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Applications for leave to read papers should be made to the secretaries at least a *week* before the meeting.

Proposals of candidate members should be sent to the secretaries, No. 1, Nelson-street, at least a *fortnight* before the meeting.

The subscription to the Society is ten shillings entrance, and *ten shillings per annum*.

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JUNE, 1858.

I.—*The Working of Tribunals of Commerce, composed of one legal and two commercial judges, as exhibited in the Hamburg Tribunal; founded on communications received from Dr. Versmann, the Vice-President of that court.*—By Henry Dix Hutton, Esq.

[Read Monday, 19th April, 1858.]

TRUE progress unites with a real appreciation of the present a just respect for the past; and while it adopts the boldest measures, if necessary, for removing inveterate evils or supplying essential wants, would rather modify than subvert, and seeks to remove or alter only that which can be replaced for the better. Deeply influenced by these convictions, although at the same time strongly impressed with the necessity for considerable changes in our judicial organization as being essential to the attainment of commercial justice, it has been my anxious desire to propose only such modifications as are requisite in order to carry out the fundamental principles, and thus to realize the essential benefits of Tribunals of Commerce. With this view I endeavoured to procure authentic and authoritative statements respecting the actual working of some such court, in which, under the presidency of a barrister, the mercantile judges occupy that position and exercise that influence which I believe to be indispensable for the administration of commercial justice. This I have been enabled to accomplish through the kind assistance of Mr. Hartwig Hertz, one of our corresponding members and a merchant in Hamburg, who introduced me to Dr. Versmann, the Vice-President of the Tribunal of Commerce of that city. Having addressed by letter to that gentleman—who combines with extensive legal attainments a long experience of the working of his own court—inquiries on the points which seemed

to me to stand most in need of elucidation, he has done me the honour of replying to them most fully; and in addition to the weight which statements coming from such a quarter must carry with them, I cannot but think that the fact of a gentleman whose time is fully absorbed in the discharge of his public functions, having taken the trouble to furnish such a report, affords a strong proof of the importance he attaches to the subject. The questions proposed by me for Dr. Versmann's consideration appear sufficiently from his communications, the first of which bears date the 28th of February, and the second, the 2nd of September, 1857. I will therefore proceed at once to give these; the substance, and, for the most part, the words of which I have endeavoured faithfully to render into English from the original German.

“The commercial court in Hamburg was established on its present basis in the year 1816; a Tribunal of Commerce having been previously created during the French domination in conformity with the prescriptions of the *Code Napoleon*. Our present court retains in most essential particulars the organization originally given to it by the French, but it will be observed that the changes introduced are the more deserving of consideration, as they were made by men who had acquired a knowledge of the tribunal by their own experience of its working. The most important of these changes, as regards the organization of the court, was undoubtedly that which placed each of the two chambers that compose it under the presidency of a lawyer, whose time is exclusively devoted to the performance of his judicial functions. The principal difference between the practice of the French and the Hamburg tribunals consists in the circumstance, that in the latter the registrar takes down the minutes of every proceeding. This is the more necessary here, since we have for all causes without exception an appeal, which, in relation to matters under 500 marcs banco (about £40 sterling), is always heard by that chamber before which the cause had not been originally heard. A second appeal can only be brought in cases where the judgment by the first court of appeal differs from that of the court which first heard the case. This principle, which is just in theory, has been found to work most beneficially in practice. At every sitting of the court the judicial bench is occupied by the president or vice-president (both of whom are lawyers), and two commercial judges. In cases of necessity, however, three commercial judges alone may sit in judgment. Each judge has an equal voice in the decision, and the opinion of the majority rules the case. In nautical cases (such as the collision of ships) two experienced captains are associated, who, however, have only a consultative voice.

“The parties are at liberty to conduct their cause either in person or by an advocate, but it is quite usual, especially in important cases, to employ counsel. The procedure is oral; but in cases of moment the advocates are in the habit of communicating to each other brief statements of their case or reply, or at least notes of the principal facts, together with copies of documentary evidence, before entering on their verbal pleadings. This is, however, altogether optional.

