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THE

RECORD OF TITLE IN IRELAND,

ITS

Working and Advantages,

ILLUSTRATED BY PRACTICAL EXAMPLES.

A Paper read at the Annual Meeting of the National Association for the Promotion of Social Science, held at Belfast, 1867, and published with the permission of the Council.

BY

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To reject any well considered reform being henceforth impossible, wise innovators should direct their chief efforts to the formation of a sound Public Opinion.
AUGUSTE COMTE.

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THE following Paper is published in accordance with the suggestion made by Mr. Justice O'Hagan, who presided over the department for Jurisprudence at the meeting of the Social Science Association lately held in Belfast, and by the kind co-operation of His Grace the Duke of Leinster, President of the Registration of Title Association, and the following members of that body:—Jonathan Pim, M.P.; William Malcomson, Colonel Knox Gore, Lieutenant of Co. Sligo; James L. W. Naper, D.L.; James Wilson, D.L.; Thomas M'Clure, D.L.; Robert Henderson, Ex-President, Chamber of Commerce, Belfast; John Leahy, Q.C.; Sir B. L. Guinness, Bart., M.P.

HENRY DIX HUTTON.

14h November, 1867.
10, Mountjoy-street.

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THE

RECORD OF TITLE IN IRELAND,

ETC.

"Tout ce qui gêne l'homme le fortifie."
(Opposition strengthens a good cause.)
JOSEPH DE MAISTRE.

THE efforts of the "Registration of Title Association," to establish a registry of title in Ireland on the firm basis afforded by the Landed Estates' Court, though cordially supported by the land-owning and mercantile public, received, I regret to say, but little sympathy from the legal profession. They were actively opposed by a large majority of that branch which exercises the greatest influence over dealings with land and land-securities. The good sense and independence of the public, however, prevailed; and an experience of only two years since the passing of the Record of Title Act (28 and 29 Vict., c. 88), enables me to illustrate the new system of conveyancing by examples and statistics which verify its progress and prove its advantages.

The objections urged against registration of title were mainly two; its alleged inutility and impracticability. The examples presently stated sufficiently refute these objections; but the full meaning and force of these examples will be better appreciated, by first considering the general grounds which lead to the conclusion that the Record of Title is both useful and practicable.

It was objected, then, that in Ireland, at least, registration of title was unnecessary, since the Landed Estates' Court

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already conferred an indefeasible title expressed in the simplest form ; and the existing Registry of Deeds, it was said, supplied the means of conducting future dealings. The objectors, however, failed to observe that the Court's conveyance gave indeed an indefeasible title, but did not *continue* it as regarded *new* dealings. Whenever the owner of the estate to whom the Parliamentary title was conveyed made a sale or mortgage, it became necessary to prove by the old method that his title was unaffected by any claims created *since* the date of the Parliamentary conveyance. The proof of title was still more difficult if the party dealing was not the original holder of the indefeasible title, but claimed to be his successor or legal representative. The Registry of Deeds did not remove, or even lighten this difficulty. The like complications which, notwithstanding this institution, had rendered it necessary to establish the Incumbered and Landed Estates' Courts, *again* attached on the new indefeasible title thus created. Experience has abundantly proved that, after the lapse of even a few years, the expense and delay of making title to a property held by a Parliamentary title were nearly, sometimes quite as great, as if there had been no such title ; and that although the subsequent dealings were comparatively simple.

For practical purposes, therefore, the value of the Parliamentary title *deteriorated.* This deterioration acted injuriously on private interests, and contravened the policy of the Landed Estates' Court. It is well known that the purchasers of properties paid two years additional purchase, simply in consideration of the enhanced value given by the Parliamentary Conveyance. When, however, they sold or mortgaged the property, it was discovered that, being unable to confer a like title, they lost this advanced price. Again, landowners were naturally deterred from applying to the Court for a Declaration of Title, by the want of a ready and

inexpensive mode of conducting ordinary dealings with land, since the obtaining of an indefeasible title involved present expense without offering any commensurate advantage.

