IV.—*Application of Copyhold Enfranchisement to Long Leases in Ireland; Assimilation of Chattel and Freehold Succession, and Simplification of Transfer of Land.* By J. H. Edge, Barrister-at-Law.

THE Report of the Committee of the House of Commons, on the working of the Bright Clauses of the Irish Land Act of 1870, has brought out in a glaring manner some anomalies and defects in the tenure of land in Ireland. The Committee, in fact, attribute the break-down in the working of these clauses in a great measure to the expense and delay attending the transfer of land from one individual to another, or from the state to a private purchaser; and the Report evidently shows forebodings of difficulties to arise hereafter from the same source.

Whatever diversity of opinion may exist on such questions as the expediency of creating a peasant proprietary, or the necessity of giving fixity of tenure to the farming class, I think all people will agree with me, that if one individual chooses to contract with another to sell him an estate, the costs of transfer ought to be reduced to a minimum. How to do so, and to what extent it can be done, are the problems to solve.

The great end to which the public would strive, if they only knew how, would be to make the transfer of land as cheap and speedy as that of ordinary personal property, and it has been powerfully urged that this can be done. It has been asserted that if you can establish a complete registry for shares in ships, you can do the same for shares in land, and that by an easy method transfers in a registry office can be accomplished.

I do not think that the question can be pushed to this limit. I think there are essential differences between land and every other marketable commodity, which would prevent its accomplishment, as in every settled country the very nature of land necessitates a division of interests which does not exist in other property. You have in ordinary cases a landlord, tenants, and labourers, public roads, private rights of way, and mortgages—not to speak of annuitants, and questions on the title involving doubtful rights. This sub-division of interests does not arise from any deficiency in our jurisprudence, but from the nature of the thing dealt with; and it would be impossible, if not against public policy, to abolish any of the classes or rights I have enumerated.

What appears to me to establish this proposition is that in those cases in which it has been attempted to create qualified interests in personal property, similar difficulties have arisen; for, *e.g.*, a system was started a few years ago by an ingenious pianoforte maker, called "the three years" system, which, I venture to say, has given rise to a greater crop of litigation, both in this country and England, with respect to musical instruments, than any which had previously sprung up since the days of Tubal Cain. But, in addition to what I may call the inevitable complication attached to the title of land, family pride and sentimental feelings have in all old countries, and in Ireland

more than any other I am aware of, added complications to its title, by imposing what may be called fanciful conditions on its tenure, which they never would think of applying to property regarded by them from a business point of view only; and if the legislature is merely intended to carry out the wishes of the bulk of the people of a country, I scarcely think it would be right to attempt to interfere with the owners in these matters.

But even without altering freedom of sale and entail, I think many useful changes might be made which would cheapen and expedite sales and mortgages—such as the adoption of one office, in which all claims and charges on land could be registered in order to effect a purchaser or mortgagee.

The legislature for more than a quarter of a century has been moving in this direction; it has, however, so far only partially effected its object.

It would be wearisome to inflict on my hearers a history of the timid attempts at reform in this direction; but the very fact that the legislature was able at a blow, some thirty years ago, to consolidate in one office the registration of judgments, shows what can be done; and even if it was otherwise inexpedient to extend to this country Lord Cairns's Act for the Sale and Transfer of Land, so much of its provisions might be adopted as would necessitate the registration in one office of all claims on land in Ireland of every description, and whether by the crown or subject. The present state of things might be learned by a perusal of a very interesting paper on the searches now necessary on the investigation of title to land in this country, by my friend Dr. Neilson Hancock, which he read before the Dublin Statistical Society.

Another reform I would suggest would be a supplement to Lord St. Leonards' and Lord Cranworth's Acts for shortening deeds. Lord St. Leonards found in every well-drawn will and settlement common form clauses, for the protection of trustees, known to lawyers as the indemnity and reimbursement clauses; and he introduced and carried an Act through Parliament, to the effect that all deeds and wills should be construed as if they contained these clauses, unless their application was expressly negatived by the instrument. Lord Cranworth afterwards carried a similar Act; by which various powers are implied in mortgages, settlements, and wills, thereby greatly shortening their length. I then would suggest further legislation in this practical direction. At present in an ordinary conveyance or assignment of land by way of sale or mortgage, there are inserted certain stereotyped covenants for title, which the purchaser or mortgagee has a right to insist on without any express agreement on the subject. There is no reason, then, why their existence should not be implied in every such deed, leaving it open to the parties to make any agreement they please, with respect to qualifying or extending their effect, or negativing their application altogether. This would shorten many deeds by at least one-third their length. And similar covenants against incumbrances by trustees might be implied, and, where only part of an estate is sold, covenants for the production of title deeds by the vendor.

