complicating facts arise; and in a few years more these titles will be little better than others."

That was exactly the conclusion at which I had arrived when, in co-operation with Sir Robert Torrens and other gentlemen, I promoted the passing of the Record of Title Act, 1865, introduced into the House of Commons by Lord O'Hagan, then Attorney-General for Ireland. A few years later in 1868, in a paper entitled "The Cost of Recorded Charges and Transfers compared with that of Ordinary Mortgages and Conveyances" (*Journal of the Statistical Society of Ireland*, part xxxiv. Jan. 1868, p. 448), I repeated the same view, the soundness of which has been affirmed and illustrated in Mr. Murrough O'Brien's paper "On some of the Difficulties in the Way of Creating a Peasant Proprietary in Ireland" (*Ib.* part lii. Jan. 1878, p. 161), and his recent article in the *Fortnightly Review* (vol. xxviii. N. S., 1880, p. 578). Yet tenants purchasing their farms through the Landed Estates Court have been charged by their solicitors with nearly £1 for the costs of *refusing* to let their properties be recorded; whereas the recording, as Mr. O'Brien remarks, would have been a peculiar advantage to such purchasers. It is simple justice to add that Dr. Hancock, during his labours of thirty-three years to amend the land laws of Ireland, has constantly put forward the view that a radical reform in our conveyancing system is an indispensable condition for creating a peasant proprietary.

The law's delay and uncertainty are often more injurious to landowners, most of all to small proprietors, than its pecuniary burdens. But the expenses of selling and mortgaging under the ordinary system are serious. In the above paper I cited the case of a small sale of land for £975, by a proprietor who had a Landed Estates Court title granted in 1861, but which had never been placed on the Record of Title. This sale, after the lapse of only six years, under the ordinary system cost £23 10s.; whereas had the title been recorded it would have cost less than £5. The 5,000 peasant proprietors who purchased the Irish Church lands have not a Landed Estates Court title, and consequently could not record their titles. Every sale and mortgage by them, as well as by the majority of purchasers under the Bright clauses of the Land Act of 1870, involves the delay and expense of the old system of conveyancing.

Now both reason and experience prove that a peasant proprietary cannot prosper, or even long subsist, under the incubus of a costly and dilatory system of conveyancing. Yet such is the English and Irish system; for though the Irish Registry of Deeds adds considerably to the security of titles to land, it in no degree diminishes the cost and delay of our cumbrous semi-feudal machinery for dealings with land. The prejudices which formerly existed as to the social danger of facilities for transferring and mortgaging land are fast giving way to a rational appreciation of their necessity in modern society for all classes, and for none more than small landowners. A ready and inexpensive mode of selling is indispensable to meet the exigencies of a farming proprietary who require to augment, or diminish, or transfer their

small properties as occasion may necessitate or suggest. As an eminent Irish political economist, Judge Longfield—whose valuable Land Debentures Act, 1865, shared the ill-fortunes of the contemporary Record of Title Act—has remarked, landowners, large or small, do not borrow because it is easy to do so, nor are they restrained from borrowing by legal obstacles. They borrow because their necessities oblige them, and the imperfections of the existing system of conveyancing merely add to the cost of borrowing and the interest demanded for the loan.

Universal experience confirms these views. In every country where peasant proprietors prevail—that is, in France, Belgium, Germany, in fact nearly the whole of Western Europe except Great Britain and Ireland—their existence is accompanied and supplemented by systems of registering titles, under which the owner can, by local agencies, at a moderate expense and readily, transfer and charge his land. The land of France, so largely cultivated by small proprietors, is no doubt heavily mortgaged; but the rapid payment of two hundred millions sterling, the war contribution imposed by Germany on France in 1871, chiefly by the savings of peasant proprietors, has sufficiently refuted the prediction that a peasant proprietary would in fifty years convert France into a pauper warren. Personal investigation of the land question in Prussia enables me to confirm and illustrate this conclusion. The history and condition of the Prussian peasant proprietors demonstrate the essential connexion between the stability and prosperity of that class, and the facilities for the transfer of land which registration of title confers on them. Allow me, on this point, to quote a passage from one of my two papers read before this Association at their meeting in Belfast, 1867, afterwards published under the title of *The Prussian Land Tenure Reforms, and a Farmer Proprietary for Ireland*, p. 23:—"The history and condition of the team-owning peasant proprietors (the class who do not cultivate exclusively by hand labour) in the seven eastern provinces of Prussia—that is, excluding the Rhine province—has been investigated, and is elaborately shown in a recent report of the Prussian Minister of Agriculture, made with the co-operation of the Director of the Statistical Bureau. It is there demonstrated that during the long period between 1816 and 1859 the number of peasant team-cultivated properties has increased nearly 2 per cent., their average size remaining unchanged. The movement of property, the result of free trade and inheritance, during nearly half a century, demonstrates, in the language of this valuable report, the entire groundlessness of the bugbear that unrestricted legal divisibility must lead to the excessive subdivision of landed property."

