ON

THE ECONOMIC CAUSES

OF THE

PRESENT STATE OF AGRICULTURE

IN IRELAND:

Part II.

A PAPER READ BEFORE

THE DUBLIN STATISTICAL SOCIETY:

BY

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On the Economic Causes of the Present State of Agriculture in Ireland, Part II.—*Legal Impediments to the Transfer of Land.* By W. Neilson Hancock, LL. B., M. R. I. A., Archbishop Whately's Professor of Political Economy in the University of Dublin.

In the paper which I had the honor of reading before this society at its last meeting, I directed attention to the present state of agriculture in Ireland. I then proposed to account for this state by showing that it has mainly arisen, neither from the ignorance nor from the perverse disposition of the people, but from the state of the law; the chief causes being the legal impediments to the free transfer and sale of land, whether waste or improved, and the legal impediments to the application of capital to agricultural operations. I then proceeded to explain the nature and extent of the legal impediments to the transfer of land, and noticed the first class, viz., those which increase the cost of transfer. We saw that this cost of transfer was excessive, often amounting to twenty per cent and upwards, besides the risk, loss of time, and trouble. We saw that this cost might be divided into four distinct elements—the expense, delay, and risk of investigating title; the expense of searches for incumbrances; the stamps on searches and conveyances; and the length of conveyances. The first of these elements is caused by the rule that the vendor must show sixty years' title; and I pointed out the means by which this element might be reduced to a moderate amount. First, by establishing a general register of all land, containing the names of all those having estates in, or incumbrances affecting it. Secondly, by appointing periodical public sales of land by auction in each county in Ireland, which should be deemed markets *overt*. Thirdly, by the enactment as a general rule of law, that the limitations and incumbrances affecting any land should, on its being sold, be transferred to the funds arising from the sale. And lastly, by applying the doctrine of market *overt* to land, enabling the registered owner, if there were no limitations or incumbrances, to transfer, as in the funds; or if limitations or incumbrances existed, to sell at the public sales, on three months' notice to the registrar, and by advertisement; the purchase money to be paid into the Court of Chancery, subject to the limitations and incumbrances affecting the land. In this paper I propose to notice the second, third, and fourth elements of the cost of the transfer, viz: the expense of

searches for incumbrances, the stamps on conveyances and searches, and the length of conveyances. I shall next explain the second class of impediments to the transfer of land, arising from the restraints on the power of alienation; and I shall lastly notice the effects of all these impediments on leasehold and other derivative interests.

As to the element of cost arising from searches for judgments and other charges, it has already been reduced by Sir Edward Sugden's act; but it could be much further reduced by a simple change in the law, combined with the register already suggested. At present the judgment, or other similar charge, is registered to the name of the person against whom it is obtained, and becomes a charge on all the land he may then or thereafter become possessed of. The effect of this is to enable parties to charge land with little trouble or cost, whilst the possibility of such a charge existing makes a search necessary on each transfer, against very many of the parties connected with the land. Now, if it were enacted that no judgment, crown-bond, or similar charge should affect any land until registered against such land in the register before suggested, then parties on obtaining judgments would have to search for the lands they wished to charge; but on the transfer of the land, no search against parties would be necessary; the few pages of the register respecting the particular parcel of land would disclose all the charges and incumbrances affecting it. The plan of having a number of separate registries of the judgments affecting land, may be compared to the conduct of a merchant who should keep a separate clerk and day-book for each article he sold, and enter his sales in his day-books only. If such a merchant, finding the inconvenience of having to direct a number of separate searches each time a customer called for an account, should get all his entries made in one book by one clerk, so as to have only one search instead of many, he would effect an improvement like what Sir Edward Sugden effected in the law of judgments. But if, finding the delay of this system of searching his day-book every time an account was called for, he should give up his day-book altogether, and make his clerk keep a journal and ledger, so that each customer's account should appear at a glance in one page of the ledger, he would effect an improvement similar to the one I have suggested with regard to judgments.

