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I.—*The Expediency of a Cheap Land Tribunal.*—By James A. Lawson, LL.D.

[Read April 21st, 1856.]

THE subject which I wish to bring under the notice of the Society this evening is, the expediency of establishing a cheap Land Tribunal. In my opinion such a tribunal is very much required, and I do not limit this observation to Ireland; I think the very same necessity exists in England and Scotland. By a Land Tribunal, I mean a tribunal having the power to decide upon the ownership of land, authoritatively, conclusively, and finally, unless appealed from; and, as incident to this jurisdiction, having power to determine all questions relating to the charges affecting it, and the mode in which its proceeds, when sold, are distributable: I think the public should be entitled to have the aid of this tribunal whenever a sale of land is desired. When I speak of a *cheap* tribunal, I mean a tribunal having its judges and officers paid by the state, and consequently exacting no fees from those who resort to it, and requiring from the suitor no payment except that which he must make to his own professional advisers—just as the transfer of government stock at present costs the seller and buyer nothing except brokerage.

I shall first state my reasons for thinking that such a tribunal ought to exist. I shall, secondly, endeavour to answer some objections which have been urged against it; and thirdly, I shall make some suggestions as to the mode in which such a jurisdiction ought to be called into operation.

I think, then, that we ought to have such a tribunal, because without it a safe and ready transfer of land is not possible, as our laws are at present framed. That a ready transfer of land is desirable, as well for the land-owner himself as for the community at large,

very few will now be found to dispute. The value of an article depends, amongst other things, upon the cost of bringing it into market, and if the sale of ordinary commodities were to be impeded until, in each case, an inquiry was made as to how the person offering them for sale acquired their possession, trade and commerce would almost cease; sellers and buyers, and the community as consumers, would alike suffer. Lands and houses, certainly, are not likely to change hands quite as often as chattels, but the injury is the same in kind, though not in degree, and we may reasonably conclude that if the present obstructions to its transfer were diminished, its changes of ownership would be affected in proportion as these difficulties were removed. I can quite understand the political argument put forward by those who oppose the giving of any increased facilities for transfer of land, when they tell us that the great value of property in land is that it can be perpetuated in the same family for generations, and that the successive owners, however anxious to dispose of it, can be prevented from so doing. I do not sympathise with those views, and I think such reasons can weigh nothing when compared with the general benefit of the public, who are interested that land should not remain in the hands of reluctant and embarrassed owners; besides, I think, experience shews us that a family is never really benefited by being thus forced to continue nominal owners of an estate. Perhaps, if a portion of it could have been readily and advantageously disposed of, the rest might have been preserved; but our law, in its desire to prevent sales, facilitated the creation of incumbrances—in other words, encouraged pledging instead of selling, and this fatal facility of obtaining money without loss of nominal ownership or position has led land-owners to improvidence and ruin. In asking that a tribunal should be established to decide upon and determine the ownership in land, it appears to me that we are not asking anything anomalous or extraordinary. The phrase, PARLIAMENTARY TITLE, which is generally applied, leads persons rather to think that some very unusual intervention is sought for, and that government is asked to interfere to alter the ordinary course of things.* If we look a little deeper, I think we shall see that we are only asking the law to correct an evil which the law has introduced. Our law of conveyancing has put the ownership of land upon an entirely different footing from that of other property, and has created the difficulty of solving the problem,—Who is, at any given time, the owner of land. With respect to other property, possession implies property—to this extent, at all events, that any one buying from the person in possession, without fraud or collusion, is safe. The possession of chattels, of stock or shares, carries with it, *primá facie*, the right of disposition to a purchaser untainted with any fraud. With respect to land, it is not so; the possessor may be a trespasser, or a caretaker, or a tenant; and a purchaser from him may get nothing but the possession—liable, at any time, to be made wrongful by a demand on the

* For instance, Lord St. Leonards lately, in the House of Lords, compared the Incumbered Estates Act to the suspension of the Habeas Corpus Act; he described it as a measure contrary to law, and that as soon as the necessity for it ceased, the law should revert to its former channel.

