

V.—*Report to the Council on the Impediments to express Contracts as to the Occupation of Land in Ireland.*—By Randal W. McDonnell, Esq., Barrister-at-law.

THE following Report has been prepared by direction of the Council, in consequence of an application from Jonathan Pim, Esq., M.P., Vice-President, to institute an inquiry into the following subject:—

A Report as to the legal and other impediments which still interfere with the proper carrying out of the system of commercial contracts with respect to the occupation of land in Ireland. For such inquiry reference to be had to former Reports of Mr. Robert Longfield, to the Social Inquiry Society, and others.

At a meeting of the Council on 12th December, 1865, Mr. Pim being present and concurring, it was resolved “That the intended Report should be, as to the impediments which still interfere with entering into and carrying out of the system of express contracts in respect to the occupation of land in Ireland.”

The Report having been received, the Council have directed it to be communicated to the members by being inserted in the Journal.

February, 1866.

GENTLEMEN,

Having received from your secretaries the intimation that you had done me the honour of entrusting to me the task of drawing up a report on the above subject, I have prepared the following pages, which I now beg to lay before you as the result of my endeavours to execute your commission. In compliance with your understood wish prolixity has been studiously avoided, and the able and comprehensive report of Mr. Robert Longfield, made on the same subject in the year 1851, has been adopted as the basis of that now submitted to you. Those impediments on which he has dwelt have been briefly re-stated or referred to, and those which are less prominent in his report have been somewhat expanded in the present. The changes in the law which have been made in the interval between them, and by which previous obstacles to the free transfer of land have been increased, lessened, or removed, have, it is hoped, been mentioned without exception and stated in substance. I have only to add to these introductory remarks, that I have considered the subject with reference, firstly, to legal disabilities; secondly, to obscurity of title; thirdly, to the course and results of litigation; and fourthly, to limitation and incumbrance—a division which embraces all the legal impediments (with the exception of a very few) which at the present time render free dealing in land impossible. Those few are comparatively of little importance. They have, however, been shortly mentioned in the general remarks with which this report concludes.

## I.—DISABILITIES.

The owners of unincumbered estates in fee simple are the only persons in this country who are perfectly untrammelled in their treaties and contracts about land. The freedom, however, of even such owners is very far from complete, if they happen to labour under any of the disabilities to contract—total or partial, technical or natural—which the law recognizes. These disabilities arise from infancy, lunacy, coverture and incorporation, and are of sufficient practical importance with reference to the present subject to deserve a short notice.

It may be taken as generally true that an infant owner, acting on his own account, cannot enter into any contract in relation to land which is not either utterly void in its very inception, or voidable; that is to say, capable of being repudiated by the infant himself on his attaining his majority, or by his heirs or personal representatives in case of his dying before he shall have attained that age and confirmed his agreement. To this rule there are no doubt some exceptions, but they are neither numerous nor important. Even these are in most cases open to much doubt, so that practically no one can obtain a title to land which can be regarded as safe and indefeasible from one who has not yet accomplished his twenty-first year. Lunatics, idiots, and persons of unsound mind labour either actually or practically under a similar disability.

Notwithstanding, however, that none of these persons can themselves make a contract that will bind them, it is competent to the Court of Chancery to some extent to do so for them. Under an act of the year 1830 (1. Wm. IV., c. 65) renewals can be made by the court out of the interests of infants, lunatics, idiots, and persons of unsound mind, if those persons, had they not been disabled, could have been compelled to grant such renewals themselves; and original leases may be granted on their behalf "for such terms and subject to such rents and covenants as the Court of Chancery shall direct." The ordinary procedure, however, is to grant such original leases only during minority or pending the lunacy, though the act authorises the creation of longer terms. The Court of Chancery has also power, in the event of the estate of an infant or lunatic being in settlement, to make leases for certain limited terms, and even to execute transfers of their entire interests under the powers contained in an act entitled, "The Leases and Sales of Settled Estates Act, 1856."<sup>o</sup> In speaking of those impediments to transfer which are caused by limitation and settlement, this enactment will be described more fully. At present it is sufficient to observe that the leases which it authorises the court to grant are very limited, and hampered with many conditions, the violation of any of which will vitiate the demise; that sales cannot be made under it unless shewn to be for the interest of all parties concerned; and that, to

<sup>o</sup> Infant and lunatic owners of estates followed by remainders can now by their guardians or committees obtain compensation for improvements, as against remainder men, in the manner provided by the "Landed Property (Ireland) Improvement Act, 1860."

obtain either a suit is of course indispensable, which is in itself a barrier that very few are inclined to encounter.