It is often asserted that the great opposition to such legislation as I mention arises from lawyers being paid by the quantity, rather than the quality of the article produced by them. A silent but sure change is, however, taking place in this respect; and where payment is made, as often latterly it is, by a fixed sum for the intended sale or mortgage, it is directly against the interest of the professional men engaged to add unnecessarily to its length.

I have now attempted to point out in what way I think the process of transferring land might be cheapened and quickened in what may be styled the mere machinery of the act of transfer. I shall now strive to go a little deeper to the root of the evil, by trying to show how the title to the land itself might, in my judgment, be simplified more than it is, without interfering unjustly with existing rights or restricting freedom of contract. The remedies I suggest are the abolition of the middleman tenure, and the assimilation of the law of succession in the different varieties of tenure.

Middlemen.

First, as to the middleman tenure. Of course in the strictest sense of the word any person is a middleman who sublets his land or house; but I shall deal only with those persons who hold directly or indirectly from the immediate tenants or patentees from the crown, under fee-farm grants, leases renewable for ever, or leases for long terms of years, amounting practically to perpetuities. I do not intend to deal with ecclesiastical or college leases, which were different in their original creation, and to which it would be necessary to devote a separate paper. In order to show the advisability of doing away with this tenure, and how that had best be effected, it becomes necessary to glance briefly at the history of its own creation and development, and at the position the holders of it occupy in this country.

The middlemen are amongst the best abused persons in Ireland. The great peers and commoners regard them as the robbers of their estates, because they hold at rents which at present may be often regarded as merely nominal, and lately Mr. Froude accuses them, in the following language, of demoralizing society:—

> "The land was let and underlet, and underlet again, till six rents had sometimes to be provided by the actual cultivator before he was allowed to feed himself and his family; while the proprietor and quasi-proprietor grew into the Irish blackguard—the racing, drinking, duelling, swearing squireen, the tyrant of the poor, the shame and scandal of the order to which he affected to belong."

These are strong words, weakened a little by their verging on the bombastic; but Mr. Froude, to do him justice, has only followed the current of popular opinion, and in the steps of former writers.

My first ideas of this much-abused class were derived from Gerald Griffin's *Collegians*. From that and other works I learned to associate them in my mind with Shylock—their pound of flesh being a pound of rent. I myself having thus early imbibed prejudices against middlemen, was somewhat startled when first I learned that I belonged to that order; and perhaps it may be suspected that had I not found myself identified with these so-called pests of society, I

would not be so zealous in trying to defend them. Be that as it may, I give you, as one of them, very briefly my views of what purposes they served, and now that their day is over how they ought to be extinguished. The tenure arose in the 17th century. It owed its origin to the practice adopted by the patentees from the crown of the forfeited lands, which they were unable to farm or let to ordinary tenants at terminable leases, and which they granted in smaller lots to adventurers, at low rents in perpetuity. These patentees were of various ranks and positions; some of them were resident Irish noblemen and gentlemen, who risked their lives and fortunes for the side they adopted, and in return received additions to their already ample estates; and who, if they parted with the control over a portion of their property by granting it away for ever, they at all events spent the rent derived from it in Ireland.

We have some bright examples of this class amongst us still, whose names will readily suggest themselves to many of my hearers. On the other hand, large estates were lavished on English noblemen and London companies, who had home interests, which prevented them making any adequate return for the lands which they received. Once the example of granting perpetuity leases was shown on the Ormond and a few other large properties, it became general throughout Leinster and Munster, and to a lesser extent in Ulster and Connaught. The mode in which the tenure was created was chiefly by freehold leases for three lives, with covenants by the landlord for perpetual renewal—a most troublesome and vexatious tenure to both parties, and productive of a fruitful crop of litigation. Sometimes leases for terms of years, either long terms or short terms perpetually renewable, in analogy to the leases for lives, were granted. These leases were made in this form, in order to enable Roman Catholics to take them, as the penal laws prohibited them from becoming freeholders; and again many leases or grants were made directly in fee-simple, reserving rent charges. The name of the conveyancer who first invented the lease for lives renewable for ever has not been transmitted to posterity, or probably he would be held in as great odium by both landlords and tenants, as the famous Doctor Guillotine was in France by the multitudes who were left orphans by his invention.