part of the rightful owner. Of the ownership itself there are very different degrees and modifications, as well as different kinds, legal and beneficial. Again, when you find out the actual owner, there is the necessity of ascertaining the charges and incumbrances which affect that ownership, very numerous in kind, and sometimes created, I may say, without the knowledge of the owner; for instance, a recent judgment, in itself not a charge upon land, is liable to be made so at the option of the owner of the judgment, by registering it as a mortgage without any notice to the debtor. The law, therefore, has permitted, has encouraged, has created this state of things, which renders the ownership difficult of ascertainment; and if the law does no more, but leaves things in this state, it is obvious that property in land must be much less easy of transfer than any other kind of property. Thus, the law of conveyancing has thrown impediments in the way of transfer, and the law which facilitates the creation of incumbrances, as a substitute for sale, diminishes the facility of transfer; while, on the other hand, if there were facility of transfer, it would be unnecessary to afford facilities for incumbering. I am assuming, for the present, that the law of conveyancing remains unaltered; and in asking that a legal tribunal should be constituted, competent to decide the question who is the owner of land, do we ask any more than that the law should solve the difficulty which it has created, and tell us, authoritatively, what is the result of its own rules? I observe that Lord St. Leonards, in his evidence before the Receiver Committee, when speaking of the state of property in Ireland, says:—"The great thing is, as quickly as possible to ascertain who is the owner, and give him the care of his property." Now is it not a strange thing that, looking at land, for the present, not as a transferable article at all, but as the great source of wealth, in the productiveness of which the community at large are interested, it should be left at all in uncertainty who is the owner? For while there is doubt about the ownership, we cannot reasonably expect that capital will be expended or improvements made. I entirely concur with Lord St. Leonards, that the great thing is to ascertain quickly who is the owner; this phrase is pregnant with two things, quickness and certainty; the process should be prompt, the result should be certain. Under our present land laws, without a land tribunal, it is slow and uncertain. We must consult the lawyer to tell us who the owner is. He has great difficulty in arriving at a conclusion, and the conclusion, when arrived at, binds no one; it is destitute of authority; and the purchaser who has purchased under that opinion, if he wants to sell the next year, cannot bind the new purchaser by the result of the former inquiry; but the whole process must be gone over again from the beginning; just as if a student in Euclid were obliged to prove over again each former theorem when he required to apply it, instead of assuming it as having been already proved. Inasmuch, then, as a safe and ready transfer of land is essential; and inasmuch as the present state of our law renders that impossible, without the establishment of a land tribunal; I think sound principle leads us to conclude, either that the law should be altered so as to allow this safe and ready transfer, or that the law should step in to remedy this defect caused by its own rules, and on every occasion of sale pro-

nounce authoritatively, if required, who is the owner or person capable of selling. With respect to the first alternative, such a change in the law as to render land as easily and as safely transferable as stock, I shall be very glad whenever the time comes that this shall be accomplished. Many doubt its practicability, that is, the possibility of putting every estate in land in these kingdoms upon a register, and keeping it there by registering every devolution of title.* Every one will admit that such a result is not to be soon hoped for; and pending its introduction, I think we should not be deprived of the very obvious and practical good which would result from the establishment of a tribunal, which, when required so to do, should have power to decide upon the ownership of land.

Such is the conclusion to which it appears to me that reason would lead us, looking at the state of our law and the exigencies of society; but it is a singular circumstance that the public mind has arrived at the conclusion by what I may call an accident. The Incumbered Estates' Act in this country, which for the first time established a land tribunal, owed its existence not to any such train of reasoning as I have been using, but to the necessities of the times. Any man would have been laughed at who proposed its establishment, on the ground that such a tribunal was at all times necessary. It was introduced as an exceptional measure, and to relieve this country from the crisis in which its affairs were—all its property heavily incumbered by reason of the state of the law to which I have adverted; the incumbered owners rendered, by a visitation of Providence, utterly insolvent and incapable of managing the estates; and the impossibility of finding any purchasers under sales as then made by the Court of Chancery, although it was manifest that it was essential to the restoration of a sound state of things that all such properties should be transferred from nominal to real owners. This Act was therefore regarded as a temporary expedient, justified and rendered necessary by the exigency of the moment, and was, of course, confined to incumbered estates, and was intended to be limited in its duration. The landed proprietors and the public have experienced the advantage which arises from a ready sale and an indefeasible title; and they naturally asked, was this jurisdiction to cease with the occasion that gave it birth, or was it to be perpetuated? After several extensions of the Incumbered Estates' Act, a Commission was issued, with which I had the honour to be associated, to very eminent persons in both countries, to inquire into the expediency of continuing this jurisdiction. They arrived at the conclusion,† that such a tribunal should continue to exist, and should be permanently established; and, moreover, that its operations should not be limited to incumbered estates, but should extend to all estates to be sold. Indeed, unless the Commissioners were prepared to

* I am glad to observe that that eminent judge, the Master of the Rolls, in his Evidence to the Incumbered Estates Inquiry Commission, states his opinion that "*the law relating to the transfer of land may be so altered that land may be sold with nearly as little delay or difficulty as government stock; and that as indefeasible a title may be given on the transfer of the former, as is now given on the transfer of the latter.*" When the law has been so altered, no necessity will exist for a Land Tribunal except at the instance of a creditor.

