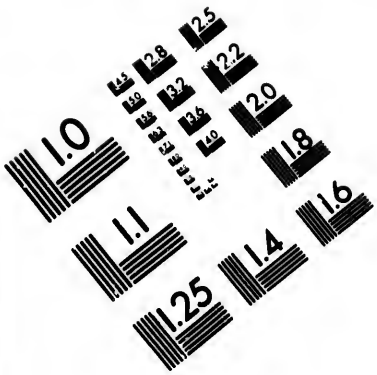

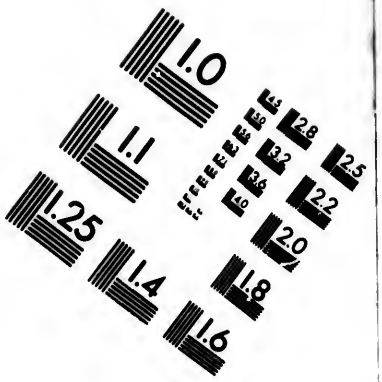

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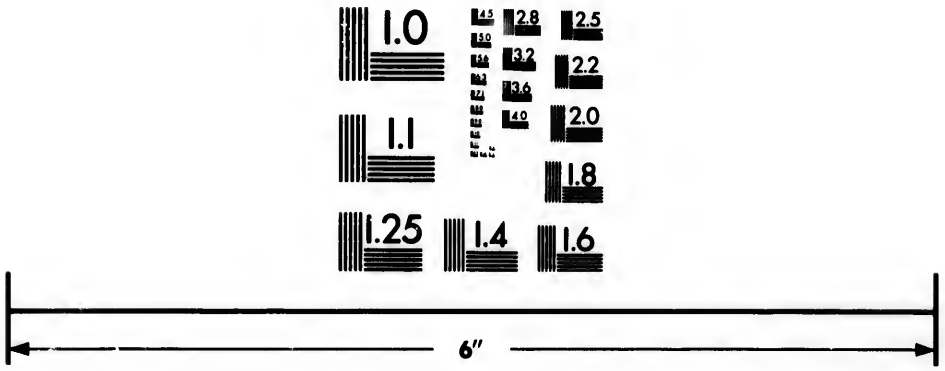

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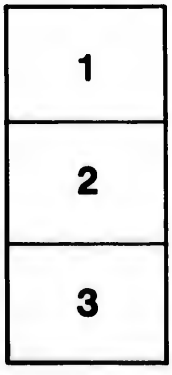

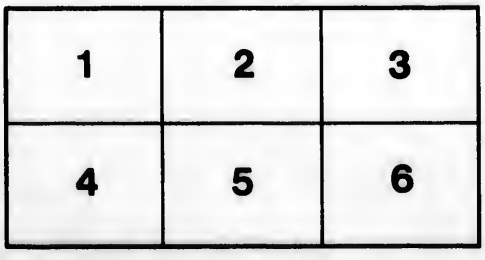

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A LETTER

ON THE

BILL FOR QUIETING TITLES TO REAL ESTATE IN UPPER CANADA,

ADDRESSED TO THE

HON. JOHN A. MACDONALD,

ATTORNEY-GENERAL FOR UPPER CANADA,

BY THE

HON. OLIVER MOWAT,

LATELY M.P.P. FOR SOUTH ONTARIO.

TORONTO:
PRINTED AT THE GLOBE STEAM JOB PRESS, 26 AND 28 KING STREET EAST.
1865.

TO THE HON. JOHN A. MACDONALD,

Attorney-General for Upper Canada.

TORONTO, Feb. 6, 1865.

MY DEAR SIR,—

I am very glad to know that the Bill for Quieting Titles is to be carried through Parliament this Session as a Government measure. As I have taken great interest in the subject to which this Bill relates, and have given to it considerable attention, it has occurred to me that I may perhaps facilitate your work a little by stating my view of the evils which the Bill was designed to meet, and of the method by which the Bill proposes to remove them.

