

ON
THE ECONOMIC CAUSES
OF THE
PRESENT STATE OF AGRICULTURE
IN IRELAND :

Part III.

A PAPER READ BEFORE
THE DUBLIN STATISTICAL SOCIETY:

BY
W. NEILSON HANCOCK, LL. B.

DUBLIN :
PUBLISHED FOR THE SOCIETY BY HODGES AND SMITH,
104, GRAFTON STREET.

1849.

DUBLIN STATISTICAL SOCIETY.

President:

HIS GRACE THE ARCHBISHOP OF DUBLIN.

Vice-Presidents:

MOUNTIFORD LONGFIELD, Esq. Q.C. LL.D.	THE EARL OF ROSSE,
CAPTAIN THOMAS A. LARCOM, R.E.	THE BISHOP OF CORK.

Members of Council:

SIR ROBERT KANE,	JAMES HAUGHTON, Esq.
W. COOKE TAYLOR, LL.D.	W. T. MULVANY, Esq.
ROBERT BALL, Esq.	SURGEON WILDE,
JOHN K. INGRAM, Esq. F.T.C.D.	ROBERT VANCE, Esq.
PROFESSOR APJOHN, M.D.	JAMES W. MURLAND, Esq.
PROFESSOR ALLMAN, M.D.	STEWART BLACKER, Esq.

Treasurer:

CONWAY E. DOBBS, JUN. ESQ. Henrietta-street.

Secretaries:

JAMES A. LAWSON, LL.B., 41, Lower Baggot-street.
PROFESSOR HANCOCK, LL.B., 40, Trinity College.

THIS society was established in November, 1847, for the purpose of promoting the study of Statistical and Economical Science. The meetings are held on the third Monday in each month, from November till June, inclusive, at 8, P. M. The business is transacted by members reading written communications on subjects of Statistical and Economical Science. No communication is read unless two members of the council certify that they consider it accordant with the rules and objects of the society. The reading of each paper, unless by express permission of the council previously obtained, is limited to half an hour.

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

Proposals of candidate members should be sent to the secretaries at least *a fortnight* previous to the meeting.

The subscription to the society is one pound entrance, and *ten shillings* per annum.

On the Economic Causes of the present state of Agriculture in Ireland, Part III.—Legal Impediments to the Application of Capital to Land. By W. Neilson Hancock, LL.B., M.R.I.A. Archbishop Whately's Professor of Political Economy in the University of Dublin.

GENTLEMEN,—In my first paper on the state of agriculture in Ireland I ascribed that state to two sets of causes—first, the legal impediments to the free transfer and sale of land ; and, secondly, the legal impediments to the application of capital to agricultural operations. I then proceeded to explain the nature and extent of the first set of causes. I shall, in this paper, bring under your notice part of the second set of causes, namely, the legal impediments to the application of capital to agricultural operations.

In considering this set of causes, the most convenient way will be to examine the case of the tenants and that of the proprietors separately. In doing so, we must always bear in mind the important observations of Adam Smith, as to the proportion in which we may expect these classes to employ themselves in the work of improvement. "It seldom happens," he observes, "that a great proprietor is a great improver. In the disorderly times which gave birth to the barbarous institutions of primogeniture and entails, the great proprietor was sufficiently employed in defending his own territories, or in extending his jurisdiction and authority over those of his neighbours. He had no leisure to attend to the cultivation and improvement of the land. When the establishment of law and order afforded him this leisure, he often wanted the inclination, and almost always the requisite abilities. If the expense of his house and person either equalled or exceeded his revenue, as it did very frequently, he had no stock to employ in this manner. If he was an economist, he generally found it more profitable to employ his annual savings in new purchases than in the improvement of his old estate. To improve land with profit, like all other commercial projects, requires an exact attention to small savings and small gains, of which a man born to great fortune, though naturally frugal, is very seldom capable." These observations of Adam Smith are fully verified by experience in Ireland ; for the Land Occupation Commissioners' Report states : "It is admitted on all hands that, according to the general practice in Ireland, the landlord neither builds dwelling-houses nor farm-offices, nor puts fences, gates, &c., in good order before he lets his

land to a tenant. The cases where a landlord does any of these things are the exceptions. In most cases, whatever is done in the way of building and fencing is done by the tenant; and, in the ordinary language of the country, dwelling-houses, farm-buildings, and even the making of fences, are described by the general word improvements, which is thus employed to denote the necessary adjuncts to a farm, without which, in England or Scotland, no tenant would be found to rent it."

