THE

TRANSFER OF LAND CONSIDERED

IN RELATION TO THE

RIGHTS OF JUDGMENT CREDITORS.

A PAPER READ BEFORE

THE DUBLIN STATISTICAL SOCIETY.

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BY

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The Transfer of Land considered in relation to the Rights of Judgment Creditors. By Robert W. Osborne, Esq.

WHILST the laws affecting property in these countries have wisely given to every one an unrestricted power of disposal over the property of his own creation, they have, at the same time, indirectly interfered with that privilege in practice, by throwing obstacles in the way of the alienation of land, injurious alike to the owner or debtor, and his creditor. As the power of transferableness forms one of the elements of the value of a commodity, any restriction on that power is a diminution of its value to the owner; whilst his creditor, from the period that he became entitled to claim the property, by advancing his money, his labour, or his goods, is injured in proportion to the delay and expense attendant upon its alienation. In considering, therefore, economically, the laws that affect the transfer of land, I propose to review them not only as they affect the possessor or the debtor, but also his creditor; and will endeavour to establish that whilst mortgages and charges created by the owner should be the only permanent incumbrances upon land, yet that it will not be incompatible with the speedy transfer and improvement of real property, that it should be liable to the claims of judgment creditors. So far as regards personal property, if it is at all marketable, the owner has seldom any delay in turning it immediately into money; or if his object be not to part absolutely with any particular article, he can obtain money on it as a pledge; whilst the creditor, on taking proceedings, and obtaining a judgment, can seize all the personal goods, and after paying himself, hand over the surplus, if any, to his debtor.

In the case where land is a security for money, it will be necessary to consider, 1st. Where the owner has the unrestricted right over it; and 2nd. Where the land is in settlement, and the possessor has only a limited estate; such, for instance, as a life interest. Supposing, then, the case of a party seized in fee hitherto unembarrassed, having a judgment recovered against him by a tradesman. His immediate remedies against the land are either to apply to a court of equity for a receiver, or to a court of law for a writ of elegit, to receive the rents and profits in trust, till the creditor is paid. The receiver being appointed, a lengthened period must necessarily elapse before the demand is realized, and although the time may be abridged under a more efficient and better regulated

practise than that which at present exists, as regards receivers and proceedings by elegit, yet where a number of creditors have to be paid according to their priorities, out of the rents and profits of an embarrassed property, no plan, however efficient, can prevent delays if not in the payment of the interest, at all events in the principal; and that when there is even a sufficient fund. The tradesman who advanced his goods under either the expressed or implied undertaking, that within a certain limited time, settled by the usual course of dealing, he should be paid his demand, is thus injured by having his capital locked up and withdrawn from its usual sources; as the original contract between himself and his debtor was not, that a certain sum was to be lent out for an indefinite time at a certain per cent. but that the principal sum was to be paid immediately, or within a limited time, to be again invested in the purchase of other goods. The great principle of trade, quick returns of capital, is frustrated ; and a transaction which was intended to be of a transitory nature is prolonged for an indefinite period, to the injury of the land as well as the creditor. If the judgment creditor finds that the annual rents and profits are clearly insufficient to pay his debt within any reasonable time, or that there were a number of prior incumbrances, he can avail himself of a power of sale given to him of late years, in addition to the more immediate remedies I have just alluded to. If, however, his wants are pressing, he cannot wait for the delays at present attendant upon a sale, and will be forced to assign the judgment at a loss.

Having thus taken a brief review of the evils arising from the law as it affects judgment creditors, I will next proceed to consider the position of a landlord or owner.

If the owner requires to borrow money, he finds he can do so most advantageously by mortgage. The mortgagee being satisfied with the security and title, and having made a search against deeds and judgments, obtains a conveyance of the legal estate of certain specific lands named in his mortgage deed. I will suppose he is the first and only incumbrancer on a well circumstanced property, one third or one half of the annual rental of which is sufficient to pay him his interest. The mortgagor, however, before the loan is completed, has to pay the expenses of searches, title, &c., as well as a bonus to the agent or the mortgagee for the obtaining of the loan. The interest he will be subject to, at least in Ireland, if the amount is under £5,000, varies from £5 to £6 per cent. though he gives unquestionable real security for the loan. When the government securities yielded £5 per cent., it was illegal to charge more than £6 per cent. on mortgage ; yet, at present, the owner cannot effect a loan for a less rate, although if the mortgagee places his money in the funds, he will obtain but from £3 to £3½ per cent., if he invest it in the purchase of land, he may not obtain much more, in many cases less, taking into account the contingencies and the taxes to which land is subject, and from which mortgages are free. How then comes it to pass, that the owner of land is obliged to pay a

far higher rate of interest for a loan than the owner of any other species of property of equal value? It may be accounted for, 1st. By the expenses of searches and making out title, which are always paid by the mortgagor; and 2ndly, the difficulty and delay the mortgagee anticipates he will have in bringing the property to a sale, when he requires his principal money, and the delays incident to the appointment of a receiver in the event of his interest not being paid.