The next element of the cost of transfer, which arises from stamps on searches and conveyances, might be got rid of altogether by abolishing those taxes, and substituting an income tax for them. As the subject of direct and indirect taxation was so ably brought before the society by Mr. Lawson at the last meeting, it will not be necessary for me to do more than refer to the principal objections to stamps on conveyances as a system of taxation. The first of these is, that no matter how they are imposed, they must always violate the first principle of taxation, by being

unequal. This has been well pointed out by Adam Smith. "Such taxes," he says, "even when they are proportioned to the value of the property transferred, are still unequal; the frequency of transference not being always equal in property of equal value. When they are not proportioned to this value, which is the case with the greater part of stamp-duties and duties of registration, they are still more so." But their inequality in this kingdom is still more glaring, if we consider that there is no equivalent tax in the sale of other articles of wealth. Why should land be dealt with differently from other commodities? If we are to tax transfers, to have equality as far as the articles are concerned, we must go the length of adopting the famous Alcavala of Spain:— "It was a tax first of ten per cent., afterwards of fourteen per cent., and in Adam Smith's time of six per cent. upon the sale of every sort of property, whether moveable or immoveable, and was repeated every time the property was sold. It is to this system of taxation that Ustaritz imputes the ruin of the manufactures of Spain." "He might," says Smith, "have imputed to it likewise the declension of agriculture, it being imposed not only upon manufactures but upon the rude produce of the land." This tax, after existing for centuries, was finally abolished at the beginning of this century. Thus we see that it would be extremely unwise to extend taxes on transfers to all sales, and without such extension they have not a semblance of equality.

The second objection to stamps on searches and conveyances is, that they are as burdensome as they are unequal; for they stop the exchanges which are most beneficial to the community. I put this argument in its most general form in my last paper: I shall now support it by the opinions of two distinguished economists. "Why," asks M. Say, "does an individual wish to sell his land? It is because he has another employment in view, in which his funds will be more productive. Why does another wish to purchase this same land? It is to employ a capital which produces too little, which was unemployed, or the use of which he thinks susceptible of improvement. This exchange will increase the general income, since it increases the income of these parties. But if the charges are so exorbitant as to prevent the exchange, they are an obstacle to the increase of the general income." Again, Mr. Mill, in his new work on the Principles of Political Economy, says: "All taxes must be condemned which throw obstacles in the way of the sale of land or other instruments of production; such sales tend naturally to render the property more productive. The seller, whether moved by necessity or choice, is probably some one who is either without the means or without the capacity to make the most advantageous use of the property for productive purposes; while the buyer, on the other hand, is at any rate not needy, and is probably a person both inclined and able to improve the property, since, as it is worth more to such a person than to any other, he is likely to offer the highest price for it. All taxes,

therefore, and all difficulties and expenses annexed to such contracts, are decidedly detrimental, especially in the case of land, the source of subsistence, and the original foundation of all wealth, on the improvement of which, therefore, so much depends. Too great facilities cannot be given to enable land to pass into the hands, and assume the modes of aggregation or division most conducive to its productiveness. If landed properties are too large, alienation should be free, in order that they may be subdivided—if too small, in order that they may be united. All taxes on the transfer of landed property should be abolished."

But in truth, if we inquire into the origin of stamp duties, and the reason given by Adam Smith for their general adoption, we shall find that the reason, although perfectly applicable to the state of even civilized countries a century ago, can no longer be relied on. "Those modes of taxation by stamp duties and by duties of registration, are of very modern invention. In the course of little more than a century, however, stamp duties have, in Europe, become almost universal, and duties upon registration extremely common. There is no art which one government sooner learns of another than that of draining money from the pockets of the people." Now, in former times, and indeed, until very recently, the whole question of taxation was looked on as an art by which the ruling classes, whether few or many, were to extract as much as possible from the classes ruled, in whatever way would create the least resistance. The consequence of this policy was, that all taxes were considered with reference not to their real but their apparent effects; hence we find indirect taxes generally preferred to direct taxes. But at the present day, when the people in this kingdom virtually tax themselves, the Queen or government not caring about the manner of raising the £50,000,000 necessary for the expenses of government, provided that sum be raised, it is absurd for the taxpayers to be humbugging themselves, and practising the art of skilfully draining money from their own pockets. It is alike their duty and their interest, therefore, to look to the real and not the apparent effects of taxes, and to take care that the sum necessary for government is raised in the manner at once most equal to all the taxpayers, and in which the cost of collection is least. If people would only look at the question of taxation in this point of view, which is sound science and plain common sense, we should have no more foolish prejudices against an income tax, the most equal and least burdensome species of taxation, and consequently the best substitute for stamps on searches and conveyances.