What, then, are the legal impediments to the tenants expending their capital in these necessary improvements? Of these I may enumerate six:—first, the old feudal principle that the ownership of improvements follows the ownership of the land; secondly, the law of agricultural fixtures; thirdly, the restraints on leasing power; fourthly, the restraints on the power of making tenant-right agreements; fifthly, stamps on leases and other contracts with tenants; and sixthly, the remnant of the usury laws.

The best way of illustrating the first of these impediments will be to take the common case of a lease supposed to be good, but turning out defective, either from want of title in the lessor, or from an undue exercise of the leasing power. Suppose a tenant to have *bona fide* obtained a lease, and to have expended a large sum in farm-buildings, fences, drains, and other necessary and desirable improvements. Suppose that his landlord is ejected on account of some flaw in his title, or that his landlord's successor discovers some defect in the leasing power; on either of these contingencies, the party becoming entitled to the land may not only break the tenant's lease, which is the fair and natural consequence of the failure of the right of him who made it, but by law becomes immediately entitled to all the tenant's improvements, without being bound to pay him one penny for the capital he has expended on them—because the old feudal principle is still retained, "that everything once attached to, or embodied in land, belongs to the person entitled to the land in the same manner as the land itself." I do not dwell on the extreme injustice which this rule of law works in the case of doubtful or defective title. But can any rule be conceived more impolitic, more calculated to paralyse exertion, and impede the application of capital in a large class of cases? For recollect that in the present state of the law, according to the evidence of Mr. Senior, although most titles are safe to hold, yet "there is scarcely any title which is not subject to some legal doubt." This rule of law has the singular effect of increasing the insecurity of property exactly in proportion as it is improved. Thus, as long as property continues in a waste or barren state, its value would often be insufficient to defray the expense of the legal proceedings necessary to establish a doubtful claim; but every improvement increases the value of the prize; and thus the chance of any flaw in the title being detected, or any remote claim being asserted, increases exactly in

proportion to the increased value added to the land by the industry and savingness of the occupier.

It becomes important, then, to trace the origin of this rule, and to point out its general effects. For this purpose, I shall quote from the very able report recently made by the committee of the society for the amendment of the law in England, appointed to consider the law respecting improvements in land and agricultural fixtures :—

“The rule that persons entitled to limited interests in land shall not take from it anything which has once been fixed or united with it, though not carried to a very great extent by the common law, owes its chief importance to the statutes concerning waste passed as early as the reigns of Henry III. and Edward I. At those periods the notions concerning property in land, and the relation between landlord or reversioner and tenant, were very different from those which now prevail; and we may fairly attribute the extensive application of the rule in question, and the severity with which it was enforced, to the very slight importance then attached to the tenant's limited interest, as compared with the landlord's freehold; to the small value of any improvement or annexation which the tenant could make; and to the fact that laws were made by the landlords only. Above all, the landlord and tenant were not looked on simply as parties to a contract concerning property, in which the rent on the one hand and the usufruct of the land on the other formed the only terms. They had personal relations which placed the landlord in the condition of a superior, the tenant in that of a dependant, and prevented the notion of a contract (which is found on equality) from being fully developed. It is hardly necessary to point out how completely the state of things is altered. In point of value and of perfection of title, chattel interests now differ from freeholds only in duration; the ownership of the freehold gives no advantage unless accompanied by superior wealth; the landlord brings the temporary usufruct of his land into the market, just in the same manner as the merchant brings his wares, and the only advantage he has, viz., that of possessing a commodity of which there is a limited supply—is one strictly commercial.

“The injustice of the rule in question, as applied to the present state of things, is therefore obvious; its inexpediency is no less so. Of all things which can be lent or borrowed there is none so capable of permanent improvement as land, none so rapidly rising in value, none for the produce of which there is so great and so increasing a demand. The application of science to this improvement, steady progress under its guidance in the art of agriculture, and of preparing of the produce of the soil for market, are matters of yesterday; and yet there are few arts which hold out, even now, so large promises of success. But experience is wanted; experiments tried on a large scale in different situations, soils, and climates, not by amateurs only, but by men who practice farming

as a trade, and who, depending on it for a livelihood, are required to make it answer. By far the greater part of these experiments are attached to, or in some manner affect the soil and freehold; they consist of machinery and buildings annexed to the land, or of drainage, manures, and other such improvements incorporated with it.