When I first introduced the Bill you were good enough to express your approval of its principle and object, and to go over its clauses with me very carefully and to suggest to some of them amendments which I had great pleasure in adopting.

The Bill as it now stands has thus had the benefit of a careful revision by yourself. For the original preparation of the Bill I frankly confess that I am entitled to no particular credit. My professional practice had called my attention to the great and growing evil of the insecurity of our Titles, and my reading had brought to my knowledge the remedy first adopted in Ireland, afterwards acted upon in Australia, New Zealand, and elsewhere, and lately applied to England itself. What I have done is the draftsman's work of adapting laws already in force in other

countries to the circumstances and requirements of this section of our own Province.

The leading objects of the Bill are to give greater certainty to Titles; to facilitate the proof of them; to expedite transfers; and generally to render dealing with real property more simple and less expensive. Everybody is interested in these important objects, for everybody either owns property now, or hopes to do so some day.

The insecurity of Titles, which it is the purpose of the Bill to remove, has often been the occasion of the greatest possible hardship and suffering to individuals and families; and facility of transferring real estate, which it is the intention of the Bill promote, is of the greatest importance to a free country, and particularly to a young country, like Canada.

The method by which the Bill proposes to accomplish its design is by rendering Titles indefeasible whenever they have been submitted with this special object to the ordeal of a judicial investigation and their validity has in this way been ascertained. This investigation is not to be compulsory on owners, but the proposal is that an owner shall have the right to have the investigation made if he chooses, and though there may be no adverse claimant. On his establishing his Title, after due inquiry and every precaution by the Court against error or fraud, it is proposed that the owner shall receive a Certificate of Title; and that such Certificate shall operate as a new starting point in his title, and shall be conclusive at Law and in Equity against all the world that at the time mentioned in the Certificate the land belonged to the person it names. Thenceforward when the owner sells or mortgages, an intending purchaser or mortgagee will only have to search for conveyances or incumbrances subsequent to the Certificate—the work of perhaps five minutes or less.

As the Law stands now an owner may have an undisputed and indisputable Title; it may be easy for him to-day to prove every deed and every fact on which his Title depends; but a dozen years hence the case may be quite different. The proof may then be difficult, expensive and perhaps impossible; witnesses whose testimony he needs may be dead; or if alive, it may be impossible to find them; or if found, they may be where the process of our Courts cannot reach them, and where therefore their evidence cannot be compelled. Or if these difficulties do not arise, others may. In a dozen years witnesses may forget important facts; or some of the papers on which the Title depends, may be mislaid or lost, and there may be the greatest possible trouble in tracing them, or proving by satisfactory evidence their loss and their contents. The Bill proposes to give to every owner the right, if he chooses, of producing his proofs now; and if they are clear and satisfactory, of being relieved forever afterwards from the necessity of producing them.

When an owner has occasion to prove his Title at law, this only gives him the opportunity of showing the legal title. An action at law seldom touches the question of the equitable Title, or of equitable interests in the property; and whatever such an action decides is binding on the parties to the suit only and affects no one else. The evidence must be forthcoming, and may have to be repeated in every suit with everyone who at any future time sets up a claim to the property.

Then again many of the flaws on which a Title is defeated are such as, if known in time, could be easily and cheaply remedied; but are beyond remedy when the property becomes valuable enough to tempt the cupidity of those who are entitled to take advantage of the defects that are discovered; or the original party to the transaction may then be dead and his heirs may be

minors or needy, and for these or other reasons unable or unwilling to correct or overlook the mistakes or omissions which render the title defective.

All sorts of questions have to be considered in looking into a title prior to making a purchase or accepting a mortgage. Are the deeds and wills through which the title is traced, genuine Instruments? or have any of them been forged or tampered with? Were they all duly executed? Have all the forms required by the Statute been observed in the registration of them? Were all the requirements of the Acts affecting married women complied with? Did every testator possess the requisite mental capacity at the time of signing his Will? Was it read over to him? Did the witnesses subscribe their names in the presence of one another? Even in regard to these ordinary questions that occur on almost every title, examples of misinformation and misfortune have not been wanting.