Married women were by the ancient common law subject to the same disability as infants to enter into binding contracts, and any such agreement made by the husband might be repudiated by the wife if she survived him. By the assistance of a fine or recovery an effectual assurance might indeed have been made, but this process being exceedingly cumbrous and expensive, has been rendered unnecessary for the future by the statute for the abolition of Fines and Recoveries. At the present day a married woman may, with her husband's concurrence, make the fullest disposition, either by sale or lease, of her landed estate. It is no doubt necessary for her, in addition to the ordinary formalities of execution and delivery which must be observed by all in similar transactions, to undergo an examination apart from her husband; but when this is done, and the deed of transfer, whatever it may be, duly acknowledged by her as the free act of her own will, her estate passes as completely and she is bound as effectually as if her disability did not exist. In practice, however, and more especially when married women are granting leases of small holdings, this acknowledgment is neglected, and the want of it is a blot on the title. It may be doubted, too, whether the freedom of action which is the aim of this troublesome procedure is really secured by it.

The disability to contract which results from certain kinds of incorporation is also of considerable practical importance. Ecclesiastical dignitaries, corporate or sole, had until recently by law (10 and 11 Car. I., cap. 3; and 3 and 4 Wm. IV., cap. 37) no power of dealing with church lands beyond making agricultural leases for 21, or town leases for 40 years. Such leases, indeed, when granted became by custom perpetually renewable, and can be turned into fee simple estates, yielding a rent for ever to the spiritual corporation. Now, by "The Landed Property (Ireland) Improvement Act, 1860," any ecclesiastical corporation may grant agricultural leases for 21 years, improvement leases for 41 years, and building leases for 99 years. To the validity of the two last classes—the improvement and building leases—the sanction of the Landed Estates Court is essential, and building leases of greater duration than 99 years may be granted if that court shall so direct. By another act (20 and 21 Vict., cap. 47) ecclesiastical persons of all ranks are empowered to grant building leases for 99 years.\* Municipal corporations, though enjoying somewhat greater freedom, are fettered by similar restrictions. They cannot sell their landed property at all without having first obtained the consent of the Lords of the Treasury, nor, without a similar consent, make leases for more than 75 years for building purposes, and 31 years in ordinary cases. Some of the Irish municipal corporations are governed by local acts

\* Under the "Trinity College, Dublin, Leases and Perpetuities Act, 1851," that body can now lease for 99 years, and have a power not yet expired to give perpetuities to those already their tenants. Those church lands which were the property of the lapsed sees can also be granted in perpetuity now by the Ecclesiastical Commissioners to persons already in possession of them as tenants.

and have different powers, but this is the general rule embracing the great majority of them.

Finally, lands held by the trustees of charities cannot be sold or leased without danger both to the trustees and the purchaser or lessee. The sale or lease is void unless it is for the benefit of the charity, and the burden of showing that it was so generally lies on the grantee or tenant. Unless, therefore, the prudence and benefit of the transaction are clear beyond all question, dealing with charitable societies with regard to land must be described as altogether unsafe.

Such are the principal "disabilities" which operate as impediments to the free transfer of landed property. Some others no doubt exist—for instance, the great difficulties which stand in the way of leasing glebe lands; but all which are of much practical importance will be found, it is believed, amongst those mentioned above.

#### II—OBSCURITY OF TITLE.

This second obstacle to easy dealing with land arises from the great expense of an investigation of title extending over a long series of years, and from the sense of uncertainty which still attends such a title even after it has been approved. An abstract of the title for 60 years is still generally expected, tracing the property through an unbroken chain of wills, descents, and deeds, and setting forth the creation and extinguishment of the various charges which have been laid upon it by its owners from time to time. This is followed by requisitions to clear up the doubts which arise on the abstract, and by the search in the registries of deeds, judgments, &c., which is requisite to ensure that there is no lurking charge or conveyance which would encumber or destroy the vendor's title. There are, then, replies to the requisitions and explanations of the documents and acts disclosed by the search; and if the title be at last approved, there is a conveyance, which is often expensive, and a considerable stamp duty. Such an expense as this involves is of course rarely incurred except on a sale or mortgage, or a lease of such length as to be almost tantamount to a sale. On some large estates, indeed, it is not possible to incur this cost when taking a lease, as it is the custom to refuse to make any disclosures whatever of the lessor's title. The saving which such a custom occasions is more than balanced on the side of the landlord by the lower rent obtainable for a lease granted by one whose title to make it has not been shown; and, on that of the tenant, by the feeling of insecurity to which such uncertainty must give rise. Even where an investigation into the title takes place, a sense of perfect safety is not secured. The misconstruction of a will—an unnoticed defect in the execution of a power—a legal estate outstanding—the non-registration of a deed—an uninvestigated defect of which the purchaser has actual or constructive notice—the existence of a right to dower—a deed unenrolled or unacknowledged—an undetected charge—and a number of similar oversights may be productive of the most disastrous consequences to the purchaser. At present, in short, as regards four-fifths of the soil of Ireland, certainty of a good title can hardly be said to be attainable, even by the most expensive inquiry.