“All these are expensive; they require an outlay of capital which cannot be repaid by the increased income of a short period. Now, under the present law, where there is no custom or special contract to the contrary, the tenant’s interest in all the improvements ends with his tenancy; and it is therefore his concern, towards the end of his term at any rate, not to spend money which will benefit his landlord only, nor leave the farm in a better condition than he found it. The present system is, therefore, injurious to the reversioner, as well as unjust to the tenant. It is also—and to this argument your committee attach great weight—altogether opposed to public expediency, which requires that land should produce as much as it can be made produce. A condition of the law, therefore, which has an opposite tendency is detrimental to the community in general.”

The remedy for these evils, so plainly demonstrated, is to alter the rule of law, by enacting that in the absence of any contract to the contrary, or of any notice not to make the particular improvements, all improvements shall be deemed to be the property of the person who made them; the owner of the land, on receiving possession of it, to acquire at the same time the right of enjoying all the improvements on paying the market price for them; the improver retaining a charge on the improvements for his compensation until paid.

In suggesting this remedy, I do not propose to enter into a review of the other plans which have been suggested for effecting the same objects, but it must recommend itself at once to the mind of any one who has considered the subject, from its simplicity. It is free from the objectionable features usually involved in such plans. Thus, it does not interfere with the contracts between landlord and tenant; but merely provides for the case where no contracts exist, or where the existing contract is incomplete. Again, it affords no grounds for the absurd notion that every plan for giving tenants security for improvements involves the possibility of “a man being improved out of his estate;” for a proprietor is benefited, instead of being injured, by getting improvements on his land at their market price. Again, the plan is free from any complicated arrangements about giving notices of improvements, registering the cost of execution, and arranging the scale of repayment. Such arrangements should always be left to private vigilance and private contracts. Public law should confine itself to the defining general rights, and the providing the machinery for disputed cases only. This machinery should, as

much as possible, be formed from the ordinary tribunals of the law.

Having concluded the consideration of the first legal impediment to the application of capital to agriculture, I proceed to the second, namely—the law respecting agricultural fixtures, which I shall explain in the language of the able treatise on the subject by Amos and Ferard :—“The rule of law, that whatever is affixed to the freehold becomes essentially a part of it, and is subjected to the same rights of property as the land itself, originated in a state of manners very different from that which prevails at the present day. The fee-simple was not in ancient times divided into a multiplicity of particular estates : personal property was scarcely regarded as an object of concern to the legislature, and the proprietors of the freehold were the authors of those very laws which settled the conflicting claims of themselves and their tenants. Notwithstanding the great change which has taken place in the habits and opinions of society, this rule in favor of the freeholder still remains unaltered, and it must be regarded as the general rule of law at the present day, although it appears to be both inequitable in its principles, and injurious in its effects to the spirit of improvement.”

The work then proceeds to explain the origin of the modern doctrine of fixtures.

“It is curious to observe the first attempts which were made by the courts to afford relief from the strictness of the ancient law. Much hesitation is apparent in the early decisions, as reported in the year-books and other authorities, and many subtle distinctions are there relied upon by the judges which have since been very properly exploded. It appears, however, that so early as in the reign of Henry VII., an exception from the law respecting annexations to the freehold was recognised in the particular case of tenants ; and these were said to be at liberty to remove some species of articles, if erected at their own expense on the demised premises. It has, indeed, been represented that the courts, at the period spoken of, allowed this privilege to tenants from a politic concern for the interests of trade and manufactures ; but it seems very doubtful whether any principle of so liberal a character is to be traced in their judgments. An important step was, however, made when the courts thus assumed the power of restraining the rights of the freeholder without the express sanction of the legislature. The modern authorities proceeded on more unequivocal principles, and from time to time they introduced exceptions of so extensive a nature, as to have subverted the general rule ; for, in the first place, it has been the recognised doctrine of the courts ever since the time of Queen Anne, that the relaxation should be allowed in favor of erections and utensils put up for trading and manufacturing purposes ; a very important description of property was thus exempted from the operation of the ancient rule.

“In progress of time other exceptions were admitted ; for it was

found that the state of refinement to which the country had arrived in matters of domestic furniture and decoration, rendered the rules of the feudal law incompatible with the general convenience of society. Accordingly, in this instance also, the judges found it expedient to modify the ancient law, with the view of adapting it to the manners of the times, and by a series of determinations a further exception in favor of articles for ornament and domestic use was gradually introduced.

"After the relaxation in favor of trade had been long and clearly established, an attempt was made to apply the principle of that exception to the case of agricultural erections. This attempt was warranted by judicial opinions of high authority, and seems to derive great support from analogy and general reasoning ; but, in this instance, as no direct precedent could be found in which erections or buildings for the purpose of agriculture had been considered as privileged, the Court of King's Bench refused to countenance this further innovation upon the general rule.

