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IS THE TORRENS SYSTEM GERMAN?

*Greg Taylor**

Abstract

Recently support has grown for the view that the Torrens system of lands titles registration, which has now spread to countless jurisdictions throughout the world, was actually not Torrens's work at all, but a copy of a German system passed off by him as his own production. This article reviews the evidence, much of which is here discussed for the first time, and concludes that that view is incorrect. Torrens is entitled to the credit for conceiving the principles of the system; for drafting the bill to give effect to them (with the help of a circle of critical reviewers); and for convincing the public and politicians to support it.

I. Introduction

The Torrens system of lands titles registration which was introduced in South Australia in July 1858 has spread around the world. In 1861 it gained a foothold in what is now Canada, and today extends to seven of the ten Canadian provinces. Some variant of it exists also in many other countries within the Commonwealth of Nations such as Papua New Guinea, Malaysia, Kenya, Belize and Uganda.¹ Its origins are therefore a topic of some scholarly interest.

The traditional story is that Torrens developed his system largely by adapting the provisions on the registration of ships and charges over ships in Part II of the *Merchant Shipping Act* 1854 (Imp.). This story was until recently generally accepted, for a number of reasons. First, Torrens

* I very gratefully acknowledge Paul Huntley's research assistance in the preparation of this article. Thanks are due to Prof. Horst Lücke, to Dr Simon Cooper for comments on a draft, to Aisling Lockhart of Trinity College Dublin for providing the information in fn 119 and to Noelene Ryan of the Parliament of South Australia. Extremely useful comments were provided by Dr Neil Jones and anonymous referees for which I am most grateful. The usual *caveat* applies.

¹ For references, see G. Taylor, '*A Great and Glorious Reformation*': *Six Early South Australian Legal Innovations*, Kent Town, 2005, 14 fn 7; and see in addition *British American Cattle v Caribe Farm Industries* [1998] 1 WLR 1529, 1530; B. Brereton, *Law, Justice and Empire: The Colonial Career of John Gorrie 1829 – 1892*, Kingston (Jamaica), 1997, 111f, 126, 212, 293; Lo Wai Ping/Lim Jen Hui, "The Development of Land Registration in Singapore" in K. Tan, ed., *Essays in Singapore Legal History*, Singapore, 2005, 231f.

himself repeatedly said that that was what he had done.² Secondly, the *Merchant Shipping Act* 1854 was introduced into the public discussion about possible conveyancing reforms by the principal local newspaper, the *Register*,³ at about the same time as Torrens began serious work on his proposal. Thirdly, Torrens had been the South Australian collector of customs, and when he made the move into politics with conveyancing reform as a key item in his election platform he brought his experience as an administrator of the *Merchant Shipping Act* 1854 to bear. Finally, there are several provisions of the original lands titles statute, the *Real Property Act* of 1858 (S.A.), which are clearly derived from the *Merchant Shipping Act* 1854 – in some cases the fidelity to the original is almost complete.⁴

In recent times however there has been considerable support for the idea that the Torrens system was really German, and was passed off as an original invention by Torrens without acknowledgement of his true inspiration. This support even extends now to the Privy Council, although in an *obiter dictum*.⁵ At a more scholarly level its chief proponents have been Dr Antonio Esposito, a German scholar,⁶ and Prof. Murray Raff, an Australian.⁷ They have certainly succeeded in showing that the Torrens system, as a system of title by registration requiring the use of the register for a legal interest in land to pass, bears some similarity to the Hanseatic system current in Hamburg at the time of the Torrens system's development. It is also known that Dr Ulrich Hübbe, a German lawyer who had immigrated to South Australia from Hamburg, was present in Adelaide at the time in question, and that he and Torrens met during the year 1857, while the Torrens system was under development. From this the conclusion has been drawn that the Torrens system is really an adaptation of the system of land conveyancing in Hamburg, and that a reception of the law of Hamburg took

² R.R. Torrens, *A Handy Book on the Real Property Act*, Adelaide, 1862?, 23; P.M. Fox, 'The Story Behind the Torrens System', 23 *Australian Law Journal* (1950), 489-493, at 492.

³ *Register*, 31 July 1856, 2.

⁴ These are thoroughly traced in the work of S. Robinson, *Equity and Systems of Title to Land by Registration*, thesis submitted for the degree of Doctor of Philosophy, Monash University, Melbourne, 1973; see also Fox, 'Story Behind', 492.

⁵ *Creque v Penn* [2007] UKPC 44, [13].

⁶ A.K. Esposito, *Die Entstehung des australischen Grundstücksregisterrechts (Torrenssystem) – Eine Rezeption Hamburger Partikularrechts?!*, Berlin, 2005; A.K. Esposito, *The History of the Torrens System of Land Registration with Special Reference to its German Origins*, thesis submitted for the degree of Master of Laws, University of Adelaide, Adelaide, 2000; A.K. Esposito, 'A Comparison of the Australian ("Torrens") System of Land Registration of 1858 and the Law of Hamburg in the 1850s', 7 *Australian Journal of Legal History* (2003), 193-229; A.K. Esposito, 'Ulrich Hübbe's Role in the Creation of the 'Torrens' System of Land Registration in South Australia', 24 *Adelaide Law Review* (2003), 263-303.

⁷ M. Raff, *Private Property and Environmental Responsibility : A Comparative Study of German Real Property Law*, the Hague, 2003, 95.

place in South Australia in 1858 and has since spread from there to a large number of jurisdictions across the world.

But of course similarity does not establish copying; and the mere presence of Ulrich Hübbe in Adelaide and his meetings with Torrens do not establish that a fully-fledged legal transplant occurred. It will be seen that the evidence strongly indicates that the traditional story is largely correct, and that the hypothesis of a transplant from Hamburg is not in accordance with the evidence. Dr Hübbe did have an influence on the system, but it was relatively minor. Torrens's initial concepts and the idea of adapting the *Merchant Shipping Act* 1854 as the basis for a system of lands titles law, for which Torrens claimed credit and which is certainly inconsistent with the hypothesis of a transplant from Germany, remained the basis of the project throughout. The project became more complicated as it went on and Torrens sought advice and received suggestions from various other people, including but by no means limited to Hübbe; but he remained in charge of both the Parliamentary and public battles for the bill and of the process of drafting legislation to give effect to the system he advocated.