† See Report of the Commissioners for Inquiry into the Incumbered Estates' Court.

make this latter recommendation, they could scarcely have recommended the permanent continuance of the tribunal; for it was obvious that for the mere purpose of selling *incumbered* estates, it was not necessary for perpetuate it. They state in their Report, I think with good reason, that incumbered proprietors are not entitled to more favour than unincumbered proprietors, or to greater advantages in bringing their properties to sale.

It appears to me that three questions now arise which are to be determined by the legislature—1st, Is this jurisdiction to pass away; having enjoyed the advantages of sale with indefeasible title, are we to lose it? 2ndly, If the jurisdiction continue, must it not be extended to all estates? And, 3rdly, Should it be confined to Ireland, or should not such a tribunal be established in England and Scotland also?

On both the first points, we have the deliberate opinion of the Commissioners, that the jurisdiction should be continued, and that it should be extended to all estates offered for sale. As to the third point, I see no reason why a similar measure should not be introduced into the other parts of the United Kingdom.* I have not been able to procure any statistics of the comparative amount of incumbrances affecting property in England or Scotland; but in both countries there is no doubt that it is very considerable: the advantages of such a tribunal would be fully appreciated there; and I hope that as soon as such a tribunal is permanently established here, a similar measure for England and Scotland will follow without delay. The reasoning I have adduced appears to me to establish that there should be a Land Tribunal; experience has shown that it has worked well, and therefore it ought to be perpetuated and extended.

I have said that this should be a cheap tribunal; by this I do not mean one where cheap and bad justice would be administered, but one in which no tax is imposed upon the suitor. One of the great merits of the Incumbered Estates' Court has been, its freedom from burdens of this kind; and, on the other hand, the great obstruction to the working of the Court of Chancery has been the existence of stamps upon its proceedings; and to expect that Chancery will be cheap, expeditious, or satisfactory, while these imposts are allowed to continue, is as absurd as it would be to expect a man to run nimbly who was laden with a heavy chain. I have no hesitation therefore in saying, that I look upon the proposal which has been made of imposing a tax by way of per centage on the amount of purchase money, in order to defray the expenses of the court, as one which, if carried out, will be fatal to the success of the experiment. It has been so often urged, and is now so generally admitted, that to tax the suitor for the support of the court is unjust and injurious, that I pause not now to argue the question. The Common Law Commissioners of 1851 recommended the abolition of these charges; and the

* Lord St. Leonards, on a recent occasion in the House of Lords, when speaking against a measure introduced to carry out some of the recommendations of this Commission, said he was perfectly convinced that if the measure passed for Ireland, it must be adopted in England; otherwise the great boon of a parliamentary title would give Irish property a great value, and place English property at a disadvantage.

Committee on Receivers, in their Report, use this expression, "Nor should any consideration connected with fees or stamp duty be suffered to prevail against the higher exigencies or the general interests of the country."

I find that one of the arguments used in the House of Commons, in support of some of the proposed alterations in the constitution of this tribunal, was that the result of the measure would be a saving to the country. A more misplaced or contemptible argument, in dealing with a question of such magnitude, can hardly be conceived. The people of these countries have proved that they are both able and willing to pay any amount of taxes that may be requisite for carrying out objects of which they approve; and believing, as I do, that the people of this country feel an interest in having the transfer of land facilitated, I am sure they would scorn the paltry design of relieving the country from the trifling expense of supporting this tribunal, at the expense of the suitor, and by means which would mar the very object which that tribunal is intended to effectuate. Courts of justice do not exist for the benefit of suitors alone, but for the benefit of those who are not suitors, and who are not necessitated to become suitors simply because those courts exist, and because the knowledge that there is a prompt remedy prevents the perpetration of wrong and the withholding of rights; and it is just as reasonable to compel the suitor alone to support the court, as it would be to levy the tax for the support of the police only from those who have had occasion to apply for their intervention. I consider it a disgrace to this country, that even in those inferior tribunals where justice is supposed to be cheaply and indifferently administered, stamps have, by the last Civil Bill Act, been imposed upon the proceedings.