But sometimes much more difficult questions than these have to be determined, as to the construction of deeds, and still oftener as to the construction of wills. Occasionally difficulties of this class entirely escape attention when a Title is investigated, and at other times a wrong conclusion is come to in reference to them.

Then questions of identity and questions relating to possible claims for dower have sometimes been overlooked by former purchasers, and involve considerable perplexity in subsequent investigations.

Again, persons dealt with as legitimate, sometimes turn out not to have been legitimate; or a person who has conveyed as eldest son and heir under the old law, is subsequently ascertained not to have been eldest son and heir. So persons supposed to be all the children and co-heirs under the new law, may only be some of the children; persons may not be dead who were supposed to be dead; or persons may not have been dead or not have been

born at the dates supposed, and on which important rights depend; persons may have been aliens who were supposed to be British subjects, or may have been British subjects who were supposed to be aliens; and persons may have been absent from the country when the Statutes of Limitations were supposed to have commenced running against them, or may have been in the Province before the Statutes were supposed to have begun their operation in barring their rights.

There are even some causes of difficulty, delay and expense in the case of Canadian Titles, which do not exist to the same extent in England.

Thus we have not hitherto had any complete system for the registration of births, deaths and marriages, and the want of any has created much inconvenience.

Again, our population is less stationary than that of Great Britain, or of the old countries of Europe. A much smaller proportion of our people, than is the case in an old country, remain permanently in one place; and a much larger proportion, after being concerned in the ownership of land, or being witnesses to transactions affecting the ownership, leave the part of the country where they were known at the time, and perhaps leave the country altogether. Native Canadians, or those who have lived for a time here, are to be found in British Columbia, Australia, New Zealand, and probably every State of the American Republic. The difficulty from this cause alone of tracing witnesses or former owners, and of ascertaining and proving the death of heirs and devisees, is sometimes found to be very serious.

Then again, Canadian Titles have, in many instances, to be traced through persons residing in Great Britain; through Deeds and Wills executed there; and through heirs who were born there, and who married and died there.

So from time to time it happens that births, deaths and

marriages which have taken place in the various States of the American Republic, or in the other British Provinces on this Continent, or in Australia, or in the countries of Continental Europe, form essential links in a Title. It is obvious that the difficulty of searching for such facts, and then of establishing them, must sometimes be very great, even when the events are comparatively recent; but when they occurred many years ago, the difficulty may amount to an impossibility. Every Title depending on such events, becomes less safe with every year that passes; and as the law stands now, no reasonable caution and no moderate expense can make such a Title entirely secure.

Again, in this country large blocks of farming land often depend on a single Title; or a farm lot is, in the formation of our cities, towns and villages, divided into building lots; and a flaw in the Title of one of those who owned the property before the division of it, destroys the Title not of one person only or of one family only, but of many persons and many families.

It often happens too that the original Title is in such cases less carefully examined than if there had been no subdivision, and one person was buying all. Parties appear to think that a weak Title acquires strength by the number of persons who hold by it; or everybody assumes that his neighbour has examined the Title and found it correct, and he trusts to this supposed investigation in order to avoid the expense of an independent investigation of his own. Were there an easy method for obtaining an indefeasible Title, no one would think of sub-dividing his land without first obtaining a Certificate of Title.

Our Registry law has, beyond all controversy, been of immense advantage to the country; and yet in regard to any of the questions I have spoken of, it cannot be said to afford any protection whatever; we need something