The law of compulsory subdivision on the death of parents, among the children, which prevails in Prussia as in France, gives peculiar importance to facilities of transfer; but, apart from this special feature, such facilities are indispensable. By permitting the free interchange of land and adjustment of interests between land and capital, subdivision is checked, and the class of peasant proprietors is otherwise benefitted and upheld. In the above pamphlet on the Prussian Land Reforms, I remarked:—"The stability of the Rent Banks rests on the priority given to the rents over all other charges; on the punctual collection of the rents by the land tax officials; and on the system of registration of title, which in Prussia has also a local character." The Prussian Rent Banks paid the landlords the purchase money of their rents not in money but land debentures. These were guaranteed by the state, charged on the peasant properties, redeemable at par, and bore 4 per cent. interest. The redemption was effected, and the cost of management was defrayed by the payment of £1 per cent. (making in all 5 per cent.) on the purchase

money by the purchasing tenant during forty-one years and one month. The British Government under the Land Act of 1881 will advance three-fourths of the purchase money in cash; but under this Act (differing from the Bright Clauses of the Land Act of 1870), the tenant may, without any consent of the Land Commissioners, borrow the remaining one-fourth. If he is to escape the clutches of the gombeen-man, the peasant must have a cheap and simple mode of charging his land by Registration of Title.

The Australian Colonies, where the commercial value of land is so thoroughly appreciated, bear a like testimony to the beneficial working of Registration of Title for transferring and charging land, under the admirable system first established by Sir Robert Torrens in 1858 for South Australia, and since extended to the four other Colonies of Australia, to New Zealand, to British Columbia, and to Fiji. Mr. Sheldon Amos, who has recently resided in New South Wales, writes to me:—"A 'Torrens title' was habitually given in advertisements of land, and the impression I formed was that the system had worked well." But the strongest evidence is afforded by the Return to House of Commons, "Registration of Title, British Colonies, 10th May, 1881," and Supplementary return, 15th August, 1881. These prove conclusively that the Torrens system has conferred the greatest benefits on the owners of land; and that indefeasible titles and dealings under it combine safety and security with inexpensiveness and rapidity. Settlements are not excluded, but the immense majority of owners do not settle. How then can we in reason create small landowners in Ireland as a social experiment, and yet withhold the legal conditions essential for their prosperity, and even their continuance?

Land, it is said, is not stock. Strangely enough the persons who use this argument in favour of expensive and dilatory conveyancing for land often assert that land and stock should be dealt with in the same way when it is a question of interfering with freedom of contract. The fact is, that each contention is right and each is wrong, according to the sense in which it is taken, and the circumstances to which it is applied. The popular comparison of land and stock hides a fallacy and conceals a truth. The essential points of agreement or difference between land and stock lie, for practical purposes, not in the things themselves, but in the *social relations*, historical and actual, which govern them. Looking at these so far as they concern the present question, is it not evident that if personal property can be securely, readily, and cheaply transferred and charged, landed property can be dealt with likewise, provided the real transactions are the same? So far as land is subjected by reason of social relations to greater complications than personalty no doubt the argument fails. But such is not the case with regard to small properties and peasant proprietors. For these we may practically eliminate entails and settlements, and with them set aside all the complications which create the doubt about Registration of Title, when proposed as a system applicable to all properties, and every kind of dealing. I concede that this *general* reform is a debateable question, and one that can afford to wait. But the case of large properties, subject to settlements, is entirely different from that of small landowners. Their properties are already numerous in Ireland, and likely to multiply, even rapidly. For them the essential conditions are simplicity combined with security of title. For them the essential transactions are transfers and charges. Now these are exactly the conditions fulfilled, and the transactions daily facilitated by Registration of Title, as exemplified in reference to stock, shares, and shipping, under the systems long estab-

lished, practised, and approved by the mercantile community, and general public.