“The public sittings are (with the exception of a four weeks vacation), held twice a week uninterruptedly the whole year round. The causes are called on consecutively. Judgments by default are pronounced at the moment; and in simple matters, after hearing the parties in a short consultation, the decision of the court is forthwith given. In cases of greater complication, or involving important points of law, the judgment is generally postponed for eight days. The presiding judge examines the documents at home, after the lapse of some days, the three judges assemble in order to deliberate on and determine their judgment, which is then drawn up by the presiding judge.

“In case the judgment imposes on either party the obligation of proving certain facts, and of producing witnesses for that purpose, these are heard by the presiding judge, who takes down their evidence in a deposition, which is afterwards brought before the court at its public sitting. This regulation is not to be commended, since the whole court does not hear the witnesses themselves; nor could it find acceptance in England, being at variance with the judicial usages of your country. The court has the right to order, either previous to or after the hearing of the case, the parties to appear in person before the president or vice-president, with a view to ascertaining the facts, or in order, if possible, to bring about a compromise. This regulation is of inestimable value, since by means of it a numerous class of cases, often of the most complicated nature, are every year disposed of by the voluntary arrangement of the parties themselves. The conduct of causes thus referred occupies a large portion of the time of the legal judges; but the fulfilment of this office of conciliation is one of the most grateful among their public functions.

“The court is authorized to refer certain matters to the ordinary civil courts, and to order the proceedings before itself to be conducted in writing, where the complication of accounts or other circumstances may render such a course advisable; but either of these steps is very rarely taken, and often does not occur once during the entire year.

“It is obvious, from the articles of our code relating to the jurisdiction of the tribunal of commerce, that its sphere of action is a very large one. The regulations on this head which, in many points, deviate from those of the French Code de Commerce—have been found practical and sufficient. Disputes as to the jurisdiction of the court very seldom occur. Its competence is not determined by the amount in litigation, but depends on the nature of the question at issue; that is to say, whether it relates to mercantile dealings or not.

“In addition to the duty of deciding commercial disputes, the tribunal is charged with the conduct of bankruptcies, and the superintendance of the registry of partnerships and companies. For each of these functions a distinct office exists, with the requisite staff. Another office of the tribunal is established for the entry of protests in the case of damage or losses suffered by ships at sea.

“From the commencement of its existence down to the present time, the tribunal of commerce in our city has enjoyed general

(algemeine) confidence, a fact which is the more remarkable, inasmuch as on its first establishment, a number of persons, particularly among the legal profession, were opposed to it. The principal objection raised by these opponents was, that a codification of the commercial law must precede the creation of a tribunal presided over by merchants. The experience of forty years in our court has, however, incontestably proved that the institutions of tribunals of commerce, having a majority of commercial judges, constitutes an efficacious and perhaps the only means of obtaining commerial justice; and, with equal certainty, that a codification of mercantile law in no way forms an indispensable condition of the existence of courts so constituted.

“A strong proof of the high estimation in which the court is held in this city, is furnished by the circumstances that while the public mind has, during the last few years, been greatly occupied with numerous propositions made for the improvement of the general organization of our civil courts, all parties are agreed that the Tribunal of Commerce should be maintained unaltered.

“In Bremen, about twelve years ago, a tribunal was established on the model of the Hamburg court, and there also the public opinion, both of the commercial world and of the legal profession, has given its verdict in favour of the excellence of this institution.

“I am not able to speak from my own experience, of the difference between the course of justice before and after the creation of our Tribunal of Commerce. It appears, however, from the pamphlets published during the years 1815 and 1816, that the decision of mercantile cases was then slow, dilatory, expensive, and very often not in harmony with commercial ideas and usages. I have myself conversed with merchants, who perfectly remembered those times, and who assured me that a very wide field was then open to chicanery; and that with regard to certain people, goods, though expressly sold, could not be regarded as sold until delivered and paid for. In the first years of the Tribunal's existence, many actions were before it at one time by firms, grounded on claims antecedent to its creation, which they would have abandoned rather than prosecute them under the old system. After the creation of the Tribunal of Commerce, however, they were no longer afraid to pursue debtors who had given themselves up to the hope that their creditors would not venture to bring them into a court of justice.

“Having thus given a brief sketch of our Tribunal of Commerce in some of its principal aspects, I proceed to consider the point respecting which you particularly requested information, I mean the composition of the court with legal and commercial judges.