The Landed Estates' Court, therefore, was proved to be incomplete, unless a machinery could be discovered which should *continue* the original indefeasible title, and enable its owner or his successor to conduct future dealings, conferring a like title, safely, conveniently, and without needless delay, trouble, or expense. In the opinion of very eminent authorities, both legal and practical, such a machinery was supplied by the system known as Registration of Title. I do not propose to repeat explanations of the principle of this system, or its special applicability to Ireland. The following cases practically illustrate the advantages conferred by the Record of Title as supplementing the Landed Estates' Court. They fall under two heads, relating retrospectively to Parliamentary titles already granted, for the recording of which a simple and inexpensive method is supplied by the 51st section of the Record of Title Act; prospectively to properties which, for want of a registry of title, were in effect excluded from the benefit of the Landed Estates' Court. As some of the circumstances possess a private character, I have thought it better not to mention the names of the parties concerned; but all the facts stated appear on the face of their written applications, which are open to public view.

First: examples of recording titles granted by the Incumbered or Landed Estates' Court before the Record of Title was established. The original owner of several Parliamentary titles died in 1863 intestate. His heir-at-law, wishing to raise money by mortgage, experienced great difficulty in doing so, chiefly owing to the necessity for proving the intestacy. The Record of Title Act supplies a

mode of establishing this fact conclusively, under the direction of a Judge of the Landed Estates' Court. The heir-at-law of the Parliamentary title accordingly applied under the 51st section; his title is now recorded, and he can execute an indefeasible security by a simple statutory charge. Again, under the same section, applications have been presented by several holders of old Parliamentary titles, to whom the properties were conveyed by the Court subject to annuities, or who themselves subsequently created charges. Sufficient evidence having been adduced that the annuities had determined, and the mortgages been paid off, the Judge has authorized the recording of these titles, and the issue of Land Certificates to the owners, clear from all such charges.

Secondly: examples of recording titles to properties for the first time passed through the Landed Estates' Court, with a view to the advantages offered by the Record of Title. These advantages are very apparent where a division and sale of land in building lots is required. A property near Belfast is vested in trustees, who have a power of sale and granting in fee-farm, and are offered high terms *provided* they can confer an indefeasible title. Accordingly, under the extended powers given by the Record of Title Act, the trustees have taken proceedings to obtain a Declaration of Title, and this, when recorded, will enable them to convey with indefeasible title to purchasers.

Accomplished facts have thus disposed of the first objection, that of inutility. The second objection urged to the Record of Title, namely, its impracticability, mainly grounded itself on the alleged impossibility of registering titles under Settlements. It could not be denied that Government Funds and Railway Shares might be placed in settlement by simply registering the title in the name of trustees. It was, however, alleged that settlements of

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land could only be registered in a method which would be either so complicated as to be useless, or so simple as to be unsafe. If, on the one hand, the title of the parties *beneficially* interested was registered, the process of conveyancing would not be simplified; on the other hand, registration in the name of *trustees* would endanger the interests of beneficiaries. The eminent legal authorities in both branches of the profession, who so long and so carefully considered this question, were of course fully alive to its difficulties; but they arrived at the conclusion that these could be overcome. The plan they proposed consisted in combining an expedient long employed by real-property conveyancers, with a precaution suggested by the experience of personal settlements. The object of every settlement is of course to secure devolution in a specified line, and to prevent alienation; but occasions frequently arise where even settled landed property becomes the subject of partial transfer or mortgage. Accordingly, the practice of English conveyancers has long been to insert the clause known as a Power of Sale, which usually empowers the trustees to dispose of the property with the consent of the tenant for life, and after his death at their own discretion. The sale is generally authorized only for certain specified purposes; but the purchaser is expressly exonerated from any obligation to regard these limitations, or to see to the application of the purchase-money. Observations made on personal settlements also proved, that the occurrence of mistake or fraud was almost invariably traceable to the circumstance that the original plurality of trustees had ceased, owing to death or other causes, and the settled property was thus placed in the power of a single trustee. The professional authorities, entrusted by Royal Commission with this question, accordingly recommended that the title to land under settlement should be registered in the name of the trustees

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of the Power of Sale; their disposing power being controlled by requiring that every disposition must be made by the number of trustees specified in the trust-deed. This control would be effected by making a note in the Registry of Title, called, for brevity, "The No-Survivorship Clause." This plan has been adopted by the Record of Title Act. There exist, no doubt, instruments—settlements by will and deed—which do not contain a Power of Sale, and it was necessary to provide for registering these in a more complicated manner. But the gradual introduction of a good style of conveyancing into Ireland is rendering such cases increasingly rare; and the omission, by professional conveyancers, to confer a Power of Sale upon the trustees can henceforward seldom occur.