to supplement its provisions before our Titles can have the reliability which it is very desirable they should possess. The Registry law in fact provides for but one source of danger to a purchaser, namely unknown conveyances affecting the property. It affords little or no aid in ascertaining the validity of conveyances, the proper construction of deeds and wills, or any events affecting Title otherwise than by written instruments; or in supplying the future proof of such events. These things may be of greater moment to an intending purchaser, than the possibility of there being some Deeds affecting the property of which, but for the Registry law, he would not have known. In fact our people have been in the habit of trusting too much to the Registry, and have in consequence neglected to preserve their Deeds as carefully as prudence required. The Registry law has not hitherto required a memorial of the whole Deed to be registered; and the Deed may consequently have contained conditions, provisions and trusts, of which the memorial gives no information. All that the Statute requires the memorial to state is, the date of the Deed, the names of the parties and of the witnesses, and the description of the property. Even the estate or interest conveyed, need not be mentioned. There may therefore be an interest under a Registered Deed which does not appear in the memorial; and a man may have an interest as (for example) a mortgagor, remainder man, reversioner, or cestui qui trust, without any intimation of this being given by the memorial. Mortgages have often been registered as absolute conveyances. If the new Registry Law which the Government has introduced should prevent this method of registering instruments for the future, the change will have no effect on past transactions.

It is a further serious inconvenience connected with our existing system, that if a purchase is effected or a loan granted after an investigation which satisfies the Soli-

citor employed that the Title is good, the whole investigation has to be gone over again upon every fresh transaction in reference to the property; and a title that was satisfactory to one lawyer may not be satisfactory to another; as among lawyers there are all degrees of professional skill and knowledge, and all degrees of prudence and caution, as well as of experience. Besides, the ablest and most cautious lawyer may occasionally make a slip or overlook a defect which an inferior man may happen to detect. Sometimes, therefore, one solicitor finds it his duty to reject a Title which another solicitor has examined and passed; and this is the case not only in Canada, but in England also, where conveyancing is a distinct branch of professional practice, and has received a degree of careful attention which it is not possible for general practitioners in Canada to give to it.

The desirableness of such a measure as you have brought in and of there being no delay in passing it, further appears from the obvious fact that every year our Titles are becoming more and more complicated by sales, mortgages, wills, and settlements, as well as by deaths, marriages, births, and all other events affecting Titles. Every instrument that is executed, every transaction that takes place, every event that affects the ownership, increases the evil; for the more complicated a Title is, the more numerous the links in the chain are, the greater is the chance of a mistake being made in advising upon it, the greater the chance of there being some flaw which it may be difficult or impossible at the time to detect, and the greater the chance of the proofs necessary to establish the Title, being lost, or for some reason not obtainable when needed. Even the mere lapse of time until it is long enough to give a title by possession, but serves to enhance the danger, through the death of witnesses, or their forgetfulness or mis-recollection of facts, and other causes. With

time property is increasing in value; the importance of the Title being unimpeachable, is augmenting; and yet with time, until the period of prescription is actually reached, come increased complication and increased danger.

Property more frequently changes hands in Cities and Towns than in the Country; and at present the evils which the Bill is designed to remove, are greater in the former than in the latter. For the same reason they are greater in those parts of the country which have been long settled, than in those in which the lands have but recently been patented. Indeed some conveyancers of great experience have expressed the opinion that, unless a remedy is found, there will not in a few years be many marketable Titles in this part of the country. The evil is certainly increasing and must increase everywhere, until our Titles become as complicated, and the investigation of them becomes as expensive, as in England itself. There the investigation usually occupies months; and it appears from our law books that ten years and even more have sometimes been spent in making out a Title. Occasionally also the expense has nearly equalled the purchase money; one instance is mentioned by Lord St. Leonards in which a Vendor gave the property to a purchaser for nothing, on condition of the purchaser's relieving him from one part of the expenses of the investigation, namely that of furnishing copies of the Title Deeds. On the other hand, the earlier in a Country's history that some system is adopted for giving certainty to Titles, the easier is the task, and the more effectual are the means which it is practicable to adopt.

The truth is, that under the English system (which is also ours) there are in a larger number of cases than I would like to designate, no means by which any one, when he buys a piece of property unless he buys from the Crown, can be absolutely certain that he is getting a good Title. Even if his Grantor was the Patentee he may not be per-

fectly safe, for there may have been a prior patent of the same lot to another person, or the Patent to the Grantor may have been issued through some fraud or mistake which, on just grounds, may invalidate it. So a sale in Chancery is only enforced if the Title on investigation appears good ; but even this investigation, as the law now stands, does not give perfect security, and in England there are in the books instances of a Title obtained under a Chancery sale, being afterwards successfully impeached from some unexpected quarter.