Thus Torrens is entitled to the credit for three things. First he conceived the outlines of his system and the idea of using the *Merchant Shipping Act* 1854 to put them into statutory form. Then he led the process of drafting the bill itself, coming up with a detailed draft which he submitted to the widest possible circle of critics for suggestions. Thirdly, he was throughout the reform's public protagonist. There was at no stage any reception of German law.

II. South Australia in the Late 1850s⁸

South Australia had been established on 28 December 1836 and was therefore just on twenty years old as the Torrens system was proposed and began to be discussed. It had been created as Australia's only non-convict colony by a group of dissenters and others dissatisfied with the established Church of England, and one of its principal promises to emigrants was religious liberty. This was the promise that attracted the first German settlers as early as the late 1830s, for they considered themselves persecuted on religious grounds by the Prussian government.⁹

By the late 1850s the colony had overcome early difficulties caused by its Wakefieldian system of land sales and government.¹⁰ While clearly overshadowed by its Victorian neighbour, rich with the proceeds of gold, it had reached a population of about 100 000 and a modest level of prosperity. It had been advanced to full self-government along with the other three Australian colonies of New South Wales, Victoria and Tasmania, and its first bicameral Parliament with responsible government was opened on 22 April 1857. It was this body which was to pass the Torrens system Act within a year, on 27 January 1858.

South Australia had inherited the English common law and with it the English system of conveyancing. The defects of that system were grave enough in England,¹¹ but in a colony in which all but the very poor could afford land, and in which speculation in land was also a much-loved pastime for some (including Torrens himself), they became intolerable. The principal defect was what Torrens called the system of retrospective or dependent titles, that is to say, the English chain-of-title system under which everyone's title to land was dependent upon demonstrating that every prior owner of land had received a valid title. Added to that were the difficulties caused by inadequate surveying and maps, which left many boundaries uncertain, and slapdash conveyancing practices.¹² The consequence of this was that for many colonists land was a principal asset and the reform of conveyancing a pressing issue.

⁸ The standard history of early South Australia is D. Pike, *Paradise of Dissent: South Australia 1829 – 1857*, 2nd ed., Melbourne, 1967. Information specifically about Torrens is from sources such as Fox, "Story Behind" and Taylor, 'Great and Glorious', ch. 2.

⁹ See further C. Clark, *Iron Kingdom: The Rise and Downfall of Prussia 1600 – 1947*, London, 2007, 415-419.

¹⁰ This, in short, separated land sales and migration from general governmental authority as part of the project of systematic colonisation under which land sales were used to begin a fund to finance immigration. The legal authority for this system was 4 & 5 Wm IV c. 95 (1834) (Imp.).

¹¹ The defects were thus the subject of much attention by law reformers in the nineteenth century. See for example S. Anderson, *Lawyers and the Making of English Land Law 1832 – 1940*, Oxford 1992.

¹² D. Pike, 'Introduction of the *Real Property Act* in South Australia', 1 *Adelaide Law Review* (1962), 169-189, at 173f.

Only limited improvement resulted from statutes requiring deeds to be registered,¹³ because those statutes provided only a central place to find deeds. They merely saved good titles from being overtaken by other later good titles, and created a better means for determining priorities among interests valid independently of the register. But as they did not provide for titles to be validated by registration, they did not rescue people whose titles were afflicted by a flaw which rendered them wholly or partially invalid. Torrens, until this point holder of a variety of governmental offices including that of colonial registrar-general, made conveyancing reform a prime item in his platform in the elections to the first Parliament of South Australia in 1857. He said that he had been first alerted to the defects of conveyancing law by the experience of a friend, who had unjustly lost his land because of them; the less kind view was that he also wished to perfect his own titles. Whatever his motivations were, his platform appealed to many South Australians, and he topped the poll for the House of Assembly (the lower House of Parliament) in his constituency. He remained there until his reform had been enacted, when he resigned his seat in order to become registrar-general for the second time and superintend its implementation.

III. Similarities Between the Systems

Dr Esposito has enumerated no fewer than eleven similarities between the Torrens system and the ancient¹⁴ system of land conveyancing practised in Hamburg at the time when the Torrens system was developed.¹⁵ Some of these however are of little probative value. Thus the point is made that both systems included a register book, were administered by a public servant and involved maps. But these are virtually inevitable concomitants of systems of title to land by registration and do not prove that one such system is derived from any other. The same might be said of limits in both the Hamburg and Torrens systems on the usual legal effect of registration in cases of fraud and error, except that even more general considerations of fairness and justice support such exceptions.

Other proffered similarities refer to features of the Torrens system which might have been taken from many more obvious sources than the law of Hamburg. Thus a rule that instruments were to rank in accordance with their date of registration rather than the date of their execution might have been taken from any number of colonial registration-of-deeds statutes;¹⁶ the idea of caveats as a means of protecting equitable interests was floated in English reports and bills of the early

¹³ The modern descendant of such statutes is the *Registration of Deeds Act 1935* (S.A.).

¹⁴ The system's origins were in the twelfth century : Esposito, 'A Comparison', 204.

¹⁵ Esposito, 'A Comparison', 212-228.

¹⁶ For example, 6 Vic. no. 21 (1842) (N.S.W.) s. 11.

1850s;¹⁷ and mortgages constituted only charges over land, not transfers of the fee simple, not just in Hamburg but also under the *Merchant Shipping Act* 1854 s. 70.