A parliamentary conveyance conferring a title that cannot be questioned may now of course be obtained by the aid of the Landed Estates Court, but leases and small properties are excluded from its operation by the expense which attends the searching investigation of title given there. About one-sixth in extent of the soil of Ireland is now, however, held under the conveyances of this court, and, although every year is obscuring again the perfect clearness and certainty of these grants, yet their recent date makes the deduction of title to estates held under them a matter of the greatest simplicity compared with the same process in relation to other estates.

An attempt has been made by an act of last session to arrest the daily deterioration of parliamentary titles, and to keep them in full efficacy by a system of registration. "The Record of Title Act (Ireland) 1865," as it is called, gives power to all who have obtained or shall obtain a conveyance or declaration of title from the Landed Estates Court, to record, if they desire it, their estates in the manner provided by the act; and the "recorded owner" then becomes, and, while he is recorded owner, remains "absolutely and indefeasibly possessed of and entitled to the recorded estate as against all the world." Qualifications of the title appearing on the record, recorded charges, incumbrances, tenancies and leases, and certain other leases and tenancies which, though unrecorded, the statute allows to retain their place on the property—these and no others are to affect the estate which is so recorded. All questions relating to the construction of instruments, the nature of interests, and the priority of claims the determination of which shall become necessary to the perpetuation of any record of title, shall be disposed of by one of the judges of the Landed Estates Court, to whom the fullest powers for this purpose are given by the act. Charges appearing on the record take priority according to the date of their being recorded, and not according to that of their creation. As the purpose of the scheme is, as it were, to re-enact from day to day the statutory titles which the Landed Estates Court alone can confer, the duty of giving effect to the act has been committed entirely to that court, and the "Record of Title Office," as it is to be called, will henceforth be one of its chambers.

The Act prescribes elaborately the mode in which transfers of recorded estates are to be made, and in which those transfers are to be entered on the books of the office. It also makes provision for the separate recording of vested interests, and charges under settlements, and trustees with a power of sale may be entered as joint owners.

No judgment, recognizance, crown-bond, *lis pendens*, acceptance, inquisition, decree, or order, is to be of any effect as against a recorded title, until a memorandum of it shall have been lodged and officially noted, and they must be entered again every five years, or they will not affect a purchaser for value, even though aware of their existence. Caveats prohibiting any dealing with a property may be lodged by any one interested, which remain in force for twenty-one business days, to give the parties lodging them time to bring their rights before the Court.

A recorded lease of land, when officially noted, becomes a recorded

estate within the meaning of this act, but the indefeasible title which is thus obtained by the lease shall not render that of the lessor likewise indefeasible, though, as he will generally be the recorded owner, his title will commonly be so. It is particularly to be observed that the portion of the act which deals with this subject, directs that, if the consent of any recorded incumbrancer be not given to the making of a lease, a note shall be entered on the record with the lease, that it is without prejudice to the title and claim of such incumbrancer : so that the previous law by which a lease made without the consent of a mortgagor was of no effect as against his charge, is in no way changed by this enactment.

Should this measure produce the results expected from it, the advantages which it will confer can hardly be over-estimated. The two evils which must always follow obscurity of title, namely, cost of conveyance and insecurity of ownership, will, as regards estates recorded, have been virtually removed, and their recurrence rendered impossible.

The last session of parliament has also produced another enactment of great importance, with a similar tendency to the above, but more limited in its object. This is the "Land Debentures (Ireland) Act, 1865." By this act the Landed Estates Court is empowered, on application being made to it by the owner of any land recorded under the Record of Title Act (Ireland), 1865, and on due investigation having been made, to certify that such land is chargeable with debentures under the act. The fact of the Court having certified to this effect is evidenced by an entry in the books of the Court. When the certificate is so entered, the owner may, with the sanction of the Court, issue debentures for any sum or sums, which alone, if the estate is unincumbered, or with the other charges if it be incumbered, shall not exceed ten times the annual value. These debentures are well charged on the land mentioned in the certificate, are *puisne* to all charges specified or referred to in it, and also to quit or crown-rent, tithe rent-charge, and drainage or improvement charges, but among themselves have all equal priority. They are transferred by a memorandum in the books of the Court, and the transfer vests in the person to whom it is made the ownership and full benefit of every debenture transferred. The amount, the interest, the time and place of payment, &c., are mentioned in each, and coupons may be attached to them, which entitle the bearer to the interest which they represent. The non-payment of interest due for a month gives the owner of a debenture a right to obtain a sale of the land charged. The act, however, ends by imposing a number of stamps, one of which is to be paid on the certificate itself, a document which might, as far as one can see, be dispensed with without at all impairing the efficiency of the act. But for this, the measure appears to be one that should work successfully, and if it should, it cannot be doubted that it will be productive of great advantage. It is indeed limited, as mentioned above, to about half the value of the estate ; but by this provision the borrower is saved from the necessity of seeing how many debentures have already been issued, as he knows that there is so wide a margin left for depreciation. The transfer of these instruments will not be more difficult than that of

Bank or Railway Stock, while the security they afford will be far superior to even a first charge by mortgage, or registered judgment on a defeasible title.