To the complaint of the head landlords or crown patentees—that the middleman got the best of the bargain, I cannot agree. Fancy a man getting 10,000 acres unreclaimed land in New Zealand, or America, or Cyprus. What other course could he adopt more likely to bring him in an immediate return, than to part with the land in suitable divisions to those who would pay him an annual return—secure though it might be small; and it cannot be forgotten that the patentee himself paid nothing for the land, save only a small quit rent. In fact, but too many of these patentees were in the same position as the Turkish Empire held with regard to Cyprus—they had vast tracts of land, unproductive, but capable of being made productive by industry and capital; and as Turkey has made an excellent bargain with her middleman, England, so these proprietors got what they considered good terms from their middlemen—often requiring, with an amusing exactness, a shilling in the pound receiver's fees, in addition

to the rent, so that even their profits would not be diminished by the cost of collection.

The middlemen were of various races (sometimes descendants of the men whose estates were forfeited), and they usually settled down on a part of the land granted to them, letting out the rest to the peasantry. After a while, by their industry and energy, coupled with the rise in the value of land due to the increased prosperity of the country, the middleman found that he was in a position to turn landlord himself, and so ensued the process so vividly described by Mr. Froude, and also by Mr. Hartpole Lecky, in the volumes of his *History of England* already published. This practice, irrespective of other evils, led to endless complications of titles and interests—in many cases one of the head landlords becoming a tenant to his own middleman, and then becoming a middleman again, and so receiving, or being entitled to receive, rent with one hand, whilst he paid it away with the other. Take Mr. Froude's example of six middlemen (a by no means uncommon occurrence), and take the case also I have suggested, of a head landlord becoming a tenant to his own middleman, and see the confusion which may be created in a short time. On a farm of eighty or one hundred acres, in the first place, according to the ordinary practice in Ireland, the head landlord puts his interest (partly held in fee, partly under lease from his own tenant) in settlement, strictly entails it on his eldest son, and charges it with portions for younger children. The first middleman, often a man of considerable position, from the fact of his ancestor acquiring a number of these holdings, similarly entails and charges his interest; and in like manner each middleman will be more or less a copy of his immediate landlord, down to the last.

You have here a network of title common to all the parties, and separate claims of title for each middleman, with a very great probability of a still greater confusion being created, from some of the parties after a while being unable to trace their titles to their sources. It often happens in Ireland that persons have been paying a rent for a number of years, the origin of which is unknown both to the payer and payee, but is supposed to have arisen from some middleman profit rent, derived under an unregistered deed which has been lost or eaten by mice.

The creation of these interests went on steadily increasing until about the close of the first quarter of the present century. Since that period they gradually became less and less frequent, except in towns; and they ceased almost altogether after the famine of 1846. The very fact of these tenures ceasing in the manner they did, shows that they did not originally owe their origin to mere philanthropy or improvidence, but that they were business arrangements. They acted as a means towards bringing the country into cultivation. They supplied the place of the too-often absentee landlord, and under what I may call their reign Ireland progressed in agricultural prosperity at a greater rate than England. The system had its defects; but Mr. Froude, in my opinion, overrates the rack-renting. Although it would be too much to say that the occupier would only pay the

value of the land as a commercial speculation, irrespective of the number of persons amongst whom his rent is to be doled out, or that rent rises and falls like the conventional farthing in the loaf of bread, still I think it will be generally found that, having regard to the value of the land, rent is pretty equal over the country. Mr. Froude cannot deny that the middleman is resident; but he very plainly intimates that it would be all the better for the country if he was an absentee, like his landlord. I cannot accede to that; the middleman may be sensitive of his rights, he may wish, if possible, to forget that he is a mere leaseholder, and may like to be regarded as lord of the soil, not perhaps unnaturally thinking that if he is to perform all the duties of a landlord, he is entitled to the importance belonging to the dignity; but his presence has been and is of great use in the country.

Contrast a small estate governed by an average resident middleman, and an estate of an absentee nobleman where there is no middleman intervening between the absentee and the occupying tenant. On the former estate you may find a tenantry, complaining perhaps of the rent, but acknowledging that they have received some return in the way of drainage, reclamations, employment to their sons as laborers, and in having some person able and willing to see that the poor-rate is kept down and that the roads are kept in repair. On the other hand, the tenantry on the absentee's estate possibly pay a lower rent—the landlord's interests being, with strict impartiality, as neglected as the tenants, but at the same time they are much more discontented, much poorer, without improvements, without persons to look after their interests and settle their disputes.