The present system of registration having been so fully brought before your notice by Mr. Hancock, in a paper read before this society some few weeks since, I shall not trouble you with any observations upon this point, more particularly as the subject is about to receive the consideration of the legislature. As to the delays and difficulties of sales, so far as they arise from incumbrances, they will be found to be for the most part caused (in the case that I have supposed, where lands are not in settlement) by judgments recovered in adverse suits. For though the mortgagor can mortgage the equity of the redemption, and so create a second, or possibly a third incumbrance, it is obvious, however, he will not succeed in inducing parties to lend, except they see a surplus to meet the arrears of interest and other contingencies; and the same rule is applicable to the cases where judgments, as in Ireland, have been used as the ordinary assurances for the permanent security of money. The adverse creditor, the tradesman, for instance, is in a very different position, as he must take what he can get; and experience shows that the long list of puisne incumbrances are for the most part composed of judgments recovered in adverse suits. The mortgagee having no controul over the acts of the mortgagor, finds, when he proceeds to a sale, a number of judgment creditors whose priorities must first be ascertained, before he obtains the amount of his mortgage. He must, in fact, remain a patient beholder, till some question raised concerning the re-docketting or registry act is disposed of, whilst, at the same time, the priority of his charge is admitted by all. To remedy this evil, I would propose that in place of the usual decree to account, in suits for foreclosure and sale in the equity courts, there should be a decree for a sale in the first instance; that the purchase money be lodged in court; and that, when no question of title was raised, the prior incumbrancers be paid off without delay, and let the residue of the fund be the battle-field on which puisne mortgagees and judgment creditors can contest their relative priorities. It is almost needless to inform this assembly, that this is the main feature of the Encumbered Etates Act—the transference of the incumbrancers from the land to the fund; and although, in its working out, it have an unimproved system of registration and the present indefinite nature of the rights of judgment creditors to encounter, I may venture to anticipate the incumbrancers will be in a far better position than if they were left to the long delays of equity proceedings as they exist at present. By only

a conditional order for sale being granted in the first instance, the injustice that might arise by a mortgagee to whom nothing was due proceeding to a sale would not occur, as the mortgagee could set up that fact as cause; whilst in cases where the transactions and dealings between the parties were complicated, by giving the court a discretionary power to direct an enquiry of the sum due on foot of the particular incumbrance, it would effectually prevent an estate being sold when the mortgagee had been paid. Again, upon the question of title, if the Foreclosure Bill contained a short abstract of the mortgagor's title and a certificate by the proper officer, similar to that given in the case of negative searches of the incumbrances affecting the property for sixty years back, the court would have before it a complete and undoubted history of the property, and so be enabled to decide at once in favour of the mortgagee's title; or if not, direct certain parties to be noticed, who may come in and show cause against the sale.

Amongst other changes, it is in contemplation, I believe, to limit the remedies of judgment creditors to the lands of which the owner was seized or possessed at the time of the rendition of the judgment, and to compel them, within a limited period after the entry, to elect what denomination they will have charged. This would reduce judgments to the nature of mortgages; and if so, I see no reason why their remedies should not be co-equal with them; with the exception, however, of the power of appointing receivers. To prevent an accumulation of incumbrances, the great evil that affects so many of the estates in this country, I would limit the judgment creditor's rights for a sale, to a period say of three years, and if the rights be not exercised within that time, that the land be free from the judgment. In this way there would be no danger of a judgment creditor lying dormant on his rights, as either he himself or some other incumbrancer must take proceedings within the allotted time. It might, perhaps, be found advisable to except from this rule the judgment creditor who was the first incumbrancer, and give him, in addition to the right of sale, a power of appointing a receiver. Whilst, therefore, the rights of the adverse creditor would be protected, the owner of land will at the same time be enabled to obtain a first or second loan at a much lower rate of interest than at present; inasmuch as subsequent incumbrancers, where there is no objection to title, will not cause any delay in the realization of the principal money. The landlord, if extravagant, will be more likely to curtail, and look into his affairs, when he sees one townland taken from him and possessed by a stranger, than if he paid a large portion of his rental away, and was allowed still to call himself the proprietor; whilst improvements will not be suspended by the varied and conflicting interests that at present affect and injure the land in this country.

In proceeding to consider the effect of entails on the interests of owners of lands and their creditors, it is not necessary for my