Two acts of recent date (22 and 23 Vic., cap. 35, and 23 and 24 Vic., cap. 145), have also done something towards simplifying the deduction of title, and facilitating transfer—but they deal with matters too minute and too technical to find a place with propriety in a report like the present.

These are the main attempts which have been made in the last fifteen years to remove the evils occasioned by involved titles and insecurity of tenure. The impediments which arise in litigation next demand a brief notice.

### III.—LITIGATION.

The pendency of an action or suit relating to land is of course a serious impediment to the transfer of it. The chief proceedings in the courts of law or equity which may act as such, are minor, lunacy, and receiver matters, and actions of ejectment. The two former have been already considered, and suits for the appointment of receivers and proceedings in ejectment have been fully treated by Mr. Longfield. It only remains, therefore, to call attention to the alterations in the law made since the date of his report, which tend to diminish the obstructive effect of these by narrowing their sphere, or by increasing their rapidity, ease, and certainty.

Very little has been done to remove the great evil of receivers, whose presence tends to perpetuate embarrassment, burdens with an additional expense an estate already incumbered, makes the granting of secure leases practically impossible, renders the owner incapable of dealing with his tenants, and hands them over to one whom duty and interest alike impel to extract from them the maximum of rent, and to whom their well-being is a matter of utter indifference. The action of the Landed Estates Court and its predecessor has, no doubt, released a great number of estates from this incubus; but should their owners again become embarrassed they are nearly as liable as before to a recurrence of the mischief. The only enactment which has diminished that possibility is one (19 and 20 Vic., cap. 77) by which the court is disabled from appointing receivers on foot of any judgment or any judgment mortgage for or below £150, and also where the rental of the estate, over which the receiver is sought to be appointed, shall not exceed £100 per annum. Subject to this restraint, this act leaves the appointment of receivers altogether in the discretion of the Court of Chancery. The preamble of the act certainly contains a very strong intimation that such discretion should be directed to the diminution of an unquestionable evil; but further than this the legislature has not yet gone. On the other hand, the practice of empowering mortgagors by their mortgage deeds to appoint receivers, so strongly deprecated by Mr. Longfield, has been sanctioned, and in some degree assisted, by an enactment of the 23rd and 24th years of her present Majesty, cap. 145, "An act to give trustees, mortgagors, and others certain powers now commonly inserted in settlements, mortgages, and wills."

With regard to the mode of getting back land from a tenant

or adverse occupier, the old and intricate machinery for this purpose, so effectively described by Mr Longfield, has been abolished, and its place supplied by a mode of great simplicity and tolerable certainty. The proceeding is now commenced by a writ of summons and plaint. This is directed to the immediate tenant or any one tenant in possession, by name, and generally "to all persons concerned." It merely states that the lands are the plaintiff's and are wrongfully kept by the defendant, and describes what those lands are with "reasonable certainty." In reply to this a defence is put in, which in the majority of cases is very short and plain, and the issue, whether the plaintiff is entitled to the lands, having been thus raised, is left to a jury of the county where the property is situated, and the claim disposed of.

In this procedure there appears to be very little room for further simplification, but considerable delay may still be caused by the rule that the venue in ejectment is local, or, in other words, that the action must be tried in the assize town of the county where the land is situated. This rule which, though the court may dispense with it, is practically inflexible, may, and often does, prevent the recovery of the land being effected with the rapidity which would otherwise be practicable. This objection might easily be removed by giving the plaintiff the power of naming the venue in ejectment as in other cases, and extending to the defendant in this action the power which he enjoys in every other, of getting the venue which the plaintiff has named, altered by the court.

The changes in the law regulating ejectments, which are mentioned above, are effected by "The Acts for the amendment of the Common Law Procedure in Ireland" (16 and 17 Vic., cap. 113; and 19 and 20 Vic., cap. 113). Those which have been enacted by the "Landlord and Tenant Law Amendment Act, Ireland, 1860" (23 and 24 Vic., cap. 154) though this act is limited to cases where the relation of landlord and tenant exists or has existed, are no less important in themselves and in application much more frequent.

For the purpose of the present report, it might perhaps be enough to mention those provisions of this important statute which, by facilitating the recovery, assist the transfer of land, but that portion of the law which it professes to consolidate and amend is so nearly connected with our subject, and its provisions so completely govern the position of the parties to an important species of transfer, that a general statement of some of the more important enactments contained in this statute will, it is hoped, not be deemed superfluous or out of place.