“I confess that this is the first time I find myself placed under the necessity of defending the participation of legal judges in the decisions of the Tribunal of Commerce; while on the contrary I have not unfrequently, more especially with reference to lawyers, been obliged to place the influence of the commercial judges in its proper light. Our lawyers are very much inclined to undervalue the efficacy of their intervention, and to regard them as being mere bystanders, and the legal judges as being the persons really responsible for the judgments pronounced. The legal profession with us

is, however, decidedly in error; it supposes that this idea, derived from its point of view, represents the general opinion of the public. In truth, as my daily intercourse both with lawyers and merchants has convinced me, the matter in most cases stands thus: that as the advocates regard the legal, so do the litigants themselves look upon the commercial judges as being the real originators of the decisions given; and, accordingly, that the mercantile public as a whole, is completely possessed by the conviction that commercial disputes are decided from *its* point of view.

"In endeavouring to prove to you, in the first place, that the commercial public is, generally speaking, perfectly right in holding this conviction, I shall execute the first part of my task, which consists in showing that in working of our tribunal the commercial element is in no way oppressed by the legal element. I will afterwards state the grounds which directly and positively favor the introduction of this last into the Tribunal of Commerce.

"The influence of the commercial members of the court does not mainly result from the circumstance that they, having two voices, can outvote the presiding legal judge, for by far the greatest number of decisions are unanimously given, and in very doubtful cases it happens at least as frequently that the lawyer and one merchant, as that both the merchants, form the majority. Their influence is in truth, generally speaking, of an indirect nature, and is often unconsciously exerted by them. The mercantile judge is in most cases thoroughly familiar with the class of affairs out of which the dispute arises; he is necessarily accustomed in the course of his business to decide every day similar questions for his own guidance; and hence he usually seizes, with a safe and rapid instinct, the true point of view in relation to the matter really in dispute. While the lawyer arrives at his conclusion by the road peculiar to himself, logically interpreting and applying the law according to universal principles of jurisprudence; the merchant, who rarely possesses an accurate knowledge of positive laws, but who has imbibed those great and fundamental principles of commercial law, which, having been created during the course of centuries by the commercial world itself, are for that very reason continually present to the mind of every superior and experienced mercantile man, forms his opinion from the immediate impression that the matter, viewed as a whole, makes upon him. This rapidity and sureness of the mercantile judge in forming his decision—always supposing that he is really active as regards his own peculiar element—must, generally speaking, and more especially when both the merchants are of one opinion, exercise a remarkable degree of influence on the lawyer, and very often determine from the outset his mode of regarding the matter in question. For the difficulty of deciding cases results far less frequently from doubts as to the principles of law themselves, than from questions as to the applicability of these principles. On this account, in no subject oftener than in relation to commercial justice does the right determination of any given case depend more intimately on a proper insight into the real nature of the matter in controversy, on a thorough comprehension of the course of business, and on the knowledge of those movements of the commercial world

and other circumstances that frequently furnish the motives for particular modes of dealing, which, while often ingeniously withdrawn from view by the advocates, are immediately apprehended and brought to light by the commercial judge. Moreover, experience shows us that in the majority of commercial differences no question arises as to the application of important principles; but that their determination depends on a number of small mercantile dealings and usages, which can be rightly judged only by men who stand in a direct relation with business.

“ You see, then, that I set a very high value on the influence, both direct and indirect, of the commercial judges, since I assign to their sound tact and knowledge of business an important participation in the decision even of the most complicated and difficult questions; and, in addition to this, I regard entire classes of questions as almost exclusively falling within their province. At the same time it will be apparent, from my estimate of the mode in which the commercial element acts, that I do not regard the change of the mercantile judges, (which takes place after five years service, and has often been objected to,) as any disadvantage. No doubt the merchant learns a great deal during his term of office, but my experience has uniformly been that the merchant who does not—of course, after having overcome the first technical difficulties,—from the commencement make a good commercial judge, never becomes such.