These provisions of the Record of Title Act for recording settlements have been brought into operation in several cases, of which I will mention two. A conveyance by the Landed Estates' Court was made to trustees named in a will containing a Power of Sale, on the trusts thereof. A Judge of the Landed Estates' Court has directed the trustees to be recorded as owners, with a special note importing "No-Survivorship." The other case is further remarkable, as illustrating the extended advantages offered by the Record of Title Act as regards applications by owners for Declaration of Title. The settlement was in the usual form, conveying to the tenant for life with remainders over. Under the Landed Estates' Court Act of 1858 no indefeasible title could have been granted; but as the instrument contained a Power of Sale, the trustees have applied for a Declaration of Title under the Record of Title Act, with the concurrence of the tenant for life. The Judge has made an order declaring the trustees owners, and they will be recorded as such, with a note of "No-Survivorship." Neither in these, nor in any other cases, has a *caveat* been

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entered; indicating that the "No-Survivorship" clause is considered, justly I think, a sufficient protection to beneficiary interests.

The foregoing facts require only to be known in order to ensure an increased success for the new system of conducting dealings with land by Registration of Title. This anticipation is justified by the Statistics of the Record of Title Office, kindly furnished to me by the Recording Examiner of the Landed Estates' Court, Mr. Urlin. The Act was passed in 1865, but the office has been in operation only since January, 1866, not quite two years. Up to the 2nd November, 1866, ninety-four properties had been recorded, their aggregate value somewhat exceeding a quarter of a million sterling. The last returns show a steady advance in the business of the office. The entire number of estates completely recorded from its opening to the 14th of August, 1867, number 210, representing purchase-money to the amount of £649,839. Thirty-four applications have been made to record conveyances of the Incumbered or Landed Estates Court, executed before the passing of the Record of Title Act. The dealings with recorded estates include twenty mortgages, executed in the short statutory form, and two judgments, altogether securing £44,000. The Public Index of recorded estates shows, among the recorded owners, sixteen solicitors, four barristers, and one judge, (the Lord Justice of Appeal, Christian) whose eminent position and attainments, as a real-property lawyer, give especial value to his practical adherence to the new system of conveyancing. The public will also learn with interest that, among the gentlemen who, as members or friends of the "Registration of Title Association," promoted the passing of the Record of Title Act, the following have already recorded properties:—Colonel Knox Gore, Jonathan Pim, M.P.; Vincent Scully, Q.C.; Colonel Tottenham, M.P.;

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the O'Conor Don, M.P.; Colonel Greville, M.P.; Lord Clermont, the Lord Mayor of Dublin (W. Lane Joynt), Eugene O'Callaghan, Owen Caraher, J. W. Murland, the Law Life Assurance Company, Bishop Moriarty, W. F. Littledale, David Mahony, John George MacCarthy, Captain Lindsay, D.L., James A. Dease, D.L., James Wilson, D.L., the National Bank.

The progress of the new system has, therefore, been considerable; but it falls much short of what may be expected when the public has become more fully aware of the advantages which the Record of Title offers in regard to safety, facility, and expense,* and the existing professional bias towards the old methods of conveyancing has been diminished by reflection and experience. The "Scale of Costs," in relation to the recording of estates and dealings therewith by trans-

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* In a Return made pursuant to an order of the House of Lords, on the motion of the Marquis of Clanricarde (Lord Somerhill, Parl. Papers, 1867, No. 335), the following information was furnished by the Recording Examiner, Mr. Urlin.

"There is no Office fee payable on recording a conveyance immediately after its execution by the Court.

"Where an interval is allowed to elapse between the execution of the conveyance and its being recorded, the fees payable are as follows:—

"During the year 1867, or within a year from the execution of the conveyance, the fee payable is 5s. where the value is £1,000 or under; and 2s. 6d. for every additional £500 of value.