One of its most important changes is effected early in the act by the substitution of contract for tenure as the basis of the relation of landlord and tenant—a step towards placing land on the same footing as the common subjects of mercantile agreement, by making the return for the hire of it depend no longer on a mere feudal theory. Soon after it enacts that, if a lease contain a covenant against assignment, no assignment is valid without the written consent of the landlord, and even after a lawful assignment the covenant attaches to the interest of the assignee. This legalises and perpetuates a restraint on contract so far as regards the interest in the lease. On the



other hand, it induces the granting of leases by enabling landlords to choose who shall be their tenants, and this advantage appears to do more than counterbalance the disadvantage of the impediment it presents to the alienation of the lessee's interest. If this be so it is important to observe that, though a clause against assignment be inserted, the tenant (unless it be more carefully worded than usual) is able, by a collusive mortgage which could never be exposed, to put in action the powers of the Landed Estates Court, and have the lease sold by public auction. If, then, the free leasing of land is promoted by facility and certainty in preventing assignment, this means of evasion is an impediment deserving notice here.

Then follows an important piece of legislation by which in the absence of express covenants in leases certain covenants are to be implied. By this implication the landlord is to be taken to have covenanted for good title to make the lease, and for peaceable enjoyment of the premises by the tenant during the term which it creates. The implied covenants of the tenant, on the other hand, are to pay the rent and taxes payable by him; to keep in good repair, and to give the premises up in that condition at the end of the term. But a still more important part of the act is that which regulates the mode of recovering the land itself. Its operation in removing that impediment to free dealing in land, which arose from the difficulty and doubtfulness of ejectment proceedings, are immense where those proceedings are taken to evict an overholding tenant or one who has made default in payment of his rent. How this, has been effected it is unnecessary to describe at length. It is sufficient to observe that the jurisdiction of the Civil Bill Courts has been extended to all cases in which the rent is under £100 a-year, and that the proofs necessary to obtaining a decree have been so simplified, that in the majority of cases this can be done without difficulty or delay.

When, however, lands have been recovered for non-payment of rent, and are actually in the landlord's possession, a temporary impediment to his leasing it again still remains, owing to the right of redemption which this act gives the tenant or any one interested in the premises, if he pay the arrear of rent and costs of the ejectment within six months. This right may be used at any time till the last moment of that period has expired, and it is therefore necessary for the landlord either not to let again while the right is pending, or to make the letting subject to it. Improvement of any kind is, of course, out of the question till the possibility of redemption is gone, and till then the landlord's enjoyment is practically suspended.

These are the portions of this act which bear on the present subject, but before passing on to another division of it, notice should be briefly taken of a very serious and daily increasing obstacle to the recovery in ejectment of lands held for a life or lives.\* When this is the tenure (and it is one of very frequent use in Ireland), the lives

\* These observations are chiefly applicable to cases occurring in the Civil Bill Courts, though in some degree to all cases where the tenure is by lease for life or lives.

named in the lease must of course be shewn to have ceased to exist, and the proof rests on the landlord. These lives are very frequently those of obscure persons, in the same rank of life as the tenant himself; and such has been the extent of the emigration of recent years, that in the vast majority of cases some one or more of "the lives" is found to have gone beyond the seas. In the absence of positive proof (which is almost unattainable) of the death of any such life, it will not be taken to have ceased unless it be shewn that for seven years its existence has not been heard of by those most likely to have heard of it. It need hardly be observed that such proof is in the highest degree difficult to the landlord, who belongs to a different class, while the tenant and his friends have only to remain silent, and the landlord is baffled, though the strongest moral proof exists of the fact of death. Both parties are thus really injured—the landlord, by being kept out of possession; the tenant, by being allowed to linger in a possession liable to the continual danger of extinction. In England the severe rule is, that the tenant must, when called on, produce the life, or the landlord recovers the land at the peril of having to restore it with mesne rates, if the life be afterwards produced. The act, however, which makes this law, has no operation in Ireland. Perhaps, by a compromise between this law and that in force in our own country, some satisfactory adjustment of this inconvenience might be effected.

We must now pass to another and still more important class of impediments, a class which stands in the way of all agreements alike, whether for leases or grants, or for compensation to improving tenants, and to which no satisfactory remedy (though the attempt has been earnestly made), has been as yet applied. This class is that which takes its rise in settlement and incumbrance.

#### IV.—SETTLEMENT AND INCUMBRANCE.

The impediments which have been hitherto mentioned as restricting the power of making and performing contracts about land, apply with as much force to owners in fee, as to those who hold their land for limited periods. The next class which comes under consideration, takes its rise, on the contrary, from the fee being bound by limitations and incumbrances, and divided by them into several distinct interests.

Settlements, whether effected by statute, purchase, deed, marriage contract, or will, usually create one or more life-estates, followed by the limitation of terms of years and remainders in tail, with an ultimate remainder in fee. The owners for the time being of all these, except the remainder in fee, are unable to make any contract which will carry an interest greater than that limited to each, or which will bind in any way the next in remainder. Thus the tenant for life cannot make a lease or grant that will last beyond his life, unless a special power enabling him to do so is inserted in the settlement. A tenant in tail can, indeed, bar the entail by a deed enrolled in Chancery, but while the entail lasts no mere grant of his can break in upon or bind the estate of the next in succession. Such tenants may have powers of leasing,

or of giving compensation,\* or of sale and exchange, annexed to their estate by the terms of the deed creating it. They may also, without such express power, make leases—tenants for life for twenty-one, and tenants in tail for forty-one years; but, except in these cases, and under these circumstances, the limitation is an impediment which can only be removed by the aid of some of the courts. Even they cannot remove it completely, as their powers, which will be spoken of presently, are very much restricted; and though they could, yet the mere necessity of resorting to them would be an impediment in itself.