“ On the other hand, however, I do not believe that the decision of all or of the greater number of the questions which arise out of extensive commercial dealings could be entrusted to merchants alone. Both the nature and the origin of commercial law demand with equal force the participation as well of legal as of mercantile judges. It is true, indeed, that a multitude of the most important dispositions in the mercantile law originated with the mercantile world itself, and were not the creation of positive legislation, a circumstance to which the general uniformity of this law among all nations must be attributed. But legislation has adopted these fundamental principles, has given them permanence by distinct prescriptions, and has regulated their details. The court must, therefore, possess a real and well-grounded knowledge of the commercial law, viewed as a whole, if it would not decide the cases that come before it, merely with reference to their immediate bearings and special circumstances, or, in other words, if it would not decide them arbitrarily; and such knowledge can be secured to the court only through the aid and participation of legal judges. In addition to this, it must be borne in mind that in commercial affairs it is frequently requisite to apply the ordinary civil law, the knowledge of which lies altogether out of the merchant's sphere; and that the greater number of commercial regulations rest on principles which are also to be found in the former.

“ But the scientific knowledge of mercantile law is by no means the only advantage for which the court is indebted to the presidency of a lawyer; another and equally great one consists in the influence exercised by a judicially trained mind. The commercial judge does well to rely on his immediate impressions and natural tact for business; but it is the duty of the lawyer to make the grounds of his

judgment clear to his own mind. The concordance between mercantile instinct, if I may so call it, and legal science affords to my mind the only guarantee for consequent, well-grounded, and permanent decisions. The judicial culture and habits of logical thought which characterize the lawyer can as little be dispensed with, in the Tribunal of Commerce, as that knowledge of business and rapid apprehension of the question in dispute which especially belong to the mercantile intellect. Each is supplemental to the other, and both legal and commercial judges divide the labour of decision without any rivalry, or, more properly, unite in the performance of the common function, since they mutually support and control one another. In this arrangement, the legal element is the more indispensable, since the pleadings are, generally speaking, conducted by advocates, and in a greater or less degree in a legal form. The court, therefore, must have within itself the means of forming a judgment on the value of any point relating to the mode of bringing the case before it, and is thus enabled to control the advocates.

"The merchant, also, ready as may be his decision in matters relating to the ordinary course of business, loses his confidence and self-reliance so soon as a new case, or one that involves unusual combinations, arises. In such cases, it is on the lawyer that the burden falls of arriving at a just conclusion, by means of legal analogies and established principles; and here it becomes his duty to convince the commercial judges of the justness of their application. If he succeeds in doing this, a good criterion of the soundness of the judgment is afforded, since it is no way necessary that the merchants should always make the decision unaided; it suffices, in many cases, that they should ratify and adopt it.

"The legal judge is the better fitted to fill the position which I vindicate for him, since his exclusive vocation consists in the fulfilment of his judicial functions. Nor will it be overlooked that he must, in the course of time, acquire great experience in judging mercantile affairs, and, to a certain extent, imbibe that which you have called the "commercial mind." For, since the lawyer's office is permanent, while the commercial judges change, the former gradually comes into close contact with a great number of the latter, and learns their views and mode of looking at things. He seeks the advice of those merchants who are particularly versed in the several kinds of business that come in question, and sometimes is even better acquainted with them than his colleagues, when a case arises which does not fall within their individual sphere of action.

"It also forms the peculiar office of the legal judge to preserve, as far as possible, that uniformity in the course of decisions which is of singular importance in commercial affairs, and for this his knowledge of the judgments already pronounced in similar cases pre-eminently fits him.

"Finally, I must call your attention to the fact, that where the difference of opinion cannot be overcome, the commercial element has the preponderance, the lawyer being in such cases obliged either to convince his colleagues or to remain in a minority.

"I have, however, already informed you that such a diversity of opinion very rarely occurs; and that the court, after due and

searching investigation of the matter, generally arrives at a unanimous judgment. In truth, it would be very unjust towards our merchants to charge them with any abuse of that numerical preponderance which the law has placed in their hands; on the contrary, among all the able and experienced merchants whose acquaintance I have made in the execution of my office, I have never had occasion to complain that even one misunderstood his position, or arrogated to himself any right to dictate on matters lying out of his natural sphere. So far from having met with anything of this kind, I have rather found that the best heads were precisely those able to appreciate most clearly the limits within which they felt themselves to be more competent than their legal colleague. On the other hand, we have constantly had the satisfaction of finding that the commercial judges—even those who in the first instance endeavoured to exempt themselves from this office, on account of the sacrifice of time its performance requires—fulfil its duties conscientiously and with great interest; so that the re-election of the merchant, after his period of five years, is by no means uncommon, though, in such a case, he has the right to decline any further service.