present enquiry to enter at any length into the many arguments that have been used, both for and against this restriction upon the alienation of land. On the one side, it is said to be necessary, in order to secure and maintain a hereditary aristocracy in the influence and position they at present occupy, that not only the rights of ownership should be restricted, but that the entire property should attach itself to the eldest member of the family; whilst there are others who would have no settlement in favor of a person not *in esse* at the time of the settlement, and who conceive that where the interests in land are restricted, improvements are not effected except at the expense and cost of the junior members of the family, who have little or no interests in the increased productiveness of the land. Supposing, however, the laws of entail and primogeniture still to continue in these countries, I will examine how the rights of debtors and their creditors are affected by their existence. If a judgment is obtained against a tenant for life, the creditor can proceed to appoint a receiver, or issue a writ of elegit, and so become entitled to the yearly rents and profits, as in the case of a party seized in fee. If, however, the judgment is for a large sum, and the annual proceeds are small, the creditor would prefer selling the life estate, to running the risk of the life dropping, and leaving a large balance unpaid. The value, however, of a life estate must always be variable, depending upon the particular life in question, and can never realize to the creditor its value; as the purchaser will insure the debtor's life for the amount of the purchase-money, and deduct the annual premiums from the sums so paid. In the meantime land will not be improved, as no one will invest capital on an interest so uncertain as the duration of a life. The Drainage Acts, amongst others, which empower the owners of estates to borrow public money to aid them in the drainage of land, at the rate of $6\frac{1}{2}$ per cent. for twenty-two years, at the end of which period both principal and interest will be paid, may do much towards improvements being effected; but where the land is in the hands of third parties, those advantages will seldom be made use of. If, then, the owners of estates are still to be restricted by settlement, is it essential for the preservation of the rights of those in remainder, that creditors cannot make their demands available, without an injury to the estate and a suspension of improvements, owing to the limited and uncertain tenure of a life interest? I do not see how these evils can be remedied, as long as land so incumbranced is made a continuing security for a number of incumbrancers. Whilst, however, it is said it would be far better to restrict judgment creditors to their original rights, and give them no remedies whatsoever against the land, than to permit the many evils that affect the community at large from the present system to continue; it cannot be forgotten that the entire bent of modern legislation has been to remove from the debtor, in favor of the creditor, the ancient feudal protections in which the landlord was formerly invested. Although, as

might be expected in the engrafting of these modern enactments upon a code so different as that of the feudal system, imperfections such as I have mentioned are necessarily found, yet the object and spirit of these enactments tend to diminish and obliterate the distinctions between landed and personal property, and declare to the debtor that he cannot owe money, and at the same time enjoy the rents of his estate.

I think the practical working of the laws affecting the taking of land by railways will shew that the rights of creditors can be preserved without the necessity for these evils arising. It is not too much to say, that the attention and revision that the laws of real property have of late years received has been in no small degree owing to railways. The necessity for the taking of land, be it entailed or not, be there one incumbrancer or one hundred, be it one rood or one thousand acres, naturally directed attention to the simplifying of titles, and led to the passing of the Satisfied Terms Act, and many others equally beneficial. Railway legislation is only in its infancy, and as the improvements of machines have been chiefly owing to the inventions of workmen to facilitate their own work, so we may look forward to parties engaged in the alienation of land for railway purposes, as the improvers of the law of real property, for the more important purposes of the transfer of land in general. It is, however, the manner of dealing with the property of those under disability that I have more immediately to consider on the present occasion. When a railway requires land that is under settlement, an inquisition is held, and the value being ascertained, is lodged in court, subject to the trusts of that settlement. The tenant for life receives the interest, and when he dies, the principal is divided in accordance with the original trusts. The money is in fact considered as so much land, and the rights of all parties interested are transferred to the fund. I would propose that a power similar to that given to railway companies be extended to the judgment creditors of tenants for life, and that they be enabled, by selling a portion of the inheritance, to receive the interest of the purchase money during the conusor's life, or until the debt is paid. The judgment creditor, as in the case when lands were free, should be obliged to elect, on or about the time of the entry of his judgment, what lands he would proceed against; but as against estates for life, I would not be for limiting the time of proceedings for a sale.

It is, I apprehend, the increased difficulties of alienation, and the suspension of improvements being thought necessarily connected with judgments being a charge upon land, that has mainly induced many to think that they should not be allowed to attach to the reality, rather than any feeling that a landlord, as well as any other member of the community, should not answer with his property to the claims of his creditor. The remedies at the present time possessed by the judgment creditor, of making judgment charges upon land, are entirely of statutable creation, as at common

law the creditor could only issue a writ of *fieri facias* or *levari facias*. It may be said that the repealing the late enactments will only be reducing creditors to the rights originally possessed by them, and that they will be no worse off than their forefathers. It cannot, however, be forgotten, that under the feudal law lands were not transferable, and that the feudal system used land not as an exchangeable property, but as the bond of union between the lord and his vassal. The enfeoffment not only placed it out of commerce, but subjected it to servitudes, and to rules adapted exclusively to this singular relation; out of which arose the artificial system of tenures, uses, and trusts, which interfered with the alienation, the the succession, and liability to the rights of creditors. Legislation every session is engaged in adapting and remodelling the ancient systems of tenures and judicial proceedings, to meet the exigencies and requirements of a commercial community. If, then, the rights of creditors can be preserved, without retarding either the alienation or improvement of land, I see no reason why they should be restricted in their rights as formerly, when property was held but by few, and not diffused and enjoyed by so many of the population.

In conclusion, I have endeavoured to shew, in this sketch of the rights of creditors and debtors, that it is not inconsistent with the transfer and improvement of land, that it should be liable to the claims of judgment creditors, provided they are restricted in the way I have suggested; and also that if the permanent and fixed equity tribunals adopted a practice in foreclosure suits, similar to the present existing Incumbered Estates Court. If the above observations succeed in drawing increased attention to this often debated, but far from exhausted subject, my object will be more than attained.