I do not deny that some large estates of absentee landlords in this country have been admirably managed, and that the landlord's place has been sometimes well supplied by a resident agent; but the sketch I have given must, I think, recall many instances to my hearers.

The contrast is still more striking between a middleman and his head landlord. Whatever return the middleman gave for the rent he received, his head landlord gave nothing. He knew he could not improve his position, and he rarely ever rode through the property which his ancestor granted away. As soon as the country became more populous and land more valuable, disputes arose between the head landlords and the middlemen with regard to their respective rights, and the most fertile cause of these was the right to renewal of the leases made perpetually renewable by covenant—whether, in fact, the tenant had lapsed his time in applying for a renewal and had forfeited his estate. Such contests led to an Act of Parliament called the Tenancy Act, defining the rights of the respective parties, and finally to the Renewable Leasehold Conversion Act, turning these renewable leases into estates in fee-simple, or, as they are popularly called, fee-farm.

This, however, was only one of the causes of contention; the earlier perpetuity leases usually only reserved a rent with receiver's fees, and mines and minerals, shooting and sporting. As land became more valuable, and the number of applicants for these leases increased, the rent became higher, the exceptions more numerous, and the covenants more onerous. In the earlier times the renewal

fines were often only nominal. Afterwards they became of substantial value, such as a half year's rent. The exceptions now included trees, bogs, and open quarries. The covenants, rarely conferring any real benefit on the landlord, were often capricious and tyrannical, one not uncommonly prohibiting subletting to Roman Catholics.

The Renewable Leasehold Conversion Act did not commute any of the covenants, except those which directly interfered with cultivation, and a great deal of the time of the Irish equity courts at present is consumed in the vain attempt to make sense out of clauses in these later leases.

One of the greatest difficulties which the land judges have to contend with is the apportionment of the rents and the burden of the exceptions and covenants. When one of these perpetuity grants is divided into lots for sale, the rent is usually put on one lot to indemnify the others; but the landlord can still exercise his rights against all. Again, the grant includes a bog, out of which vague and varying rights have been reserved, and which it is impossible to apportion without leaving an opening for after disputes. Often the reservations which are of least value create most irritation—for example, the rights of shooting. Until within comparatively a few years every lease made in Ireland, whether in perpetuity or on short terms, reserved, by a common form in universal use, a right of shooting and sporting to the landlord, his heirs, and assigns. This gave him a concurrent right with his tenant. He could go, or, as it was afterwards held, send a substitute to shoot for him; but his tenant could go also. Between a haughty landlord and a sturdy middleman it does not require a very lively imagination to conjure up the scenes that might take place under such circumstances. The greatest safeguard was that, until of late years the landlord did not often exercise such rights; but when a day's journey could bring a person from Dublin or London to Donegal or Kerry, matters became different. One case came to my own knowledge, in which a gentleman held a large tract of mountain under an old fee-farm grant, at a nominal rent, which, however, reserved, in the manner I have mentioned, the right of shooting. He and his family had for generations been in the habit of regarding the game as their own, and his landlord never attempted to avail himself of the reservation. The landlord's rent and right of shooting were, however, sold in the Landed Estates' Court; the purchaser determined on enforcing his rights, and for a long time a bitter war ensued between them. Now in this case neither party was to blame. What more natural than that the tenant should be irritated at the assertion of a right which had slumbered for a century, or that the purchaser should endeavour to make use of what he had purchased?

What then is the remedy for this? I propose that the middleman should be enabled to purchase, by compulsory sale, his landlord's rights, in analogy to the English Acts enabling copyholders to compel their lords of the manor to enfranchise their holdings.

I do not think it would be any more violent interference with the landlord's rights to force him to sell them to the middleman, than it was to force a lord of a manor in England to enfranchise a

copyhold. Copyholders held under a more servile tenure than the middleman did. Having been the villeins or serfs of the manor, they held their lands originally merely as tenants at will, at rents paid partly in labour. They were subject to very arbitrary restrictions and exactions; and Parliament thought the time had come for converting these copyholders into fee-simple proprietors, and forcing the landlords to sell their seignorial rights.