"*After the end of this year* (1867), no conveyance that has been executed more than a year can be entered on the Record of Title, except on payment of the full duty fixed by Stat. 29 and 30 Vict., c. 99; viz., 10s. for every £100 of value up to £10,000, and above that amount on a decreasing scale. [10s. is reduced to 5s. between £10,000, and £25,000; 5s. is reduced to 2s. 6d. above £25,000].

"The whole estimated expense, including solicitors' fees, of recording forthwith a conveyance *now* executed by the Court, varies from 10s. to £1 15s. 6d. (This sum does not include the entire cost of registering in the Office for Registry of Deeds a memorial of the fact of recording. The expense of this is nearly the same as the cost of registering the conveyance when *not* recorded.)

"The whole estimated expense, including solicitors' fees, of recording under the fifty-first section of the Act, a title *formerly* granted by the Court, varies from £5 to £18, according to the nature of the estate, changes in the tenancies, &c."

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fer, charge, or otherwise, is well worthy of study both by landowners and by members of my own profession, particularly that branch which chiefly transacts dealings with landed property. This Scale* has introduced into professional remuneration a feature deserving of special notice.

The negotiation of sales and mortgages of land is, generally speaking, conducted by the same professional gentlemen who are entitled to prepare the necessary documents for completing the transaction. But in taxation of costs no separate charge for the trouble and responsibility of such negotiations was hitherto allowed to solicitors. Under the old and expensive system of conveyancing, they were, doubtless, sufficiently paid for this office also by the ordinary charges allowed for conveyancing. But when the Landed Estates' Court laid the foundations of the new system, in some measure abridging the delay and expense of fresh dealings with Parliamentary titles, the inadequacy of the old method of professional remuneration became apparent. I can only account in this way for a practice which has grown up, and is, I have reason for believing, adopted by solicitors of respectability and professional standing. I refer to the practice of charging to clients, on sales and mortgages of Parliamentary titles, a sum not properly taxable, but styled "in lieu of costs." That certainly looks strange; but the practice may, in part at least, have originated in the absence of a recognised charge for services really rendered. The Judges of the Landed Estates' Court therefore deemed it better, as regards both the public and the profession, expressly to sanction a specific charge to a solicitor who, *in point of fact*, negotiates a sale or loan of recorded property. The charge thus allowed in taxation of costs is five shillings per cent.; and where two

* It will be found in "Land Transfer and Land Securities," by H. D. Hutton, 2nd Ed., p. 190.

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different solicitors are concerned in the negotiation for the principal parties, each of them will be entitled to the like per-centage brokerage. The same rule, of course, applies to all recorded charges, whether executed in the shape of a statutory charge, or issued in the form of debentures under the Land Debentures Act, which was engrafted on the Record of Title Act.

The entire "Scale of Costs," framed by the Judges of the Landed Estates' Court, is conceived in the same spirit, and aims at conciliating the public interest in moderate charges with a fair and liberal remuneration for all professional work really done. At the same time, I fear it must be long before the grounds of such conciliation will be fully understood, and the necessary change cordially accepted. The old system of conveyancing has, unfortunately, engendered habits of mind at variance with the exigencies of modern society, and the just demands of the public in reference to dealings with landed property. Under that system professional remuneration was determined by the length and number of the documents, thus encouraging the wish for a comparatively small number of large transactions, artificially complicated by useless legal forms. The new system of dealings with recorded estates aims, on the contrary, at the greatest degree of simplicity compatible with safety; and, in conformity with mercantile practice, promises remuneration to the agents employed from multiplied dealings, large and small, at moderate charges. The old system hinders its adepts from attaining the true point of view. When Mr. Robert Torrens, whose eminent services in this reform are well known, stated that a mortgage for £100,000 could be completed by registration of title, with the same facility as a mortgage for £100, his statement was received with incredulity by professional gentlemen. Yet the fact admits of no doubt, and is easily explained.