The creation of an incumbrance does not deprive the owner of the power of disposing of his entire remaining interest. He may do so, and his equity of redemption or his estate subject to the charge, passes to the purchaser. But it does deprive him of all power to make leases of his property which will be binding on the owner of the incumbrance. If the lessee desire to obtain a lease which will be good against the incumbrancer, he must get him to join in and execute the instrument which creates it. This is, in any case, an impediment to the making of unimpeachable leases; but when the number of incumbrancers is large, it becomes an insuperable obstacle. It is a virtual impossibility to obtain a lease that may not be defeated by any of the prior charges, however created.

No legislative attempt has ever been made to enable the owner to make leases which will be effectual against incumbrancers; though it is hard to see how they could be injured by such a power being given to the owner, if it were provided that the lease should be without fine, and at the best rent. With regard, however, to the partial incapacity occasioned by limitation, something has been accomplished since the date of Mr. Longfield's Report, enough, at least, to indicate the general desire and belief that landowners should be freed from the trammels of limitation, if not enough to give them that freedom. The first and chief enactment on this subject is that referred to above, "The Leases and Sales of Settled Estates Act, 1856."

This act, which is a feeble protest against the inconvenience and embarrassment arising from settlement, enables owners of interests limited in succession (by whatever kind of instrument such limitation may be effected) to procure leases and sales to be made of their property, and, in some cases, to make leases of it themselves. The last power is one of very little magnitude. It merely enables any person entitled for life, or for any greater estate, to make leases for 21 years, binding on all remainder-men in the settlement, or if the estate be unsettled, on all successors of the life tenant. These demises are to take effect in possession, to be at the best rent, and to be subject to certain other restrictions specified in the act, and may be made by the life tenant without resort being had to any court. But the assistance of the Court of Chancery must be called in by any who wish to enjoy the other advantages conferred by the act.

\* The writer has never seen any form to this effect, nor is he aware of such a one being in use at all among conveyancers; but it is one which might be employed, and which, if employed, could not but prove of the highest advantage in the majority of cases.

Of these the first and most important is the power given to a limited owner to grant, through the instrumentality of the Court of Chancery, agricultural or occupation leases for 21, mining leases for 40, and building leases for 99 years, or in the last case for such longer term as the court shall direct. The application for its aid is made by petition, and can only be made with the consent of the first tenant in tail who is of age (if there be one), of all trustees, and of all persons having any beneficial interest under the settlement in priority to an estate tail so represented. If the difficulty created by this system of consents be overcome,\* a number of notices must be served on trustees, &c., and be published in newspapers. When the matter is ripe for the consideration of the court, it must see that the making of the lease is "proper and consistent with a due regard for the interest of all parties." Should birth at last be given to a lease, it must, to be valid, comply with a number of requirements contained in the act. It must, according to its nature, be for one or other of the above terms, and no more; unless in the one case of the discretion of the court being exerted to extend the term of 99 years, allowed for building leases. It must reserve the best rent, be granted without fine, be made by deed, &c. The court has, indeed, power to depute to trustees a general authority to lease a settled estate, but this authority is, as the power of the court itself would have been, subject to the restrictions expressed in the act, as mentioned above. It is hardly necessary to observe that, independently of the circumstance of the aid of the Court being indispensable, these numerous and troublesome forms constitute a serious impediment to persons anxious to avail themselves of the powers of this statute.

In order to procure the sale of a settled estate under this act, the same preliminary difficulties must be encountered as on an application for a lease; and if sold in the Court of Chancery, the procedure is the same as if the property were being sold under a decree of the Court. However, this power has been communicated to the Landed Estates Court under their Act (21 and 22 Vic., cap. 72); and although it would appear that the same preliminary conditions are imposed on it in bringing the matter forward, and in considering the fitness of the application, yet its facilities for selling make this an important improvement.

Here also we find that the rights of incumbrancers are well guarded, and a lease even though made as above described under the sanction of the Court, is bad as against any charge having the advantage of priority.

This act no doubt possesses some value. Its direction appears to be right, but it is hardly too much to say of it, that by a most cumbrous procedure it gives to those who labour under the restrictions of settlement very imperfect and unsatisfactory liberty.