Another form of the burden of stamps on conveyances can be put in a very forcible point of view, by considering it with reference to the statute of frauds. This celebrated statute was passed in the twenty-ninth year of the reign of King Charles II. The great Lord Nottingham used to say of it, 'that every line was worth a subsidy.' The chief object of passing it was to prevent

the facility to frauds, and the temptation to perjury held out by the enforcement of obligations depending for their evidence upon the unassisted memory of witnesses. How great this temptation and facility were is obvious, and accordingly the statute, in the first section, declares its own enactment to be for the prevention of many fraudulent practices which are commonly endeavoured to be upheld by perjury and subornation of perjury. The means which it adopted for this purpose were the substitution of written for oral contracts. Thus the first section is directed against parole conveyances of land; the third against parole assignments, grants, or surrenders; the fourth and nineteenth sections require all the most important contracts to be in writing. Now the policy of this statute has always received the most unqualified praise, and yet the policy of our present system of taxation is directly at variance with it. We tax the very paper on which the contracts are written, and by stamps on conveyances we deprive written contracts of the security which naturally attaches to them, and make them instead a source of expense, litigation, and fraud.

Having disposed of the element of cost of transfer arising from stamps on conveyances and searches, I proceed to notice the last element of the cost of transfer, namely, the length of conveyances. This arises almost entirely from the rule of sixty years' title, and the necessity of a number of parties joining in the conveyance. If the plan already suggested for obviating the cost of transfer arising from the expense of investigating title were adopted, the length of conveyances, as far as the transfer of land is concerned, would be curtailed within reasonable limits. Any attempt of the legislature arbitrarily to abridge the length of conveyances, without simplifying the law which makes this length at present necessary, must end in doing more harm than good. There is one method, however, by which some saving might be effected, namely, by including all the usual covenants and powers in an act of parliament with appropriate names, and then giving deeds referring to these covenants and powers the same effect as if they were actually inserted therein. And here I may notice an objection which has been urged against any changes facilitating the transfer of land, that they would destroy the legal professions. But this objection is founded on a complete misapprehension of the case, and of the results which such changes would produce; for, in the first place, the great part of the cost of transfer, instead of being beneficial to the legal profession, is really beneficial to no one. In the second place, legal assistance to some extent is likely to be always required, and as the number of sales will increase very much when the cost is diminished, the aggregate emoluments of the legal professions will most probably increase, although the amount made in each transaction will be less. But the objection admits of a more general answer, for the interest of no profession, when rightly understood, can be opposed to the interest of the community; so that even if the legal professions

made less on sales, they would make more in other ways, arising from the general increase of wealth consequent on increased facility in the transfer of land.

I have hitherto directed your attention to the legal impediments to the transfer of land arising from the cost of transfer. I shall now notice the impediments arising from the absolute restraints on alienation. These come into operation in three classes of cases. First, where land is settled on any one for a life interest only, or on a person in tail, where such person is not of age; secondly, where land is held by the church; thirdly, where land is held by lay corporations, or by trustees for educational or charitable purposes; or, in other words, these impediments arise from the law respecting entails, religious foundations, and other foundations. As to these impediments, there are two questions perfectly distinct, but too often confounded together. First, are entails and foundations on the whole beneficial to the community? Secondly, can the purposes of entails and foundations be substantially carried into effect without any permanent restraint on the power of selling land? Now I do not propose to enter on the former of these questions; the policy of entails involves political and moral considerations of extreme importance, quite distinct from their economic effects. I may observe, however, that the limited right of entail here and in England and the perpetual entails in Scotland derive their legal force from statutes passed under the influence of a policy wholly inapplicable to the state of society at the present day. The English statute of Westminster the second (13 Edward I. c. 1), entitled "*De Donis Conditionalibus*," was planned by the greater barons to prevent not so much the alienation as the forfeiture of their estates, which in those unsettled times was an all-important object. The Scotch act (1 James II. c. 22), passed in 1685, was intended in like manner to protect the estates of the nobles from forfeiture. The question of foundations also involves religious, political, and moral considerations of far greater extent and importance than the economic considerations involved in them. But I proceed to point out the means by which the purposes of entails and foundations can be substantially secured, without any insuperable obstacle to the free transfer of land.