There are, furthermore, a few features of the Torrens system which are difficult to explain on the hypothesis of a transplant. The Assurance Fund, which is used to compensate people who have lost their land as a result of errors in the administration of the Act, could certainly not have been taken from Hamburg as the law of Hamburg did not contain any such thing.¹⁸ A late addition, the Assurance Fund was quite possibly inspired by an English source.¹⁹ We find Torrens still playing with the idea of an assurance fund as late in the development of his system as 12 November 1857, after the Bill's second reading.²⁰ This was in a letter raising a series of points about the shape of the system that Torrens sent – not to Ulrich Hübbe, who was by this time, on the Hamburg theory, the supposed true source for the whole system, but to the newspaper editor Anthony Forster, one of Torrens's numerous advisors and sounding-boards, of whom more shortly. There is also a close similarity in wording between (for example) s. 6 of the *Real Property Law Amendment Act* of 1858 (S.A.) dealing with the powers of the registrar-general and cl. 64 of the English Registration of Assurances Bill 1853.²¹ Even at this late stage, therefore, the project was not one for merely translating the Hamburg system into English.

The Hamburg system, given its great age and the small area to which it applied, was also naturally without any means of bringing within the system land formerly outside it. This topic however was vitally important for the Torrens system as it had to deal with a colony in which land had been transferred exclusively under the old English system of chain-of-title conveyancing. This aspect will be further discussed in part X of this article. Dr Esposito is also compelled to explain why the Hamburg system, if transplanted to South Australia, was deprived of the second of its three stages in conveyancing, namely the public proclamation of the sale in a Court session.²²

There is however one similarity between the Torrens system and Hamburg's system which is not as easily dismissed as those already mentioned. The principle concerned is central to the Torrens system's success, and if it could be said that it came from Hamburg that alone would allow us to conclude that there was substantial input from Hamburg. That is the rule that (subject to the ex-

¹⁷ One example of many possible is the Registration of Assurances Bill 1851 cll. 49 – 51 (House of Commons Papers, 1851 vol. V, 467ff).

¹⁸ I expand on this point in a book review, 26 *Adelaide Law Review* (2005), 359-363, 361-363.

¹⁹ D. Whalan, 'The Origins of the Torrens System and its Introduction into New Zealand' in G.W. Hinde (ed.), *The New Zealand Torrens System : Centennial Essays* Wellington, 1971, 7-9.

²⁰ The letter is reproduced in 23 *South Australiana* (1984), 17.

²¹ This bill may be found in its most developed form in House of Commons Papers, 1852-53 vol. VI, 13, 45; there are earlier sources elsewhere in the Parliamentary Papers.

²² Esposito, 'A Comparison', 211f.

ceptions for fraud and error, and one or two others such as the exception for short-term unregistered leases) the register is the conclusive source of information about the state of the title to registered land. The converse of this rule is that no interest in land can be transferred at law by private agreement between the parties – a legal transfer can occur only when the transfer is registered, for otherwise there would be a means of acquiring title other than registration.

This principle was indeed to be found in the Hamburg system, although in a less than entirely perspicuous form as it was the result of centuries of evolution. Its presence in the Torrens system however is not conclusive, as there are at least three other sources from which Torrens might have taken this principle. The first is 12 & 13 Vic. c. 77 (1849) (U.K.) s. 27, which granted an indefeasible parliamentary title to all persons taking a conveyance from the Commissioners for Sale of Incumbered Estates in Ireland. This scheme had proved so successful and popular that some owners went to the trouble of having an encumbrance specially created against their lands for the purpose of securing a title under the Act.²³ A second possible source for this feature of the Torrens system is Torrens's own reflections : as registrar-general he had some opportunity of observing the causes of the defects in conveyancing law and working out the "opposite" of those principles, which would constitute the framework of a reform. There was moreover an example of an "opposite" system close at hand. 'Basically the Torrens idea was that records of the sort normally kept by any competent land office in respect of Crown leaseholds should also be kept in respect of freehold grants.'²⁴ Thirdly, the principle might have been suggested to him by someone other than Hübbe, or emerged from discussions between Torrens and someone else. For example, the South Australian Crown law officer (and later Chief Justice) R.D. Hanson had written very briefly of the desirability of a system of title by registration.²⁵ In order to determine whether Torrens borrowed from Hamburg, we need to determine how likely this is given the other facts we know, and immediately we run into the difficulty that the timing of Torrens's first meeting with Hübbe seems to exclude him and Hamburg as a source of this vital principle.

IV. Timing

Dr Hübbe obviously cannot claim credit for anything said, done or published by Torrens, or anything that may be found in drafts of Torrens's bill, at a time before they came into contact. Torrens also expressly acknowledged the help of 'a high legal authority – one who had devoted much time to that branch of law'.²⁶ Some have put forward Hübbe's name as that of the anonymous helper.²⁷

²³ Dowling, 'The Landed Estates Court, Ireland', 26 *Journal of Legal History* (2005), 143-182, at 176.

²⁴ S.R. Simpson, *Land Law and Registration*, Cambridge, 1976, 71.

²⁵ GRG 1/6/1853/307; Hague, *A History of the Law in South Australia*, Adelaide, 2005, 781, 788, 790.

²⁶ *Register*, 21 November 1856, 2; see also 13 November 1857, 3.

Torrens however first paid tribute to his unknown helper on 20 November 1856. Accordingly this person can have been Hübbe only if he had met Torrens well before that day.

Now it is admitted on all hands that Hübbe was the author of three letters under the pseudonym “Sincerus”.²⁸ The first appeared in the *Register* on 18 February 1857, and the last on 29 April 1857. Dr Hübbe himself tells us that he and Torrens met for a long discussion about the proposed reform as a result of those letters.²⁹ But the obvious conclusion which this permits about the date on which Hübbe met Torrens is highly inconvenient to some of Hübbe’s modern champions.

One writer first mis-dates Hübbe’s third letter by a number of weeks, bringing it forward to 8 March 1857, on which date there was no newspaper at all because it was Sunday. The same writer would attribute to the effect of Hübbe’s letters an important statement by Torrens on 10 February 1857 explaining that the principle of his bill was the need for all transactions to be registered. This is on the basis that the statement concerned appeared ‘a few days after’³⁰ Hübbe’s first letter. But the first letter by Hübbe appeared on 18 February 1857!