The powers conferred on the judges of the Landed Estates Court, by the act which we have just considered, are confined to the

\* It should be mentioned that, without consents, the court may act; but, if it do, must save the rights of all non-consenting parties, thus giving, in fact, no security that a lease granted by it may not be invalidated by some of the parties who have withheld their consent.

selling of settled estates; but the "Landed Property (Ireland) Improvement Act" (23 and 24 Vic., cap. 153), by its second part gives them, and in certain cases, the chairmen of counties powers almost identical with those conferred by the above statute on the Court of Chancery. The chief differences are firstly that, by the "Leases and Sales of Settled Estates Act," it is the Court (except in the case of leases for 21 years by life tenants) which makes the lease, and not the owner; while under the "Landed Property (Ireland) Improvement Act" the owner makes the lease, and the Landed Estates Court or the Chairman, as the case may be, merely gives it a sanction, without which it would not be valid. The distinction intended seems to be that, under the former act the benefit and propriety of the lease is determined by the court, while under the latter that is left to the owner, and the court merely sees to the statute being exactly obeyed by complete conformity to the restrictions which it imposes. The second point of difference is, that a number of implied covenants are imported by the latter act into the leases made under it, a novelty which forms no part of the scheme of the other statute. In this, however, they resemble each other, that no lease made under the latter, any more than one made under the former, can resist the superior right of a prior incumbrancer, should they happen to come into collision.

The existence of a partial or limited interest of course incapacitates the owner of it from making any improvements, however permanent, with the cost of which, or any part of which, he can charge the remainder men; and from agreeing with a tenant, so as to bind those who follow in the succession, that he shall be compensated for any improvements he may make. With this state of things also this statute, which is commonly called Cardwell's Act, undertakes to deal. It is divided into four parts, of which the first is devoted to an attempt to encourage partial owners to improve by enabling them to secure the cost of their improvements on the estate. The following is the mode in which the attempt is made.

The limited owner\* who wishes to improve must, as the very first step towards obtaining a right to compensation as against any one coming into the estate after him, go to the Landed Estates Court, and submit to it a scheme of the proposed improvements, and the estimated expense of them. These can only be directed to certain specified objects—namely, thorough drainage—reclamation of bog, waste land, or land under water—protection from inundation by embankment—making of roads and fences—the erection of farm houses—houses for labourers, and similar erections—and, lastly, the reconstruction of any of these. After the scheme has been submitted to the court, it is to hear the applicant, and the person next entitled, or some one whom it approves of as a substitute for him, and is then either to give or withhold its sanction. If the sanction be obtained,

\* "Limited owners" under the act are, in effect, all persons having by settlement life estates and estates greater than life estates, and less than absolute interests; and "settlement" is in effect any document creating partial estates with remainders over.

the "limited owner" makes the proposed improvements, which in their progress the "successor" has a right to inspect: and then resort must again be had to the court. This time the application takes the form of a statement of the expenditure actually made, which must not exceed the original estimate approved by the judge, and the account of which the successor is at liberty, at this stage of the proceedings, to reduce. If the successor does not appear, the court is provided with machinery, by means of valuers, surveyors, and others, for arriving at an estimate of the fair cost of the work done. £7 2s. a-year for every £100 of the sum so ascertained is then charged by the order of the court on the land improved, or any adjoining land subject to the same limitations; and this, unless the court otherwise order, takes precedence of all other charges, with a few trifling exceptions. The sum so charged, after registration\* of the charging order, constitutes the compensation which is the object of these proceedings. If the limited owner die within the twenty-five years, his executors, administrators, or assigns are entitled to the annuity till it expire.†

So far this act deals with the matter of compensation as between limited owners and remainder-men. The second part of the act is that relating to leasing powers, of which notice has already been taken in speaking of the powers given by the "Leases and Sales of Settled Estates Act." That which next demands consideration is the one by which an attempt has been made to inaugurate a system securing compensation for improvements to agricultural tenants.

This portion of the statute appears to be based on the principle that the tenants are not entitled to compensation for improvements, unless they have been made with the consent of the landlord. The obtaining of this consent is accordingly the first step to be taken by the tenant who wishes to improve, and to obtain a certainty of compensation for his improvements. This is done either directly or indirectly. The direct mode of doing it is by agreement between the tenant and the owner, who is empowered, notwithstanding the terms of any settlement, to make such an agreement. The indirect method of obtaining this consent is by serving a notice on the owner or his agent, stating the contemplated improvements, and the proposed method and probable expense of effecting them, from which proceeding the landlord's assent will be implied, unless within three months from the service of the notice he shall express his dissent. If the necessary assent expressed or implied be obtained, the tenant makes his improvements, and lodges with the Clerk of the Peace for the county in which the lands improved are situate, a statement of the improvements made, and the cost of making them. The procedure for ascertaining the value of the work done and charging the compensation on the lands, is exactly similar in all respects to that pro-

\* The act leaves it in complete doubt whether the omission to register invalidates the charge, or takes its priority away, or leaves even its priority unaffected.