Having now stated my reasons for concluding that a cheap Land Tribunal should exist in the three kingdoms, I proceed to consider one or two objections which are frequently urged against it. These are, the dangers of mistake and fraud—of selling one man's estate to pay the debts of another—a danger which, it is said, is greatly increased because you have no *contestatio*, no person interested in opposing the proceedings, and bringing before the Court everything material for them to know; on the contrary, that it is an *ex parte* proceeding. I have no wish to deny the existence of those dangers, and the possibility of mistake and fraud; but the question is not whether there be that danger, but whether it is sufficient to outweigh the consideration of the general benefit that would result to the community from the measure. It does, however, appear to me that those dangers are exaggerated, and that by proper care they may be almost removed. Every tribunal is fallible, and the apprehension that an erroneous decision may be come to is not any argument against the administration of justice. We have a right to deal with the decision of every court as correct until it is reversed by a higher one. This is not the kind of error which is feared, but it is the danger of overlooking the rights of absent parties, and of intentional fraud and deception being practised on the court. With respect to the first, I think a Land Tribunal would be at least in as good a position to pronounce upon the ownership of land as the Court of Chancery is

in a creditor's suit. The decision of the Court of Chancery that a good title has been shewn only binds the parties to the suit; the change suggested is, that it should be binding upon all the world—that it should be a judgment *in rem*. It was a mistake, when such an expensive investigation had been gone through, not to make it final to all intents and purposes. With respect to the danger of overlooking the rights of absent parties, care should be taken that a strict investigation of the title shall take place, and that notice be given to all parties interested, in addition to giving the proceedings themselves the utmost simplicity in their form and the fullest publicity, which will be best done by avoiding technical forms and rendering the proceedings generally intelligible. With respect to the point that there is no *contestatio*, the same may be generally observed with respect to creditors' suits themselves, the creditor and owner being alike interested in seeing that the debtor has power to create the incumbrance. The purchaser, indeed, is interested in seeing that he has a good title; but I think the title would undergo as careful an investigation from a court accustomed to deal with such matters, and having powers to arrive at the truth, as it now receives from a purchaser's counsel. With respect to the danger of actual fraud, that can never be entirely prevented, but the publicity of the proceedings and the care taken in conducting them form the best securities against this danger. As far as experience goes, we can say, I think, that the experiment of selling with an indefeasible title has been a very successful one, and that none of those evils which were apprehended have as yet arisen. But the question for the legislature to determine is, whether those apprehended evils are worthy of consideration, when we regard the general security of title and the free transfer of land which would follow from the establishment of the tribunal which I have been advocating.

I now proceed to make some suggestions as to the mode in which this jurisdiction should be established.

In the first place, I think that the decision of the title to land is one of the most important questions which can be submitted to any court; and therefore the jurisdiction should not be entrusted to any inferior court, but to one presided over by judges of the highest order, assisted by competent officers, and the suitor should have power of obtaining, by way of appeal, the decision of the ultimate Court of Appeal upon his rights. There is at present a course of practice and procedure established in the Incumbered Estates' Court, which is simple, unembarrassed with needless forms and technicalities, and has given very general satisfaction. It is plain, therefore, that by whatever court this jurisdiction is to be exercised, that system of practice should be followed and adopted. With respect to the proposal of annexing this court to the Court of Chancery, I think that if carried out, it could be safely done by constituting a separate department of that court, to be called the Sales and Title Department. I have no fear that the practice of the Court of Chancery would corrupt the practice of the new tribunal; but, on the other hand, one might reasonably hope and expect that the practice of the Court of Chancery should be reformed and assimilated to the more