Time would not permit even a glance at the details of how this commutation should be worked out. Once the principle was recognised, there could be little difficulty in arranging the details. The Copyhold Enfranchisement Acts and the Renewable Leasehold Conversion Act would be guides in the matter—the one showing how the value of the interests to be purchased could be ascertained, the other showing who would be the persons to apply for, or to whom application should be made, in the event of the interest of the landlord or tenant being incumbered or in settlement. I would also, in addtion, give power to the land judge, where a middleman's interest was sold, to commute the rent, reservations, and covenants, and pay their value out of the purchase-money to the landlord.

Assimilation of Tenures.

It is scarcely possible that anyone will dispute the question, that the assimilation of the law of succession, in freehold and chattel real property, would simplify titles, and therefore facilitate the transfer of land, as there are numerous instances in which the one farm, or even a portion of the same house, is held under both tenures, and even the one lease through one portion of its duration is freehold and another chattel. I cannot discover any valid reason why there should be the two kinds of tenure; nor were the two even deliberately or purposely created, but merely are remnants of the old feudal period, when leaseholds for years were not regarded as constituting any estate in land, and were allowed to go like cattle to the executor. The popular view is to assimilate the succession of freeholds to leaseholds. This was the object of Mr. Taylor's Bill, which was recently discussed in the House of Commons. The debate on the second reading, rejecting the measure, I think, sufficiently indicated the various views put forward for and against the proposed alteration—on the one hand, the undoubted hardship which follows when a man dies intestate, leaving a large family, some freehold property, and nothing else. —the eldest son would getting all, subject only to his mother's right of dower, if living, and the younger children nothing. On the other hand, a change of tenure in freeholds, would undoubtedly increase the difficulty and expense of the transfer of land, and tend to break up large estates into small, and small estates into mere cottage allotments.

A compromise is a cowardly expedient, which rarely pleases either party, but sometimes meets the justice of a case. It would appear to me that a fair settlement of the question would be to recognise the eldest son's right to inheritance, to restrict the widow's right to dower or one-third of the annual profits for her widowhood only, as exists in lands held in gavelkind, and to allot a third portion to the younger children during their minorities—leaving the remaining third

to the heir, who would get the whole on his mother's death or second marriage, and on his brothers and sisters attaining full age. This would remedy the great hardship of the present law as regards freeholds, would, I think, make a useful alteration in the law of chattels real, and would certainly facilitate the transfer of land by simplifying the title to chattels real, without embarrassing to any appreciable extent that of freeholds.

V.—*On the Creation of a Public Commission for the Purchase of Land for Re-sale to Tenants in Ireland.* By Francis Nolan, Esq. Barrister-at-Law.

THE return published in the year 1874 of the number of landed proprietors in Ireland, drew at once attention to their very limited number. The total acreage of Ireland is 20,047,572 acres, whilst the number of proprietors (excluding town holdings, but including even those who hold less than an acre) is only 19,228. But indeed almost half the island appears to belong to 742 favoured persons—742 proprietors, holding each over 5,000 acres, own 9,830,332 acres, of which the government valuation is £4,140,414. The government valuation of the entire of Ireland, excluding towns, is £10,182,681. In England for many years there has been considerable complaint of the small number of proprietors; but contrasted with Ireland, their number is very considerable, probably fourteen times as many, whilst the acreage of England is not much more than a half greater than that of Ireland—viz., 29,179,622 acres.

The above short summary of the result of Irish Doomsday Book shows that any measure calculated to increase the number of proprietors ought to be favoured. It is not my intention in the present paper to enter upon the vexed question of landlord and tenant. That such a question not only exists, but that its final settlement is the most difficult of Irish political questions, few will deny. Nor do I seek to demonstrate the desirability in itself of a peasant proprietary. All that I can do is to refer those who are opposed to their creation to the pages of Mr. Mill's great work on Political Economy, where the advantages to be derived from their existence are so clearly and so forcibly pointed out. Until that work was published, many well wishers of the tenants assumed that the creation of peasant proprietors was ruin to those who became such. Want of thrift and minute sub-division were considered immediately to follow. Taking up country after country in Europe, Mr. Mill has shown the benefits to be derived from such proprietors and the fallacies of arguments which were really English objections to a system of which they had no experience. All who have travelled in the countries which he cites as examples must acknowledge the accuracy of his statements. There is one matter, however; which I wish to guard against; that is the all but universal assumption that the creation of a peasant proprietor necessarily confers on him the right to subdivide his land, and that the only restraint in his so doing is self-interest. There is