"The exigencies of society, however, had, previously to the last-mentioned determination, rendered it necessary that the ancient law should receive some qualification in the case of erections made with a view to the enjoyment of the profits of land ; and accordingly, there have been several decisions, in which an exception similar to that in favor of trade has been allowed in respect of steam-engines and other machinery, for the purpose of making mines, collieries, &c.

"With respect to the extent to which these several exceptions have been carried, it is to be observed that the judges, in admitting the innovations in question, have evinced a great anxiety to remove from themselves the charge of infringing upon ancient principles, or of affording a ground for future encroachment. They have, accordingly, taken great pains to support their decisions by a variety of reasons derived from the facts of each particular case : and hence it appears, that in questions respecting the right to fixtures, it is in general necessary not only to inquire whether an article, its object and purpose considered, falls within any of the admitted exceptions, but to advert also to many other incidental circumstances which have occasionally been relied upon in the judgments of the courts.

"And, indeed, where there is a direct precedent in favor of the removal of a particular fixture, the right of the claimant may still be subject to great uncertainty, if he does not stand precisely in the same situation as the party who has been held entitled to remove it. For the courts have repeatedly affirmed that the exceptions from the ancient rule of law have been carried to a different extent in the several cases of landlord and tenant, executor of tenant for life or in tail, and remainderman, or reversioner and executor of tenant in fee and the heir ; and yet the limits within which the privileges of these parties are respectively confined are nowhere pointed out ; neither have any satisfactory

reasons been assigned by the courts for the distinctions thus laid down, from a consideration of which the rights of those several classes of individuals might be inferred.

"For the purpose of rendering the branch of law relating to fixtures at once intelligible in its principles, and precise in its terms, it would seem in the first place desirable that no change of property should result from the mere fact of annexing a personal chattel to the freehold, unless in cases in which some principle intervened which might be deemed reasonable at the present day. "For it seems," say the authors from which I have been quoting, "a reflection upon the jurisprudence of the country, that a general rule of law, which is productive of much inconvenience to the public, should have no better foundation than the motives of feudal policy."

Such being the account of the law of fixtures given in the text-book on the subject, is it not manifest that this state of the law must exercise a very injurious influence on the state of agriculture? Can anything be more unscientific than the established distinction between agricultural and trade fixtures—as if the freedom of removal necessary and beneficial in the latter case must not be equally so in the former? Can anything be more impolitic than to leave the law in its present unsatisfactory and complicated state, when the judges are driven to the special facts of each particular case, instead of having a broad general principle to guide them in their decisions? The law of agricultural fixtures has been very properly condemned by the committee of the Society for the Amendment of the Law, in the report which I referred to already. The remedy for it is an extension of the principle I suggested with regard to other improvements—namely, that all improvements of the nature of fixtures shall, in the absence of any contract to the contrary, be deemed to be the property of the improver, and, of course, removable by him.

The next impediment to the application of capital to land by tenants, is the state of the law which allows property to be settled in such a manner that the owners have short or defective leasing powers. I cannot give you a better illustration of the effects of strict estate settlements in this respect, than by stating a remarkable case, the outline of which has been furnished to me. About fifteen years ago, an enterprising capitalist was anxious to build a flax mill in the north of Ireland, as a change had become necessary in the northern linen-trade, from hand-spinning to mill-spinning, in order to enable the trade to be carried on in competition with the mill-spinning in England and on the Continent. He selected as the site for his mill a place in a poor but populous district, which had the advantage of being situated on a navigable river, and being in the immediate vicinity of extensive turf bogs. The inhabitants of the district were well suited for the new manufacture, as they had been long accustomed to the hand-spinning and weaving of the linen trade. The capitalist applied to the