The principles and practice thus ratified by experience are perfectly applicable to peasant properties, and need only a few modifications simple in themselves, and easily attainable. These modifications, arising out of differences, real or artificial, between landed and personal property, may be reduced to three. They concern the description, the user, and the devolution of land. Land must be circumscribed, and marked off by boundaries. For describing these, the Ordnance Survey of Ireland furnishes an admirable method, the use of which was contemplated by the late Lord Romilly's Act, 1850, and has since been recommended by high authorities, quite recently by the report of the Royal Commission on Registration in Ireland, 1879. The user of land may arise under a lease which is only a temporary transfer, or by virtue of rights of way or other easements. These peculiar rights need not be entered on the Registry of Title. Such was the principle acted on under the original Incumbered Estates Court Act, but unfortunately departed from when that court was made permanent as the Landed Estates Court. The third point of difference between land and personalty is purely artificial, and can be removed—as recommended by high authorities—by requiring the appointment of a real representative in case of devolution by death, and making an entry of every transmission on the registry a condition precedent to the title and exercise of his rights by the new proprietor.

It is sometimes urged that where stock or shares are transferred by mistake or fraud, the true owner does not suffer by the erroneous transfer, since the bank or company is liable to make good the loss to him. But the Shipping Registry, which records not only sales but charges, does not guarantee the owner against loss. The amount of property dealt with since 1854 in the United Kingdom and the Colonies under the Merchant Shipping Acts, by registration of title has been enormous. Nevertheless, the Registrar-General of Shipping, Mr. Robert Jackson, who supervises the entire system, which is both central and local, from London, informs me that “in practice the checks are sufficient to prevent fraud or mistake.” He further states “that the registry law and the general regulations and forms, although simple in character, render the perpetration of fraud difficult, and only one instance of fraud has come under our notice, and then it arose through the neglect of a purchaser to register his title.”

We know that in France, Belgium, and Prussia, the responsibility of the government officials charged with the supervision of the Registries of Title is found an adequate protection. In South Australia, under the Torrens system, a small fee was imposed, as the nucleus of a fund for compensation in cases of error, but the guarantees afforded by that excellent system against fraud or mistake, have, with very few exceptions, been found adequate during the many years that have elapsed since its foundation. In South Australia, during twenty-three years since its introduction, no case has arisen in which the title of a purchaser for value has been disputed. The working of the Torrens system in the other colonies has been equally safe. From 1865 to 1878, 499 transactions were recorded in respect of the 681 titles placed on the Record of Title in Ireland. Out of these transactions there were only three errors (*i.e.* little more than one-half per cent.), which were corrected, hurt no one, and could have been avoided by greater care.

The last question which I propose to consider briefly is, in what way should the advantages of Registration of Title be secured to Irish peasant proprietors? There is a well-known warning against putting new wine into old bottles, the wisdom of which we have not unfrequently verified in



Ireland. When a new and important function is imposed on an old institution, the result is often unsatisfactory. The existing staff of officials employed to carry out the innovation, seldom have the leisure requisites still less the special qualifications for its effectual prosecution. This was signally shown by the failure of the scheme for selling incumbered estates in Ireland, when first grafted on the Court of Chancery in 1848, as compared with its remarkable success when entrusted to the Incumbered Estates Court in 1849. Two distinct matters must be attended to in order to ensure the advantages of Registration of Title to peasant proprietors in Ireland. First, these titles should be rendered as simple and clear as may be practicable at the outset; secondly, the titles once granted, should be registered, and all future dealings with them conducted by registration of title. These operations should be made as easy and inexpensive as possible for all purchasers, past and future, of church lands; also for purchasers under the Bright Clauses of the Land Act of 1870; and for all who shall purchase through the Land Commission or otherwise, under the Land Act of 1881. I would empower all such owners to record their titles under the supervision of the Irish Land Commissioners, who should undertake the duty of recording future dealings with such properties.