A more recent proposal for extending the credit due to Hübbe is based on Dr Esposito’s suggestion³¹ that Hübbe might have been the author of an earlier letter to the editor of the *Register* under the pseudonym “Vitis” that appeared on 16 August 1856, and the consequent hope that this letter, if by Hübbe, may indicate that their meeting occurred much earlier in the development of the Torrens system than the “Sincerus” letters, and well before even the first draft bill in about October 1856.³²

But there is no evidence produced for Dr Esposito’s assertion that “Vitis” could be Hübbe beyond the fact that Hübbe was a German lawyer and would have known the limited information about German law contained in the letter. His view runs up against so many convincing objections that it is hard to know where to start. First, Hübbe was hardly the only German in South Australia, and many non-lawyers know some law. In addition, some English-speaking colonists such as John Hector³³ and Thomas Wilson³⁴ had spent considerable time in Germany and might well have known

²⁷ H. Lücke, ‘Ulrich Hübbe or Robert Torrens? The Germans in Early South Australia’, 26 *Adelaide Law Review* (2005), 211-243, at 241.

²⁸ See on this particular point the valuable information in Esposito, *Die Entstehung*, 140, according to which Hübbe is known to have used the same pseudonym elsewhere.

²⁹ U. Hübbe, 32 *Proceedings of the Royal Geographical Soc of A/asia (S.A.)* (1931), 109-112, at 110; S. Robinson, *Transfer of Land in Victoria*, Sydney, 1979, 13 fn 15.

³⁰ *Ibid* 13.

³¹ Esposito, *Die Entstehung*, 139.

³² *Register*, 17 October 1856, 2.

³³ Manager of the Savings Bank of South Australia.

³⁴ For further information about him, see Taylor, book review, 360.

about its law. The information given in the letter is indeed the sort of blow-by-blow account of the steps by which a title becomes registered that might be expected from a layman. British Royal Commissions had also reported on Continental systems of land titles registration a quarter of a century beforehand,³⁵ another possible source of the information contained in the letters.

Furthermore, the letter of 16 August 1856 was written from Tanunda. That town is about fifty miles from Adelaide, where Hübbe lived at this point.³⁶ The letter refers to what ‘we non-legal colonists’ might expect from a reform of the law, words that a lawyer with a doctoral degree would hardly have written. The chosen pseudonym “Vitis” – for reasons I have never seen explained, almost all correspondents of newspapers at this point in South Australia used pseudonyms – is Latin for “vine” or “vinebranch”, a designation which is likely to reflect the letter-writer’s true occupation, especially given that Tanunda is in the Barossa Valley, which is now famous for its wines. The “Vitis” letter is also in a rather vigorous rhetorical style, quite different from that of “Sincerus”, who is wordy, academic and intricate³⁷ as one might expect a scholar such as Dr Hübbe to be. The information given about the law in the letter was about the law of Prussia, while Hübbe is supposed to have put forward the law of Hamburg as the model for South Australia.

We may be quite confident therefore that the letters by which the meeting between Torrens and Hübbe is to be dated are the “Sincerus” letters, and them alone.³⁸ This means that the meeting might have taken place as late as May 1857. Although it is not to be ruled out as impossible, it would in fact have been distinctly odd for Hübbe to write a letter to the editor of the *Register* at the end of April putting forward his principles if he was already working with Torrens privately. Dr Esposito³⁹ can explain this oddity only by postulating in essence that Hübbe conducted his campaign to convince Torrens to adopt the Hamburg law via the public press even after they had met. Hübbe and Torrens are not recorded as being together in the one place, as far as I know, until late May 1857. On this occasion Torrens added also, again for the first time that I am aware of, that his proposed system was similar to Hanseatic systems such as that of Hamburg.⁴⁰ A few days later in

³⁵ House of Commons Papers, 1830 vol. XI, 522ff; Esposito, *Die Entstehung*, 67-71.

³⁶ See his entry in the *Australian Dictionary of Biography*. And of course Hübbe’s own story of the meeting between him and Torrens assumes that they lived reasonably close together.

³⁷ This was pointed out to me at the end of 2006 by Prof. Horst Lücke of the University of Adelaide, apparently recanting the opinion he expresses in ‘Ulrich Hübbe or Robert Torrens?’, 241.

³⁸ Recall that Hübbe himself says that their meeting was a result of these letters : see above, fn 29.

³⁹ *Die Entstehung*, 143f.

⁴⁰ *Register*, 1 June 1857, 3.

Parliament Torrens added that he did not know that fact when conceiving his system.⁴¹ He had probably found that out from Hübbe, whom he had met very recently.

But their meeting could conceivably also have occurred as early as mid-March, after the publication of the first letter. Even on this generous assumption, however, little credit can be given to Hübbe. By then the basic principles of the system had largely been developed. In particular, an extended summary of the provisions of what was described as a ‘lengthy’⁴² bill was published in the *Register* on 14 and 15 April 1857. The bill was printed – it was suggested that legal readers should obtain copies for themselves – and, given the time required for the preparation of a clean printed copy of a ‘lengthy’ draft bill and for the editor of the *Register*’s commentary on it, the finalisation of the concepts underlying this draft cannot realistically be dated any later than the end of March 1857; early to mid-March is probably closer to the mark. By mid-February planning was certainly well advanced on Torrens’s part, and he was responding convincingly and speedily to questions of detail asked of him through the press.⁴³ Even if Hübbe and Torrens had met in mid-March 1857, therefore, the meeting certainly did not occur in sufficient time for Hübbe to have any significant influence at all on the draft, let alone transform earlier proposals into a scheme for receiving the law of Hamburg.