The means to which I refer is by the adoption and extension of a principle already well known in our law, namely, the power of sale and exchange thus described in one of our law text-books (Cruise's Digest): "These powers are usually inserted in settlements of real estates in England, whether by deed or will, for the purpose of effecting those improvements of the settled property which would not otherwise be attained on account of the partial interests of the tenants for life, and the suspense or minority of the objects who may ultimately become entitled under the limitations. They are given in various forms — sometimes to the trustees with the consent of the tenants for life, sometimes to the tenants for life with the consent of the trustees, at others to the trustees with the

consent of the tenants for life, and after their death at the discretion of the trustees," &c. Now this principle might be extended to all settlements and foundations, by enactments creating a complete power of sale and exchange in every settlement, leaving it to the parties to determine the person or persons to exercise the power; but in the absence of such provision, conferring the power on the protector of the settlement created by the Fines and Recoveries Act, or on some person or persons defined in the enactment in the same way as the protector is defined; the persons exercising the power being subject to the conditions of selling at the public sales already suggested, after having given previous notice, and of the purchase money being lodged in the Court of Chancery, subject to the same limitations and trusts as the land. Such an enactment would completely remove the restrictions upon alienation, without impairing in the slightest degree the real interests of the parties for whose benefit entails and foundations are maintained. The chief object of entails is to maintain a wealthy and hereditary aristocracy, and it is upon its wealth much more than its connection with land that the aristocracy must in future rest its power. Freedom of sale, by enabling the wealth of the aristocracy, whether in land or money, to be readily transferred, would enable it at all times to be most productively employed, and so secure its increase. Besides, nothing can be more injurious to the ultimate stability of the aristocracy, than the continuance of any restriction like that on the transfer of land, which, without adding anything to their wealth or power, can be clearly shown to stand in the way of the welfare of large classes of the community, and indeed of national wealth and advancement.

In the case of foundations, the power of sale and exchange could be vested in the hands of corporations, on a plan similar to that proposed by Archbishop Whately for the management of church property; and the only loss which the objects of foundations could sustain would be, that the possible future increase of value of the land might be under-estimated by all the competitors at a public sale. Should this event, however, take place, there would be full compensation for the result, in the increased wealth and prosperity of the community, and in the increased popularity of the objects of the foundations. For all such objects derive only part of their support from past endowments: it is very unwise, therefore, to sacrifice the present or future endowments, certain to be bestowed out of the increased wealth of the community, for sake of an unascertainable possibility of future increased value in past endowments. The reasoning I have already used in regard to entails applies with equal force to foundations. Nothing can be more foolish than to make their endowments depend on the maintenance of restrictions on the free transfer of land, so manifestly productive of loss and injury to the community.

This plan of an extended parliamentary power of sale would combine admirably with the plan of register already suggested, as

the persons having the power of sale could in all cases of settlement or foundation be registered as the owners of the land for the purposes of sale. It would also be the first step towards extinguishing the numerous derivative interests out of land, which contribute so much to embarrass its management in Ireland. Thus the lessees for lives renewable for ever would be all enabled to purchase the fee simple. The principle should also be extended to the sale of quit and crown rents in Ireland, and of the land tax in England. There is a certain scale for redeeming these at present, but they should be divided into convenient amounts, and endowed by act of parliament with the character of fee-farm rents, arising out of the land on which they are charged, and then be sold by auction; the proceeds being applied in redemption of so much of the national debt, thus saving the expense of collecting those taxes and of managing a portion of the debt. The land tax unredeemed amounts to £1,069,904 a year. Its sale would therefore produce about £30,000,000. The crown lands are now under the management of the Commissioners of Woods and Forests, and they have a power of sale and exchange. This power should be employed in selling off all the crown lands not wanted for public purposes, the produce being applied in redemption of debt; thus saving the double expense, as in the case of selling the land tax; and these lands, which are now some of the least improved and most disorganised parts of the country, would get into the hands of private capitalists, who would soon make them thriving and prosperous, which there is little chance of their becoming under the management of a public board.