approved practice. It is not a little strange that both the friends and the enemies of the Court of Chancery argue against this annexation. It is said, "Will you make the Court of Chancery a great medium for conveyancing, its proper duty being to decide conflicts between adverse parties?" It appears to me a strange thing that the admirers of that court should pronounce it incapable of undertaking the decision of the most important questions, and propose that they should be committed to other hands, since it is plain that whatever tribunal is entrusted with them will be the first in importance. On the other hand, those who dislike the Court of Chancery say that it is not fit to do this, that its abuses are such that it would ruin anything which was entrusted to it. I ask, if that be so, why should it be allowed to remain so? And what better opportunity could there be for removing those abuses, than by entrusting to it a jurisdiction which would compel it to adopt a new and simple course of practice and procedure? In other words—if not fit, make it fit. I do not concur in the opinion as to its unfitness; I think, by adopting this course, it would be quite fit for the effectual discharge of these functions. The effect of such a transfer, if properly made, would be not to swamp and render useless the new department, but to invigorate and remodel the entire. I find that when it was proposed to entrust the Incumbered Estates' Court with the sale of the estates which were the subject of Chancery suits, the same prediction was made, that it would have the effect of overwhelming the new tribunal. In Lord St. Leonards' evidence before the Receivers' Committee, in answer (600) to the question, "Would it be proper in the Bill now before the House, to allow the Commissioners to deal with estates now under the management of the Court of Chancery?"—"No, I think it would be a very great mischief to give any such power; it would overwhelm the Commissioners at once, and would prevent them from discharging the duties which it is at present proposed to confer upon them."

It is to be observed that this duty of pronouncing upon title is one that will become every day easier, in proportion to the number of estates which have been made the subject of it, for these afford us so many termini from which to start, and it is only necessary to deal with the subsequent devolution of the title. With respect to the proposal which has been made, to suffer the present court to finish its business, and set the new court in operation at the same time, I look on it as most mischievous and impolitic; the effect of it would be to deprive the country of the services of those who have acquired experience in the working of the system, and to entrust the business to new and unpractised hands.

I look, therefore, upon the proposal of annexing the Incumbered Estates' Court to the Court of Chancery, instead of being destructive of that jurisdiction, as the engrafting it upon the permanent institutions of the country.

While I thus advocate the establishment of a Land Tribunal, in order to remove those difficulties which our law of real property has created, I am by no means insensible to the necessity of reforming those laws. I trust, however, that this reform will be well considered and comprehensive, and that this subject will not be marred by piecemeal and experimental legislation. The entire subject ought to be

carefully considered, and it is impossible to separate the reform of our laws relating to land from the question of the Ecclesiastical Courts. These courts have been annually threatened with reform, and I suppose it will at last come; and in any measure for their abolition and the transfer of the probate jurisdiction to some other tribunal, the question of having a real as well as a personal representative ought to be considered. At present, real as well as personal estates are subject to the payment of the debts; the personal representative is the absolute owner of the personal estate, so far as the *jus disponendi* is concerned; and there seems no reason why there should not be a real representative having the same power to dispose of the real estate. Thus, in case of death, the law would authoritatively determine the devolution of real estate for the purposes of sale. If other alterations were made, assimilating the law of real to that of personal property, and shortening the period of limitations, the duties of a Land Tribunal would be greatly facilitated, and the transfer of land would soon be placed upon a sure and satisfactory basis.*

II.—*The Private and Local Business of Parliament.*—By Joseph John Murphy, Esq.

[Read May 19th, 1856.]

THE private and local business of Parliament arises from the fact, that work has to be done which the law of the land does not afford the requisite powers for doing; so that it is necessary to obtain special powers from Parliament. No individual or company, for instance, has the power of compulsory purchase, except in so far as it is conferred by Parliament for a special purpose, and to a defined extent; so it is necessary to obtain that power from Parliament in every separate case where a railway is to be made, as it is manifestly impossible to make a railway of any length, without authority to purchase land at a compulsory valuation.

Thus a vast quantity of work is thrown on Parliament, of a kind that was not contemplated by the framers of our constitution. The constitutional functions of Parliament are, 1st, to make laws; 2nd, to sanction the expenditure of the public money; and, 3rd, to control the executive; but now the business of public legislation is seriously impeded by this huge and increasing mass of miscellaneous local business.

It would be a partial compensation for the hindrance of public business and the postponement of measures of public legislation, if the private and local business were well done. But this is not the

* It is right to observe that the subject discussed in this paper is at present under the consideration of a Select Committee of the House of Commons, to whom the Bills for continuing the Incumbered Estates' Court, or annexing it to the Court of Chancery, have been referred. The Committee has not as yet made any report, but a general impression prevails that the opinion of the majority of its members is adverse to the continuation of a Parliamentary Title. It remains to be seen whether such a decision, if made, will meet the approval of the Legislature, or whether the public, who not unreasonably expect that the principle should be perpetuated in Ireland, and extended to the rest of the kingdom, will approve of the retrograde movement which such a decision would suggest.