Looking more closely at the bill settled some time in March 1857 and the *Real Property Act* of 27 January 1858, one sees overwhelming similarities, going even beyond the cribs from the *Merchant Shipping Act* 1854. The first dozen clauses of the bill as published in mid-April are virtually identical to the first dozen sections of the Act, and we are also told that its cl. 68 contained the crucial principle summarised in the newspaper as : ‘no instrument shall be valid to pass the property in any lands under the operation of the Act, until after entry in the register book’.⁴⁴ This is the key principle by which the Torrens system distinguishes itself from the failed registration-of-deeds statutes it replaced and creates instead a system of title conferred not prior to, but through the act of registration itself. The dates show that it cannot have been suggested by Hübbe. Furthermore, cl. 29 of the draft bill provided for conclusive certificates of title – a fact which, it should be noted, we know not from the newspaper’s occasionally sketchy treatment of the bill but from Hübbe’s own commentary on it in an extended pamphlet commenting on the bill published by him in mid-1857.⁴⁵

⁴¹ South Australian Parliamentary Debates, House of Assembly, 4 June 1857, col. 210.

⁴² *Register*, 14 April 1857, 2.

⁴³ *Register*, 10 February 1857, 3; 28 February 1857, 3.

⁴⁴ *Register*, 15 April 1857, 2.

⁴⁵ *The Voice of Reason and History Brought to Bear against the Present Absurd and Expensive Method of Transferring and Encumbering Immovable Property, With some Comments on the Reformatory Measures Proposed in the Opening*

We can see, therefore, that system design was well advanced before Hübbe came on to the scene. It is not merely that Torrens was the chief public promoter of his system; before Hübbe's involvement he had developed its key legal principles and drafted a bill – at least, the newspaper does not suggest that anyone else was involved except as a sounding board for and constructive critic of Torrens's ideas.

Additions after April 1857 dealt with second-order or third-order questions rather than first-order principles. Hübbe's letters reflect this and do not actually indicate any great insight into what turned out to be the keys to the success of the Torrens system. If we did not know that these letters were by Hübbe, and if it had not been suggested that the Torrens system became a transplant of the law of Hamburg through Hübbe's influence, nobody would think for a moment of suggesting that the letters were those of the Torrens system's intellectual powerhouse as distinct from a moderately useful public voice in its favour. In order to find clear explanations of things like the need to abolish the system of retrospective or dependent titles, as Torrens frequently called it, we need to go to Torrens's numerous speeches on the subject, including those before he had met Hübbe, which indicate a strong grasp of the broad picture and of the defects of principle in the existing system.

In his letter of 29 April 1857 Dr Hübbe mentions three vital principles : the need for publicity of land titles; no charge on land to be effective until registered; and priority by date of registration. He however says nothing about indefeasible registration of transfers as distinct from charges. He praises the proposed system of registration as 'simple and plain', but says nothing about the need for registration to cure any invalidities in the transfer documents registered. Hübbe admittedly alludes to this principle in his first letter but does not place it at the centre of his thoughts.

There is one final reason for thinking that the bill published in mid-April was pre-Hübbe. The original Torrens plan was for mortgages to be charges only rather than transfers of the ownership of the land to the lender subject to a right in the borrower to have the land re-conveyed on payment of the debt – as mortgages functioned under the old law.⁴⁶ By the mid-April bill this idea had been abandoned, and it was to be provided that mortgages would formally operate as transfers, as they did at common law. Hübbe criticised this reversal in his pamphlet,⁴⁷ and the change back to the final Torrens system rule under which a mortgage was again merely a charge enforceable as a securi-

Speech of the Governor-in-Chief and the Bill Recently Introduced by the Hon. R.R. Torrens, Esq., into the House of Assembly, Adelaide, 1857, 29f.

⁴⁶ Section 70 of the *Merchant Shipping Act* 1854 also provided that a mortgage was not to be a transfer of ownership; and that this idea in the early drafts of the Torrens system pre-dates Hübbe's involvement is shown by *Register*, 17 October 1856, 2, and statements reflective of it such as that by Torrens in the *Register*, 2 February 1857, 3.

⁴⁷ *Voice of Reason*, 89.

ty against the land itself, but not formally a transfer of it, is ascribed to his influence.⁴⁸ I should feel no great difficulty with this ascription, as it affects merely a second-order detail of moderate importance to lawyers rather than a fundamental question of principle crucial to the Torrens system's success; but there is little to no positive evidence that this change was due to Hübbe's influence, and we shall shortly come across an alternative candidate.⁴⁹ But even if this change was due to Hübbe's influence, the fact that the mid-April bill still provided for mortgages to be transfers shows that his influence was not significant on the bill published in mid-April, which was in an advanced stage of development and is beyond all doubt the Act in embryo.

A detailed analysis of the succeeding draft bills suggests that Hübbe's influence was significant only as the bill went through Parliament : in the period between its second reading on 11 November 1857 and the Committee stage a week later.⁵⁰ Even then the Act that emerged was clearly based primarily on the *Merchant Shipping Act* 1854 and will patently not support Hübbe's later implausible claim that he re-drafted the whole bill essentially from scratch.⁵¹

It is some confirmation of the hypothesis that Dr Hübbe was influential only at a late stage, when principles were already settled and only details remained to be finalised, to see in Hübbe's pamphlet⁵² criticisms of the bill published in mid-April for using the term "certificate of title" instead of "land grant" – and it is unsurprising that he should criticise a bill developed without his input – followed by a statement that 'it is not to be doubted but that the necessary clauses to secure its effect in the eye of the Judges will be added in Committee'. The Committee stage is where technical details are discussed, once the general principle has been approved. So it was the ideal place for Hübbe's, and others', minor improvements of detail and in wording.

⁴⁸ For example, Robinson, *Transfer of Land*, 17.

⁴⁹ Namely Rudolf Reimer : see below, p. 26. I have postponed an attempt to find Reimer's essays to another day. They were stated to have helped Torrens only, so to speak, in the public forum; there is nothing about assistance provided behind the scenes; they were at least not so significant that they are referred to by others; and one might guess from the subject-matter, without being able to be entirely certain, that they concerned largely mortgages only. Perhaps, however, Reimer is an author already known to us; for example, he might have written the letter from "A Reformer" in the *Register* of 11 February 1857.