† The analogous act to this in Scotland is that called the Montgomery Act, which has been a great success, while this has been a total failure. The distinctive difference seems to be that here the first step to be taken by an owner seeking compensation leads into some place of litigation. Under the Montgomery Act every opportunity is given to arrange the compensation out of court, and it is only when that cannot be done that litigation commences.

vided for cases between limited owner and remainder-man. The tribunal only is different. In these cases it is the chairman of the county where the lands are who is empowered to estimate and charge the compensation.

It might possibly be supposed that the power, given by this enactment to a limited owner entitled under a settlement, of agreeing, notwithstanding his settlement, for the execution of improvements by the tenant, enables him to make an agreement in this behalf, which without the assistance of any court will bind his successors to terms which he was himself willing to accept. This, however, is not so. The agreement is only a consent to the execution of the improvements, which enables the tenant when he has made them to proceed to the court and get his charge. As yet no act has given any such free and unobjectionable power as that above referred to, so that a landlord sincerely anxious to deal fairly with his tenants in this respect is, if he be a limited owner, under an absolute inability to do so without the expense and trouble of an application to the chairman.\*

The fourth part of this act need not be mentioned further than to say that it fixes a maximum for charges of this kind, namely, one-third of the annual value of the land, and provides for the redemption of a tenant's annuity by the landlord. The rest is occupied with matters of detail.

This attempt to enable the tenant to obtain compensation for improvements has also proved a failure. One of the reasons of this is certainly that an annuity is not a mode of compensation suited to the wants of the tenant class. In many cases it would have been nearly exhausted during the tenant's occupation; and if needed for an emergency, as it was most likely to be, could not be capitalised at once, and, even after delay, only at a serious depreciation. Another reason may be that it makes litigation unavoidable. Certain it is, that the Act has in practise proved a dead letter.

#### V.—CONCLUSION.

It only remains to mention a few other impediments not included under any of the foregoing heads. The expense of searches and stamp duties, by increasing the cost of investigating and conveying the title to land, have some effect in deterring purchasers. The frequent necessity, which might be so easily obviated, of obtaining new trustees of wills and settlements as a preliminary to conveyance, has also a similar result and tendency. The loss of unregistered deeds and unproved wills causes another and still more important difficulty in the purchase and sale of lands. It is believed that on sales of small properties held for long leases this is a frequent cause of the greatest embarrassment. The duty payable to the Crown, out of the purchase-money for lands sold in the Landed Estates Court, also appears to be sufficiently large to have some operation in preventing landowners from availing themselves of the great advantages which that Court offers. Again, it is possible that the rule of law which divides chattel leaseholds equally among the

\* The utility of this act, had it worked, would have been further impaired by the fact that no tenant holding by lease for life or lives, although this is so common a tenure in Ireland, is admitted to the advantages offered by it.

next of kin of the lessees who die intestate, may produce a reluctance to create leases liable to such subdivision.

Some other impediments to the formation of contracts relating to land will also suggest themselves (as for instance, the important one arising from the existence of the law of distress), which operate, no doubt, morally in the same direction as those which have been discussed: but these, it was conceived, did not come properly within the range of the present Report.

All others, it is hoped, will be found to have been adverted to in the foregoing pages. Under the first branch of the division there adopted, it has been shewn that it is only by the assistance of the Court of Chancery that infants, and lunatics under its care, can make reliable contracts touching land—that the acknowledgment by married women, which is necessary to make deeds executed by them binding on them, is frequently omitted, and thus creates a defect in the title they have purported to pass—and that corporations, secular as well as spiritual, are restricted from doing more than making short leases of their lands.

Under the second of those heads into which the subject has been divided, attention has been called to the impediments presented by the expense of investigation, and the sense of insecurity to which the obscurity of title gives rise; to the action of the Landed Estates Court in simplifying title; and to the recent attempts to perpetuate that simplicity and to facilitate mortgaging which have been made by the Record of Titles Act, and that authorising the issue of Land Debentures.

The third section treats of the impediments which arise from litigation, as minor, lunacy, and receiver matters, and proceedings in ejectment—the improvements made of late years with regard to these—the impediments still presented by the tenant's right of redemption, and the difficulty of proving the determination of leases for lives.

The fourth head relates to impediments caused by the limitation of estates in settlement, and by the existence of incumbrances—refers to the various recent enactments which tend to remove them, and discusses the obstacles resulting from these and some other causes which prevent agreements being made with tenants, to compensate them for their improvements. In conclusion have been mentioned a few minor though far from unimportant considerations which could not have been properly introduced in any of the previous sections.

Under some one or other of these heads it is believed that all existing legal impediments of sufficient magnitude to deserve notice here have received a place. It is also hoped that in these pages a summary of the recent changes in the law relating to the matter proposed for consideration may be found, which may prove of service to those members of your society who may be engaged at any time in the consideration of the important subject with which this Report is conversant.

I am, gentlemen,

Your obedient servant,

RANDAL W. M<sup>C</sup>DONNELL.