landlord for a lease of 50 acres for a mill site, labourers' village, and his own residence, and of 50 acres of bog, as it was proposed to use turf as the fuel for the steam engines of the mill. The landlord was most anxious to encourage an enterprise so well calculated to improve his estate. He therefore offered to give all the land required, one hundred and sixty acres, at a nominal rent; to grant the longest lease which his settlement would allow him to do; to renew the lease every year as long as he lived; and to give a recommendation to his successor to deal liberally with the capitalist. An agreement was concluded on these terms; but when the flax spinner consulted his legal adviser, he discovered that the law prevented the landlord from carrying out the very liberal terms he had agreed to. He was bound by settlement to let at the best rent only; he could not, therefore, reduce the rent to a nominal amount; and for the same reason he could not renew the lease each year at the old rent, as once the mill was erected, he was bound by the means of the settlement to set at the best terms, that is, to add the rent of the mill to the old rent. The longest lease the landlord could grant was for three lives or thirty-one years. Such a lease, however, at the full rent of the land, was quite too short a term to secure the flax-spinner in laying out his capital in buildings; the statute enabling tenants to lease for mill sites only allowed leases of three acres, and could not be extended to fifty. The landlord suggested that by the custom of the estate the interest of the tenant was never confiscated, and therefore the flax-spinner would be safe. But the flax-spinner found that this good understanding between landlord and tenant was not a marketable commodity on which he could raise money, and it would not answer him to have capital vested in any way that he could not readily pledge it with his bankers, for the purpose of raising the floating capital always necessary to carry on his business. For these reasons—or, in other words, in consequence of the legal impediments arising from the limited nature of the landlord's leasing power, the mill was not built; and mark the consequences. Some twenty miles from the site I have alluded to, the flax-spinner found land in which he could get a perpetual interest; there he laid out his thousands in buildings and machinery; there he has for the last fifteen years given employment to hundreds of labourers, and has earned money by his own exertions. The poor and populous district continues as populous, but, if anything, poorer than it was; for whilst the people have lost employment at hand-spinning, no mill-spinning has taken its place. Their weavers have to get their yarn from other places, such as the town twenty miles off, where the state of the law allowed mills to be erected. During the past seasons of distress, the people of that district suffered much from want of employment, and the landlord's rents were worse paid out of it than from any other part of his estate. Could there be a stronger case to prove how much the present state of Ireland arises from the state of the

law ? Here was no ignorance or perverse disposition. The flax-spinner knew his business, as his success for fifteen years has proved ; the landlord opposed no short-sighted selfishness to the arrangement ; there was no combination nor outrage amongst the people ; but the law alone was the impediment. By this cause all parties were injured ; the poor people were deprived of employment at building, at spinning, and at cutting turf ; the landlord suffered in the poverty of his tenantry preventing the increase of his rent ; the millowner had to use English and Scotch coal instead of Irish turf. It is in vain to teach the people that turf is cheaper than coal, if the law will not let mills be built in turf bogs. It is in vain to tell the people that it is their fault if they have not employment at mill-spinning like their neighbours, when the law stops the erection of mills.

The remedy for short or defective leasing powers is to create general statutable leasing powers for short terms, for farming purposes, and for long terms for buildings ; and then to prohibit any settlement of property which does not provide for there always being some person to exercise those powers. This remedy was applied about eighty years ago to the same evil, when arising under the perpetual entails in Scotland ; and the owners were enabled to grant leases for fourteen years and one life, or for two lives, or for thirty years ; and also to grant building leases for ninety-nine years. Similar statutable powers have been conferred in special cases in Ireland. Thus tenants in tail and tenants for life were, in 1800, empowered to make leases for lives renewable for ever, to persons covenanting to carry on the cotton manufacture. But this power was accompanied with unwise restrictions ; thus, the number of acres to be leased could not exceed fifteen. Then the party erecting the mill had no power to change the trade, for the covenant of renewal was void if the trade were not carried on for two years. Now the flax trade has almost entirely supplanted the cotton trade in the north of Ireland, and the largest fortunes have been made by those who were the first to change the cotton machinery for the flax machinery ; but in mills built under this leasing power, the millowners could not change their trade without forfeiting their right to the renewal of the lease that secured their mills. By another act, passed in 1785, a general leasing power was given for terms of years, or for lives renewable for ever, for the erection of mills ; but this power was restrained by allowing only three acres to be included in the lease, which rendered it wholly inapplicable in the case I have mentioned, where the millowner required upwards of fifty acres. In the same manner, the leasing powers for mines in Ireland were so restrained as to paralyse, in a great measure, this important branch of our industrial resources ; and it was only in the past session of parliament that the efforts of those interested in mines to obtain a removal of those restrictions were partially successful, when an act was passed on the subject. All these restrictions are

founded on the economic fallacy, that parties who expend capital on land will not make the most profitable use of their own improvements if left to themselves, and require to be restrained by legal provisions from injuring themselves. As long as this fallacy was generally believed, legislation was accordant with the scientific principles of the day ; but at the present time, when this fallacy has been completely refuted, and when it is no longer believed by any economist or statesman of character, it is not a little surprising to find the legislation framed upon it still allowed to retain its place on the statute-book.

Having thus completed the consideration of three of the legal impediments to the application of capital to land in Ireland, I shall in my next paper consider the other three, viz., the restraints on the power of making tenant-right agreements, the stamps on leases and other contracts with tenants, and the remnant of the usury laws.