⁵⁰ Robinson, *Equity and Systems of Title*, 77.

⁵¹ U. Hübbe, 32 Proceedings of the Royal Geographical Soc of A/asia (S.A.) (1931), 109-112, at 112. In South Australian Parliamentary Papers, no. 215/1862, 1, it is stated that the government had paid £75 to the local lawyer Rupert Ingleby for work including the settling of the Real Property Bill of 1857 (and there is no mention of Hübbe). This may also refer to the Torrens Bill, but as there was a competing government Real Property Bill in 1857 it is not possible to draw a definite conclusion.

⁵² *Voice of Reason*, 80.

Hübbe's suggestion that the certificate of title should be re-named a land grant was not however adopted. This was because, in the final version of the Torrens system, transfer by endorsement on the certificate took the place of the idea of making each transfer of a fee simple effective by means of a re-grant from the Crown, and Hübbe's suggestion assumed the continuance of the latter considerably less elegant plan.

V. The Expression "Torrens system"

Dr Peter Howell has recorded an oral tradition in South Australia that Torrens should not be referred to as the author of the *Real Property Act* because it was well known in South Australia from the beginning that he was an impostor with no real claim to the origination of the Act.⁵³ Knowing Dr Howell as I do, I am utterly certain that he has accurately reported what his informants told him upon his arrival in South Australia in 1963. He makes no claim, however, to a positive oral tradition in favour of Hübbe; and sources from the 1850s and 1860s show equally certainly that his informants were mistaken if they intended to assert the existence of an oral tradition from that time deprecating the phrase "the Torrens system" as a historical falsification. The phrase was repeatedly used among Torrens's contemporaries. Dr Howell's oral tradition must be a later invention or development.

We learn from the columns of the *Register* that, as early as May 1859, the system established by the *Real Property Act* is 'popularly called by his [Torrens's] name'.⁵⁴ In January 1861 the other leading newspaper of the colony, the *Advertiser*,⁵⁵ referred to Torrens's being in Melbourne to discuss 'the measure identified with his name; and a Victorian Real Property Act, *a la Torrens*' was to be expected as a result. The name was taken over even in the German community. At a meeting in Tanunda on 21 August 1861, which was conducted in German as everyone there except one person had German as a native language, there were cries of approval from the audience for 'Torrens's Act' at one point.⁵⁶

⁵³ P. Howell, 'Saints or Scoundrels? A Reappraisal of Some Notable South Australians, with Reflections on Related Issues', 7 *Journal of the Historical Society of South Australia* (1980), 3-23, at 9-11.

⁵⁴ *Register*, 16 May 1859, 2.

⁵⁵ 21 January 1861, 2. Italics and dog French in original.

⁵⁶ *Register*, 23 August 1861, 3. These are not recorded in the *Advertiser*, 24 August 1861, 3, but of course reports of interjections cannot be expected to be uniform. Both reports have Mr von Bertouch rhetorically addressing the absent Torrens with words such as, 'Don't go to the lawyers'.

See also the letter in the Melbourne *Argus* on 2 January 1860 (p. 6) from 'one who witnessed the struggle in a neighbouring colony [which at this point could only be South Australia], which terminated in the triumph of what is now everywhere known as "Torrens' Real Property Act"'.

The *Register*, run by Anthony Forster M.L.C.⁵⁷ who had the most intimate connexion with the origin of the system, over and over again called Torrens its ‘author’ or referred to it as Torrens’s system or Act in the first few years after it had come into existence.⁵⁸ It did so eleven times in one leader alone in 1862.⁵⁹ In November of the same year it could publish a report referring simply to the adoption of ‘Torrens’s Act’ in New South Wales without the need to explain what this was.⁶⁰

It is certainly true that there is some evidence which could be interpreted to mean that the expression “the Torrens system” was not known to everyone in South Australia in 1862. On 18 February 1862 the *Advertiser*⁶¹ published a leader about the spread of the Torrens system to the neighbouring colonies. It remarked upon the fact that the proposed measures were known there as “Torrens’s Bills”. It is possible to read this as meaning that the expression was unknown or unusual in South Australia at the time, but to come to that conclusion one must ignore all the foregoing statements. It is more likely that the *Advertiser* was just noting that the expression had spread elsewhere and recording the connexion it demonstrated with the law of South Australia. More importantly, though, the leader writer, if Dr Howell’s hypothesis were right, should have gone on to damn the ignorance of people in those other colonies, who were falling for a fraud, and naming the system after an impostor. In fact the leader-writer did quite the opposite, singing Torrens’s praises.

Dr Howell further deplores the naming of a building after Torrens in Adelaide in the 1970s as occurring in ignorance of the local tradition about Torrens he discovered as late as 1963, and a historical atrocity which an earlier generation, knowing the truth, would not have committed.⁶² It is again remarkable how badly this view fits the contemporary record. In a Parliamentary debate in 1864, H.B.T. Strangways, while generally less favourably disposed towards Torrens than most other speakers, did suggest naming a bridge after Torrens as a sufficient reward for his services.⁶³ In 1881 a writer of a letter to the editor suggested erecting a marble monument to Torrens.⁶⁴ In 1950, no less a figure than the registrar-general for South Australia, G.A. Jessup, deplored the fact that there was not a building named after Torrens in the State.⁶⁵ Surely if there were such an unequivocal

⁵⁷ I.e. a member of the Legislative Council, the Upper House of the South Australian Parliament.

⁵⁸ For example, *Register*, 16 May 1859, 2; 8 March 1861, 2; 13 June 1864, 2; 24 September 1864, 2. See also the letters to the editor of 5 June 1864, 3; 15 June 1864, 2.

⁵⁹ 29 April 1862, 2.

⁶⁰ *Register*, 13 November 1862, 2.

⁶¹ Page 2.