“Although, however, our law requires the participation of one legal judge at every sitting of the court, it is hardly necessary for me to mention to you that the matter would wear an entirely different aspect, if more than one lawyer were to take share in its deliberations. If such were the case, the conflict of the legal opinions would probably have the effect of rendering the commercial element too subordinate, and so impairing its efficacy.

“Having thus stated the grounds on which I hold that the association of a legal with the commercial judges constitutes the sound principle for the organization of Tribunals of Commerce, I find myself compelled,—my time being greatly occupied by my official duties, and this communication having already run to a considerable length,—to confine myself for the present to mere indications of my views on some points which require elucidation; assuring you, at the same time, that I will gladly give any further information on such points as you may think require explanation.

“It may be thought that the experience of the French courts runs counter to my views. This, however, is so only in appearance, since a lawyer is attached to the Tribunals of Commerce in France under the name of a registrar or secretary (*greffier*); and this officer, in point of fact, more especially as regards the less important tribunals, exerts a marked influence over the entire course of the decisions of the court. I must say that the arrangement which assigns to the legal element a direct and responsible position in the tribunal appears to me preferable to that which obliges it to obtain influence by indirect means. Even putting this view of the case aside, dispositions which may be well suited to the French are not necessarily fit to be adopted, without modification, by nations of German origin; since the former, as regards administrative talent and facility in public life, are in many ways superior both to your and my own nation.

“There are besides a long series of practical considerations which

speak in favour of the participation of the legal element. Of these I will mention only the two principal ones.

“In the first place I fear that the disproportionate sacrifice of time would deter merchants from undertaking the judicial office without the co-operation of a lawyer. In our tribunal the demand on the merchant's time is limited almost exclusively to the public sittings of the court, and the deliberations concerning the judgments to be pronounced, and even thus we not unfrequently hear complaints of the great sacrifice of time. But the verbal utterance of a judicial decision, and even its determination after consideration of facts and documents, is something quite different from the composition of a formal judgment drawn out with due precision, a task which in itself demands much time. This duty, as well as that numerous class of cases which here fall within the province of the legal judge—such, for example, as the examination of witnesses, references for compromise and reconciliation, seizures of ships or goods, the correspondence of the court, &c., &c.—would have either to be performed by the commercial judges themselves, or handed over to subordinates.

“You will find no merchant, not even the most patriotic, disposed to make such sacrifices of time; and I think rightly, since he must feel it unreasonable to burden him with a kind of business which lawyers can perform as well as or better than he can.

“Besides you might find it difficult to get merchants willing to take upon themselves the entire moral responsibility of pronouncing the decisions. In relation to the legal profession and the press, the tribunal needs a strong and sustaining spirit, which, in important and exciting matters, will not allow itself to be dictated to, and maintains itself superior to all extraneous influences.

“For these practical reasons, also, I consider it very material to the success of your plan to include the legal element in the organization of the Tribunal of Commerce, and to take as your model that form of the institution which exists here, and which, I may observe, it is in contemplation to extend to the whole of Germany.”

Having addressed a second letter to Dr. Versmann, he most kindly responded to the inquiries made in it, by a communication bearing date the 2nd of September last. In this letter, referring to that portion of the report of the Mercantile Law Conference which relates to Tribunals of Commerce, he makes the following valuable remarks:—“I see that the establishment of these courts undoubtedly encounters great difficulties in your country, difficulties which lie partly in its social relations and judicial institutions, and partly in the prejudices and misconceptions of a portion of the public. As to this last point, I have been greatly interested in perceiving that many of the very same arguments which were once urged in this city against the Tribunal of Commerce are now put forward by its opponents in England. The pamphlets and newspapers belonging to the epoch of the establishment of our tribunal are no longer to be had, except those copies which are preserved in our commercial library, otherwise it would have afforded me great pleasure to send them to you, as showing to what an extent men are everywhere prone, under like circumstances, to fall into like errors.”

Dr. Versmann then proceeds to state that his time had been

much occupied by an examination of the project for the codification of the commercial law, based on a scheme which had been proposed by Prussia for adoption by the German Confederation, and submitted to the consideration of a mixed assembly of legal and commercial delegates at the Congress held last year for that purpose at Nuremberg. Of this project Dr. Versmann kindly sent me the portion which relates to Tribunals of Commerce, and expressed his conviction that there was every likelihood of seeing established, in the principal commercial towns and seaports of Germany, tribunals constructed on the model of those at Hamburg and Bremen.