I think you will agree with me that it is specially important with us that means should be adopted to give the greatest practicable certainty and simplicity to our Titles, because Immigrants and others are apt to take on trust the validity of the Title of the apparent owner of the property, especially if he appears to be a respectable man, and are unwilling or perhaps unable to bear the expense of obtaining competent professional advice in looking into the Title for them ; and it is a cruel hardship that a man of this class, or of any class, after buying a lot, entering into possession, perhaps spending all his means and the labour of himself and his family for years in improving it, should be suddenly deprived of his property and perhaps the labour and acquisitions of a life-time, through some defect in his Title of which he had no suspicion. Yet instances of this kind are unfortunately within the knowledge of almost every lawyer.

It is hardly a less cruel hardship that the law should be in such a condition that a man who lends his money on a mortgage under professional advice, is liable to lose his money afterwards from some latent defect in the title. I have heard of one lender who in this way lost £11,000 in one transaction. Even Building Societies and Loan Companies occasionally meet with like losses, though for various reasons they are more frequently heard of in the case of private lenders.

But the advantage of our Titles being certain, is very far from being confined to the particular cases in which innocent persons might otherwise suffer. The country generally would benefit by its being known that our Titles were perfectly safe and simple, or could be made so. Such a state of the law would tend to encourage both settlers and those who have money to invest, while any doubt or fear about our Titles discourages both.

The saving of time on all subsequent transactions in relation to property after a Certificate is obtained, would not be the least valuable result of the system which the Bill proposes to introduce. Under the existing system the investigation sometimes takes weeks, sometimes months and occasionally (as I know from personal experience) even years; and the transaction is sometimes broken off in consequence of the delay, or is only carried out when the owner's purpose in selling or mortgaging can no longer be answered. I have known some painful illustrations of these results, and probably no lawyer in large practice but has done so too.

Under the proposed measure if an owner has a Certificate of Title, he may complete a sale or mortgage in two hours after bargaining for it. The preparation of the Deed or Mortgage seldom occupies much time; and the search at the Registry Office for mortgages or conveyances subsequent to the certificate, would be the work of but a few minutes.

The existing system exposes parties in taking or acting on a Title to the danger of the Title turning out to be bad through some unperceived flaw or some unknown fact; to the danger of losing the evidence of a Title that is really good; to delay in the investigation when expedition is an object; and to constantly increasing expense in the investigation and proofs. The Bill proposes by a short, inexpensive and just method to remove these evils. I say

a just method, for I do not know that any one will think it unjust or objectionable that latent claims will be shut out by the Certificate. We already by our Registry law recognize the propriety of such a provision; and so great and undeniable are the advantages the country derives from the law, that the tendency is to extend and not to restrict it. Under its operation latent claims are excluded without any of the precautions which the Bill proposes that the Court should observe before a Certificate is granted; and I think there can be no reasonable doubt that when a person is in possession of property as apparent owner, when his Deeds and papers appear on a rigid examination of them to establish clearly that he is owner, when the Registry Office gives no intimation of an adverse claimant, when none can be discovered in answer to public advertisements, it is but just that the law should protect the person who purchases from such an owner, rather than protect the interest of some unknown person who afterwards sets up a claim of which he had taken no steps to give others warning.

The principle of the Act exists in Lower Canada where, I believe, Sheriff's sales give an indefeasible Title. I have been informed that a Sheriff's Deed is in consequence regarded in Lower Canada as the best, and indeed only entirely safe, Title that a man can have.

The machinery which the Bill adopts, is in principle that which was adopted in the Statutes regarding Irish Incumbered Estates, and which was found to work so beneficially in Ireland that it was afterwards made to apply there to all lands, instead of being confined as it was in the first instance to Incumbered Estates. It has also, with the cordial approbation of English Law Reformers of all parties, been lately extended to England; though the opposition of the Solicitors has prevented much use being yet made of it there. In this Province the

interest of the legal profession is not against the proposed measure. Conveyancing forms a smaller part of professional business than in England, and the incidental advantages of the proposed measure will more than compensate Solicitors for their loss of profit through the general simplification of Titles. Had it been otherwise, I am bound to express my conviction that Canadian lawyers would have been found too liberal and patriotic to prefer their own interest to an important Reform in the laws of their country.