The removal of the legal impediments to the transfer of land would also provide an immediate and complete remedy, for the alarming and increasing evil of the quantity of property falling under the management of the Courts of Chancery and Exchequer, under the operation of the acts of parliament enabling those courts to appoint receivers over the property of defaulting mortgagors and judgment debtors. The amount of this property had reached in 1844 the extraordinary sum of £600,000 annual rental. It is impossible for property to be managed under the courts, especially in the present state of the law, with anything like the same advantage as in the hands of enterprising capitalists. The facilities of transfer would lead to the sale of the land in most of those cases where a receiver is now appointed. This general power of sale would realise the advantages so well pointed out by the Land Occupation Commissioners: "We believe," say they, "that there is a large number of persons possessing a small amount of capital, which they would gladly employ in the purchase and cultivation of the land, and a still larger number now resident in different parts of the country, and holding land for uncertain or limited terms at a rent, who would most cheerfully embrace the opportunity of becoming proprietors. The gradual introduction of such a class of men would be a great improvement

in the social condition of Ireland. A much larger proportion of the occupiers than at present would become personally interested in the preservation of peace and good order, and the prospect of gaining admission into this class of small landowners would often stimulate the renting farmer to increased exertion and persevering industry."

Having now completed the consideration of the legal impediments to the transfer of the ownership of land, it remains to consider the effect of these impediments on leasehold and other subordinate interests in land. In such interests the impediments frequently act with a double force. Thus, in leaseholds, according to the rule of sixty years' title, the purchaser is not secure without examining the title of both the lessee and the lessor. The latter examination is no doubt generally dispensed with; but this saving is effected at the risk of the purchaser, which he of course takes into account in buying, and therefore gives so much less for the leasehold interest. Mr. Stewart shows that this reliance on the title of the lessor is often misplaced, and mentions that in one of the new suburbs of London the title to all the leases was found to be bad, and had to be rectified by a special act of parliament. Instances are by no means unfrequent in Ireland, where leasehold interests have been lost in consequence of the title of the lessor turning out to be bad, or his leasing power to have been exceeded. In the same way the cost of searches for judgments, the stamps on conveyances and searches, and the length of conveyances all operate in a still more serious manner to retard the sale of leasehold and subordinate interests in land, than they do in the case of large freehold interests. The remedies which have been suggested in the case of those apply with equal force to the leaseholds. Thus, the general register could contain the leasehold as well as the freehold interests affecting the same land, together with the limitations and incumbrances affecting the leasehold. Then the periodical sales of leaseholds would be as useful as the sales of freehold interests, and the principle of markets *overt* could be applied with equal success to them. The abolition of stamps, and the shortening of conveyances consequent on the simplification of title, would be most effective in facilitating the transfer of these occupation interests. The impediments to transfer of land arising from the restrictions of the power of alienation exist in the case of leaseholds also, for they may and very frequently are made the subject of settlement, and entailed or otherwise subjected to limitations; and from the small value of the property, these settlements are more frequently drawn in a defective manner, and consequently destitute of the power of sale and exchange. The general statutable power of alienation is therefore much wanted in these cases. The extension of the register to all interests arising out of land would make the register a most useful basis for the poor law valuation, the valuation for county cess, and

other local taxes. The poor law rating has at present to include the names of all the occupiers, and of all the immediate landlords of tenements not exceeding four pounds. The valuation for county cess comprises a tenement survey and valuation. The great part of the expense and trouble of making out, and, from time to time, correcting these valuations and the ratings based on them, would be saved if there were a complete register of both occupiers and landlords. It would also afford facilities for the imposition of an income tax, the most desirable substitute for the stamps on conveyances and searches. A complete register of both owners, occupiers, and incumbrancers of land would besides possess many advantages for legal purposes. Thus, after a short time, extracts from it would come to be received in courts of law, as evidence of many matters which now involve unavoidable difficulty and expense in their proof.