⁶² P. Howell, ‘Constitutional and Political Development, 1857 – 1890’ in D. Jaensch, ed., *Flinders History of South Australia : Political History*, Netley, 1986, 162.

⁶³ *Register*, 24 September 1864, 3.

⁶⁴ *Register*, 12 December 1881, supplement, 1.

⁶⁵ *Biography of Sir R.R. Torrens* (unpublished, South Australian Archives, D 3060 (T)), 4.

cal historical memory as Dr Howell alleges existed at these times, these persons would at least have stated why they disagreed with it rather than passed over it in silence.

Perhaps however there were two local traditions. Shortly after the invention of the Torrens system in South Australia the Melbourne *Herald*⁶⁶ stated on several occasions that lawyers had mockingly named the system after Torrens. In reporting this it had no intention of thanking lawyers for their historical insight, however. Lawyers were the stage villains in this episode of Australian legal history because they were suspected of wishing to hinder the spread of the Torrens system in order to preserve their lucrative fees under the old system.⁶⁷ The *Herald*'s main claim (to be examined shortly) was that the system was a copy of an English proposal, and thus had more credibility because it had emanated from the metropolis. If the system was not really Torrens's that would be a point in favour of the system which the newspaper supported.

The *Herald* said that lawyers had come up with the expression "Torrens system" because they knew that other people had invented systems of lands titles registration before Torrens and were using the term derisively. This suggestion is mildly startling, and the source less impressive than the earlier and local South Australian sources. But even if there is a grain of truth in this report, all it suggests is that lawyers have, as so often, missed the mark because they are being too clever by half. It would have been absurd for Torrens to claim that he was the first person to think of the idea of registering lands titles, and he did not do so. What he did claim was that he had invented a system of registration of title adapted to the needs of South Australia in a way that earlier systems, such as copyhold, were not. That no more suggests that we should not refer to the system as the "Torrens system" than the derivative nature of most of the Napoleonic Code disqualifies it from bearing that title. If this is indeed the origin of the oral tradition to which Dr Howell refers, it is based on stupidity, hostility and cupidity.

VI. More Contemporary Statements

There are also contemporary statements almost beyond number which assert that Torrens was the responsible for the Act in some way without actually using the expression "Torrens system". These both further rebut Dr Howell's strong oral tradition and are in themselves evidence of Torrens's role.

Sometimes these statements do no more than allow us to conclude that Torrens was seen by the public as the chief promoter of the bill. For example, at a public meeting open to all in April 1861, Mr Thomas Magarey M.P. referred to Torrens as the Act's 'originator' and said that 'the

⁶⁶ 23 May 1861, 5; 24 May 1861, 5; 2 April 1862, 4f.

⁶⁷ I deal with this episode in greater detail in 'The Torrens System's Migration to Victoria', 33 *Monash University Law Review* (2007), 320-368.

whole colony knew'⁶⁸ that to be a fact. The audience's response was to burst into applause. Unless there was someone in the audience with knowledge of the behind-the-scenes process of drafting, these people were testifying by their applause solely to Torrens's leadership of the public campaign.

But much earlier, on 5 July 1860, a huge public banquet had been given in Adelaide in honour of Torrens, and in thanksgiving for his great invention. At this gathering there were plenty of insiders who knew more about the process of developing the concept and writing the draft, and their attendance at this banquet speaks volumes. The president was the Governor of South Australia. Thirty-six of the fifty-four members of Parliament were on the organising committee. There was 'scarcely any colonist of eminence or reputation who was not present on the occasion';⁶⁹ a 'more thoroughly influential and completely representative assembly it would be impossible to get together in this colony'.⁷⁰ A principal toast at the banquet was the success of the *Real Property Act*, and the health of Mr Torrens. It is recorded that it received tremendous cheering. On Dr Howell's theory contemporary South Australians should have been asking: what had Torrens and the *Real Property Act* to do with each other? Nevertheless the toast's proponent 'associated the name of Torrens with the *Real Property Act*, and certainly that toast would never be complete without the name of its author'. That statement too was cheered by this assembly of notables.⁷¹

All this tallies also with what was said only a few years afterwards in a Parliamentary debate in 1864,⁷² another source which has not been referred to in the debate to date, perhaps because "Hansard" was not published in this year and one has to go to the newspapers. The debate was about whether a large sum of money should be granted to Torrens as a reward for his invention, following on the presentation of petitions with about 12 000 signatures advocating that course.⁷³ In the end this was not done solely because it was thought unwise to reward members of Parliament for proposing legislation. The principal signatories of the petition included the Mayor of Adelaide and the Anglican Bishop of Adelaide, and there were also several dozen German names.⁷⁴ In the debate in the House of Assembly on the petition, there were numerous statements by Torrens's contemporaries to the effect that Torrens was the 'author' of the Act: it had come to pass 'by his exertions alone' and had 'originated with Mr Torrens', and it was 'well known' that the skeleton of the Act

⁶⁸ *Register*, 25 April 1861, 3.

⁶⁹ *Advertiser*, 7 July 1860, 3.

⁷⁰ *Advertiser*, 7 July 1860, 2; italics in original.

⁷¹ *Advertiser*, 7 July 1860, 3. Cheers are not recorded in the *Register*, 7 July 1860, 3, but there is no reason to suspect that they would have been invented.

⁷² *Register*, 24 September 1864, 3.

⁷³ South Australian Parliamentary Papers, nos. 84/1864; 118/1864.