The reasons for confiding this new departure to the Land Commission are weighty and hardly contestable. To it is entrusted the promotion and superintendence of a peasant proprietary in Ireland; it is invested with the full jurisdiction of the Board of Works under the Land Act of 1870, and of the Irish Church Commissioners, as regards purchasers; it possesses large additional powers, including the important right of guaranteeing to future purchasing tenants a practical indefeasibility of title. The Land Commission will come into direct contact with all future purchasing tenants, and a large proportion of such past purchasers. They can also command the services, I believe the willing services, of an official solicitor—a consideration the importance of which is well shown in the following extract from The O'Connor Don's Report already referred to:—

“To say that the Record of Title has never had a fair trial in Ireland, and that it met from the start with the most determined and active opposition from that branch of the legal profession most nearly concerned with its working would be but to affirm a proposition proved by almost every line of the evidence.”

It would not be possible, nor is it needful, on the present occasion, to discuss the particular plan for realising this great social and legal reform. I cannot, however, forbear from expressing my strong conviction that the Torrens system of registering titles and dealings affecting land has borne the test of time; that it presents all the essential conditions, legal and practical, of a thorough reform in conveyancing, and could, with a few inconsiderable modifications, be advantageously and promptly applied to peasant properties in Ireland. Those who desire to study it will find the necessary materials in Sir Robert Torrens' statement of the South Australian system, copies of which are accessible in our public libraries, and in the recent colonial returns above quoted (Registration of Title, British Colonies, Parl. Papers, H. of C., 10th of May, 1881, No. 211, and 15th August, 1881, No. 211-I). The latest of these returns comes from the new British Colony of Fiji, and concerns the Torrens system as applied to “the titles of the white settlers” since its introduction in 1877. Chief-Justice Gorrie (who encloses a statistical table signed by Mr. Emberson, the Registrar-

General of Titles), in his Report dated 18th April, 1881, makes the following important remarks :—

“On my way from Mauritius to Fiji, I had the opportunity of seeing in Adelaide, South Australia, the working of the Torrens system. The whole details of the registration of titles of that large and wealthy colony were being conducted by a staff not larger than that of a solicitor in extensive practice in London or Edinburgh. It must be kept in view, however, in judging of the applicability of the system of conveyancing by registration of title to England that, so far as I understand, the practice of settling estates does not exist to any appreciable extent in any of the Australian colonies. No simplification of conveyancing will have the result of making the land free and a fund of credit, when the hands of all interested in the estate are tied up in the manner adopted in the family settlements of England. I may say that having had a thorough knowledge of the Scotch titles to land and registration, having acted for fully six years as a judge in Mauritius, where the French land system prevails, and having the English and Australian methods of conveyancing now constantly before me, I do not hesitate to say that the South Australian system reduces conveyancing to the simplest possible conditions, and is even more calculated than the registered notarial deeds of France to make the land of a country transferrable with ease, and thus to form a ready available fund for the promotion of industry and enterprise.”

The above is a brief and imperfect sketch of the views which I desire to submit to your consideration on a subject admittedly of the deepest importance for Ireland—the means necessary for ensuring the prosperity of an Irish peasant proprietary. This problem transcends all party politics. Some are sanguine of its success, others have less confidence. All agree it should have a fair field and a fair trial ; and this it cannot have under our present costly, cumbrous, and dilatory system of conveyancing. Let me conclude by expressing the earnest hope that the sad experience of the last two years will stimulate public opinion in Great Britain and Ireland, and impress the urgent need for the prompt realization of measures which for more than thirty years have been sanctioned and advocated by the highest authorities on social and legal reforms in Great Britain and Ireland. Surely it is time to cast away the unwisdom that deliberately creates a class of peasant proprietors, yet withholds from them the essential conditions of prosperity—nay of existence. It is not thus that nations and statesmen act who know how to take the tide in the affairs of men, which taken at its full leads on to fame and fortune, and to things still better and nobler—to social well-being and political harmony.