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The principles and practice of conveyancing are general, and independent of the extent of land dealt with. The old system imposed artificial conditions, which caused a delay and expense that practically excluded all but large dealings. The new system lays down natural and simple rules, under which the owners of recorded estates can carry out, with equal security or facility, the largest or the smallest dealings. When the tendency to multiply dealings with land, which the reduced expense, diminished delay, and greater certainty incident to conveyancing by registration of title must encourage is more justly estimated; when the impulse which the Record of Title should, in various ways, impart to the business of society is more deeply considered, I am convinced that the new system will be regarded with greater favor by my professional brethren. I trust, also, and believe that, independently of such personal views, motives of a higher character will influence many, especially among the younger members of the legal profession in both branches; following the example set by the gentlemen whose services and public spirit were so highly appreciated by their lay coadjutors on the Committee of the Registration of Title Association.

In the meanwhile it is essential that the great interests involved in the progress of the Record of Title should be appreciated and vigorously protected by the public; more particularly, I would add, by the numerous and influential members of the "Registration of Title Association." In this view I deem it right to call attention to a circumstance of very great importance for the proper working of the new system, but which hitherto has been imperfectly understood by the public. Registration of Title, though long established in other European countries, and more recently practised with great success in English colonies, was new to us. It was therefore considered more advisable to make

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its adoption *optional.* But the Legislature unmistakably *recommended* the recording of titles. The Record of Title Act assumed that all future titles issuing from the Landed Estates' Court would be recorded, the burden of *declining* to record being thrown on the owner. By the 7th section any person obtaining a conveyance or declaration from the Landed Estates' Court may, *by requisition under his hand*, require that the title so conferred shall *not* be recorded under the Act. Signature by the owner himself is, therefore, indispensable, and it is no doubt the duty of the solicitor to consult his client as to whether the title shall be recorded or not. A practice, however, has grown up, quite contrary to the spirit of the Act. A printed form *not to record* is sent to the client, to which his signature is requested without adequate, and sometimes without any, explanation that by signing it he *excludes* himself from the benefit of an Act which was passed through Parliament, almost without a dissentient voice in either House, as an undoubted public benefit. Several cases have come to my knowledge which clearly prove the necessity for exercising personal vigilance, and the same independent judgment which secured the passing of the Record of Title Act, in order now to ensure its good working. From the ways in which the knowledge was obtained, I do not feel at liberty to mention the particulars ; but it admits of no doubt that the practice referred to of asking clients to sign, *as a matter of course,* the printed notice *not to record,* prevails very extensively, and exerts a most prejudicial influence against the recording of titles.*

* The following instance, which I derived from good authority, shows the *modus operandi* and its effect. A solicitor wrote to his client as follows :—" Dear Sir, please sign the enclosed (Notice *not* to record), and send me it by return of post." The client signed the document, and learned afterwards, to his regret, that he had thus declined the benefit of the Record of Title Act.

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I make this statement with great regret and reluctance, but with the firm conviction that the confidence naturally reposed in professional advisers ought not, under existing circumstances, to dispense with a watchful care on the part of the client. There is every reason to believe that the Judges of the Landed Estates' Court and the Recording Examiner are impressed with the value of the new system, and anxious to give full effect to its provisions. Their office, however, is essentially executive; and the extent to which the benefits of the Record of Title Act may be realized, must depend mainly on the intelligence and moral courage of the Public.

Extract from a letter written by George K. Holden, Barrister-at-Law, head (jointly with Mr. Dick) of the Registration of Title Office for New South Wales, to Henry Dix Hutton :—

"Sydney, 1st July, 1867.

. . . . "Although your report of the progress of the new system in Ireland is far from being as encouraging as we who have faith in its usefulness could desire, it is perhaps as promising as could be expected under the circumstances. The *passive resistance which your Act permits to be exercised by the profession*—*i.e.*, the notice *not* to record—must be greatly calculated to retard the measure so long as self-interest or prejudice keep alive an opposition in that quarter. With us the property that comes under the Act is greatly augmented by the issue of new Crown grants, all of which since the passing of the Act, *i.e.*, from January, 1863, bring the granted land *ipso facto* under its operation. Besides this we have passed, upon application, nearly 1,700 titles, and the average of current applications continues still about the same standard as heretofore. All this is accomplished, however, in spite of a great deal of the same passive resistance which you have to encounter, although it may not admit of being exhibited in precisely the same way. All active opposition has ceased, and nobody talks of repealing the Act."

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BY HENRY DIX HUTTON,

Barrister-at-Law.

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