The injurious effects of the impediments to the transfer of land on small leasehold interests explain a set of facts frequently observed upon. Thus it is stated in Lord. Devon's Digest: "It has not been shown that tenants possessing long and beneficial leases of their lands have in general brought them to a high state of improvement, whilst on the contrary some of the evidence brings forward the fact, that lands lent on long terms, and at very low rents, are in a worse condition, and their occupiers even more embarrassed than others." These results do not arise, as some people foolishly allege, from the security which these tenants enjoy, but from the impediments to the transfer of their interest, which are, as I have pointed out, greater than they are in the case of large estates and from other causes which I shall notice again. A yearly tenancy, although a more precarious, is, on well-managed estates, a much more transferable interest than a leasehold interest in the present state of the law. And here I may notice an objection to my reasoning in these papers. "How," it is said, "can the state of agriculture in Ireland be caused by the state of the law, when the agriculture in England is much better, and the law is the same?" But Dr. Longfield has shown, in his paper read this evening, that the law is not the same; for in consequence of the Irish Registry Acts, together with the Irish enactments as to the legal assignability of judgments, much greater facilities exist in Ireland than in England to the creation of incumbrances, and consequently to the existence of impediments to the sale of land. And as far as the law is the same, the objection is invalid, because the agriculture of England should be compared with the manufactures of England; and such a comparison proves that the progress in agriculture there has not been near so rapid as the progress in every other branch of industry —a fact which shows clearly the injury which the restraint on the transfer of land has produced in England. That the injury is not so great as in Ireland arises from counteracting circumstances—such as the general prevalence of powers of sale and exchange in English

settlements, which makes the interest of the landlord more transferable than in Ireland. Then the practice of the landlord's making all the permanent improvements, and the customs of tenant-right and way-going crops, afford yearly tenants such legal security, that where confidence between landlord and tenant is added to it, farmers have no hesitation to take large holdings on this tenure. The prevalence of those yearly tenancies makes the interest of the tenant a much more transferable commodity in England than in Ireland. Thus the agriculture of England being better than that of Ireland, whilst it is far inferior to the manufactures of England, affords a complete proof of the proposition I have been contending for. In the same way, the Montgomery Act in Scotland, conferring on landlords general leasing powers, notwithstanding the clauses in the entails, and enabling them to charge the inheritance for improvements, has led to a system of management of land, by which the interest of the farmer is a much more transferable commodity than in Ireland.

I have now completed the consideration of the legal impediments to the transfer of land; and whether we reflect on the nature and extent of those impediments, or the powerful influence which they must necessarily exercise on the improvement of agriculture, part of the proposition which I stated in a former paper is established. The state of agriculture in Ireland does to some considerable extent at least arise from the state of the law. The causes, too, of this great national evil have been long acknowledged and pointed out by the highest authorities on the subject. But as to the remedies by which these causes can be removed, it is manifest that they rest with the legislature alone. Private enterprize cannot establish a general register, or give to public sales the force of market *overt*. Private enterprise cannot transfer charges from the lands to funds, or require judgments to be registered against the land instead of against the person. Private enterprize cannot repeal taxes, or prevent land being settled so as to be inalienable. All these things can be effected by the legislature alone. Here, then, we see at once the true business of government, as pointed out by economic science. It consists not in lending money for drainage, for railways, or for fisheries. Such can be better done by private enterprise. Neither does it consist in patronising particular manufactures, nor in attempting to regulate profits by usury laws, rents by valuations, or wages by organisation; such interference is unjust and impolitic; but it does consist in the careful but progressive and complete alteration of the law, so as to make it ever conformable to the teachings of the most advanced discoveries in social science; it does consist in removing every legal impediment to our progress in wealth, happiness, and civilization.