In reply to my request for information as to the amount of time which the exercise of the judicial office by merchants demands, Dr. Versmann states that their attendance at the tribunal averages four or five months in the year for each; the duty being taken by the five commercial judges that compose the chamber in their turn; and that during the month of office ten or eleven hours weekly are occupied by the public sittings and conferences of the judges. "The other duties of the commercial judges are," he observes, "very light. The administration of bankruptcies is so ordered, that any contested questions arising out of them are brought before the tribunal at its public sittings like ordinary actions, while the rest of the business is entrusted to a special officer acting under the superintendence of the President and Vice-President, who apportion the cases in bankruptcy between them every year. The office of commercial judges is besides greatly lightened by the permission accorded to them of exchanging their month with a colleague; thus facilitating necessary journeys and such like matters. I do not believe that the disposition to make personal sacrifices for the public good is, on the whole, stronger with us than in your country; but it is known that the acceptance of such honorary functions is a duty imposed, once for all, by law; and the elected merchants almost always find that their interest in the business of the tribunal and the confidence shown by their election, afford an adequate compensation for the indispensable sacrifice of time. Besides, it is the common opinion here that the function of a commercial judge is preferable to most other honorary offices."

Dr. Versmann in conclusion states that he has commenced a work on the statistics of his court, which circumstances have obliged him to lay aside for the present. I am indebted to him, however, for two reports of the addresses delivered, according to custom, by the President or Vice-President at the commencement of the judicial year. Though of course very general in their nature, these clearly manifest the great and increasing activity of the tribunal, and the high estimation in which its services are held by the mercantile public of Hamburg. From the last of these addresses, delivered on the 1st. of March, 1858, it appears that the deplorable crisis which caused so serious a disturbance in the commercial world occasioned a large increase in the business of the Tribunal of Commerce. The great number of bankruptcies which arose at the conjuncture were dealt with by it, and the prospect of the speedy payment of considerable dividends in them was announced by the President, affording in these respects a striking contrast to the helplessness of our own

Courts of Bankruptcy, and their inability to meet such catastrophes. The President also stated, that in consequence of the augmenting arrears resulting from the increase of the business of the court, the Tribunal of Commerce had thought it right to take steps for adding to the number of the commercial judges, with a view to holding more frequent sittings; and that there was every reason to believe the applications made on this subject in the proper quarter would be attended with success. This circumstance is worthy of attention, both as proving the value attached to the Tribunal of Commerce by the public, and as showing that, notwithstanding the disinclination of merchants to sacrifice their time, this difficulty does not present any insuperable obstacle to increasing the number of the judges.

II.—*The Report of the Registration of Titles Commission, 1857.*—By James McDonnell, Esq.

[Read Monday, 15th February, 1858.]

In the month of May last the Royal Commissioners appointed by her Majesty, "To consider the subject of the Registration of Title with reference to the sale and transfer of land," made their Report.

It opens by considering the subject of the registration of assurances, as distinguished from the registration of titles. By a registry of assurances is meant an office in which all deeds or wills relating to real estate, or abstracts of them called memorials, are lodged, arranged, and indexed, so that a purchaser, or other person dealing with any land, can, by searching, ascertain all the deeds affecting it.

The object of a registry is to secure purchasers, and prevent frauds and forgeries. This object is effected, partly by the publicity of the registry, but chiefly by the enactment, "That any deed shall be effectual according to the priority of time of its registry; and that deeds not registered shall be void as against deeds registered;" which effectually prevents secret deeds starting up to the prejudice of a purchaser, or other person whose deed is registered. A public registry of deeds has existed in Ireland since the year 1708. Its utility has, however, been in some measure lessened by the equitable doctrine of notice, and also by the registration of memorials—that is, short abstracts instead of the deeds themselves. The Commissioners admit that some important advantages would flow from a well-devised system of registration of assurances, but reject the plan, for the reasons set forth in their report (sections 16 to 24), which are thus shortly summed up at section 25:—

"The unmanageable accumulation of deeds and instruments in one place; the certainty of an immediate addition to the expense