The English law as to the sale of Goods in *market overt*, is an illustration of the principle on which our Registry Law and the Bill in question alike proceed; and for upwards of three hundred years a like doctrine was allowed to prevail to a considerable extent in regard to lands also, by the operation of fines and recoveries. Lord Coke said that "the Law had ordained the Court of Common Pleas "as a *market overt* for assurances of land by fine; so that "he who shall be assured of his land not only against the "seller but against all strangers, it were good for him to "pass it in this *market overt* by fine." But the change of manners gradually destroyed the value of the precautions which originally were a sufficient protection to persons who were no parties to the proceeding, and ultimately rendered necessary the abolition of fines and recoveries. For it will be remembered that there was no investigation of the Title by the Court in such cases; all that was required was, that the person who "levied the fine" should be in possession of a freehold by right or by wrong, and that no adverse claim should be duly made; and the only notice given was the rehearsal of a fictitious formula couched in technical and obsolete language to an uninterested audience in the Court of Common Pleas at Westminster. The Fine bound all persons who were not under disability, even though they were entirely ignorant of the proceedings.

To prevent possible injustice from the working of the new system, the Bill provides all reasonable precautions. The Court, before declaring a Title good, is to make, by itself or a competent officer acting under its own supervision, a thorough examination of the Title Deeds and evidences of Title in the possession or power of the party; a thorough search at the Registry Office is also required; and copies of all memorials are to be produced that relate to Deeds of which the originals cannot be found. An affidavit is required from the owner that he knows of no adverse claim; and a certificate from his Solicitor or Counsel that he has examined the Title and conferred with the owner, and believes the affidavit true and the Title good. There will thus be the best possible security that nothing is kept back. Notice of the application for a Certificate is further proposed to be given, not only to any one having an adverse claim, but to any one whom the Judge thinks it prudent to notify. In addition to all these precautions, notice is to be published in the *Canada Gazette*, and in any other newspapers the Court sees fit, in order that if there is any claimant whose Title neither appears on the Deeds nor in the Registry, nor is known to the claimant or his professional adviser, such claimant may still, if possible, receive an intimation of what is going on and have an opportunity of establishing his right. But if any one has a claim which is not shown by the Deeds or the Registry, and which the astuteness of the Court and its officers cannot detect, and which even advertisements cannot bring to light, the Bill assumes that the public interests require that such a claim should thenceforward be excluded as against honest purchasers or their representatives.

If, notwithstanding all the precautions referred to, a Certificate of Title should happen to be obtained through fraud or false statements on the part of a petitioner,

the Certificate is declared (§47) to be void in such a case as respects the petitioner, and to be valid only in favor of a purchaser for value who had no notice of the fraud or falsehood. The chance of the Act working injustice in any possible case, is thus reduced to a minimum; while on the other hand it is especially declared that the Act is to be so construed and "carried out as to facilitate as much "as possible the obtaining of indefeasible Titles by the "owners of Estates in Lands, through the simplest ma- "chinery, at the smallest expense, and in the shortest "time, consistent with reasonable prudence in reference "to the rights and claims of other persons."

The machinery provided is so simple that I do not see that, with the exception of the disbursements for publishing and serving notices, the expense of a judicial investigation need be much greater than that of one thorough investigation out of Court on a sale or mortgage of the property. It will certainly be less than of two such investigations; and the judicial investigation will have the immense advantage of being made once for all, instead of having to be repeated at every new sale or mortgage of the property; and will have the further advantage of being certain and conclusive, instead of being forever open to question. I am satisfied that a measure which secures these advantages will prove a great boon to the country.

I remain,

My dear Sir,

Yours truly,

O. MOWAT.