⁷⁴ I have seen the original petition to the Legislative Council, which is still in the archives of Parliament House, Adelaide, filed loosely with other old petitions but not otherwise catalogued.

was based on the *Merchant Shipping Act* 1854 as Torrens repeatedly claimed. There was not a single reference to Dr Hübbe. One or two members were certainly less well disposed towards Torrens, but even they did not mention Hübbe or Hamburg.⁷⁵

In the Legislative Council,⁷⁶ (Sir) Henry Ayers, for reasons he did not deign to give, dissented from the majority view and expressly noted that he was not being asked to vote for a motion proclaiming Torrens author of the Act. There was also certainly some awareness of the fact that others – both South Australians such as J.H. Fisher, R.D. Hanson and Charles Mann, as well as British Royal Commissions⁷⁷ – had advocated registration of title before Torrens. But most members took the sensible view of this fact, summarised by one who said that Torrens was entitled to claim ‘the merit of originating’ the Act despite others’ input because, as another said, ‘Mr Torrens had perhaps gleaned some of the principles of his system from others, but in the compilation of the details he was entitled to the honour of being author of the present system’.⁷⁸ These people had enough common sense to realise that it would be absurd to look for the author of the idea of a register of titles in the abstract; rather, the credit belongs to the person who brings it down to earth from the realms of theory, and more particularly to South Australia in a form which suited its needs. The statement quoted also does not sit at all well with the hypothesis that Torrens was just the public face of the campaign while Hübbe was the indispensable provider of the knowledge needed to translate a German system into English.

When Parliament marked Torrens’s death, two members of the South Australian Parliament that had passed the first Act spoke up. Alexander Hay referred to ‘the great pains which he [Torrens] took in framing that measure’, and opined that he ‘deserved all the hono[u]rs he got, and far more’.⁷⁹ He did not mention Dr Hübbe. Of interest also in this debate is the vivid description of the proceedings at the second reading of the Real Property Bill in November 1858, and Torrens’s central role in them, that was provided by Friedrich Eduard Heinrich Wulf Krichauff, M.P., who spoke as the only member still in the House of Assembly who had voted for the second reading of the

⁷⁵ One speaker, while confessing Torrens to be the ‘author’ of the Act, claimed that he had heard it said that the idea of conveyancing reform had been suggested to Torrens by a Mr Bryant, a man who had a good strategic sense for what would appeal to the voters. This Bryant was presumably the storekeeper of that name in Hindley Street in the centre of the city (G. Young, *Adelaide City and Port Commercial Directory and Almanac for 1856*, Adelaide, 1856?, 6). Perhaps therefore we should look to him, rather than Ulrich Hübbe, as the real brains behind the system, and the real originator of the reform?

⁷⁶ *Register*, 9 June 1864, 2.

⁷⁷ Cf. Robinson, *Equity and Systems of Title*, 49, where mutterings that Torrens was not the originator of the idea because of alleged reliance upon Royal Commissions’ reports are mentioned.

⁷⁸ Hague, *A History*, 792 contains a similar conclusion.

⁷⁹ South Australian Parliamentary Debates, Legislative Council, 2 September 1884, 820.

great reform in November 1857. He, like Hübbe, had been educated at the University of Kiel, but he did not see fit to mention Hübbe⁸⁰ even though he was aware of his claim to have helped.⁸¹

These statements together indicate that Torrens was in several senses the originator of the reform. First he derived the broad idea of registration from sources such as the Royal Commissions' reports, the earlier suggestions of other colonists such as Hanson and Fisher and the *Merchant Shipping Act* 1854 – and no doubt from his own reflections as registrar-general. Then he was principally responsible for the elaboration of the details in a draft bill. Finally he persuaded the public of the need to make the change, and the desirability of his plan as a means of improving the workings of the law.

Compared to this weight of evidence, it verges on the preposterous to rely instead upon the isolated statement twenty years later of a German-born M.P., Rudolph Henning, mentioning Hübbe as the 'brains'⁸² of the system. Mr Henning was barely an adult when the Torrens system was being designed and, unlike many of the participants in the debate in which he spoke, had had no involvement in the development of the system whatsoever. He even corrected himself a few years later and said that Hübbe had merely provided assistance to Torrens.⁸³ Even without this, however, his statement deserves no attention because it was made without any background knowledge, and he cites no source for his belief.

VII. The Governor's Statements

One of the most extraordinary omissions in this entire debate is the failure of anyone to refer so far to the confidential despatches to the Colonial Office written by Sir Richard Macdonnell, the Governor. His despatches accompanied the *Real Property Act* home to England for the Colonial Office's approval, and later commented on various aspects of it as it developed.

Dr Stanley Robinson⁸⁴ refers to a few of these statements, but both he and Dr Howell⁸⁵ prefer as evidence the statement of the next Governor of South Australia, Sir Dominick Daly, that Torrens was 'well known' not to be the originator of the Act, a statement which occurs in the middle of a damning character assessment of Torrens. There is no doubt that Torrens's character had its flaws, but that is not my concern here. Sir D. Daly quotes no support for his statement about Torrens's role in the origins of the Act, nor does his statement necessarily support claims of Hübbe and Hamburg :

⁸⁰ South Australian Parliamentary Debates, House of Assembly, 2 September 1884, 827.

⁸¹ Esposito, 'Ulrich Hübbe's Role', 271.

⁸² South Australian Parliamentary Debates, House of Assembly, 20 July 1880, col. 427.

⁸³ South Australian Parliamentary Debates, House of Assembly, 17 September 1884, 1025.

⁸⁴ *Transfer of Land*, 12.

⁸⁵ Howell, 'Constitutional and Political Development', 162.

it could easily be a reference to the *Merchant Shipping Act* 1854 or the English reports to be mentioned in the next section.

It is far from clear why any weight should be attached to Sir Dominick Daly's statements at all, however. He was not in South Australia when the *Real Property Act* of 1858 and the fine-tuning legislation of 1858 – 1861⁸⁶ were being developed. Daly first saw Adelaide on 4 March 1862, having been Lieutenant-Governor of Prince Edward Island to 1859 following a long career in the civil service of the province of Canada. Torrens left Adelaide in November 1862, never to return – an event which produced many further tributes to his genius as the founder of the *Real Property Act* by numerous persons from the Mayor downwards.⁸⁷ As a result Daly can have had only a slight if any acquaintance with him, but nevertheless proceeds to assess his character and influence upon South Australian politics and law as if he had known him for years! It is worth noting also that at the time of the making of Daly's statement the Premier of South Australia, Daly's chief constitutional adviser, was (Sir) Henry Ayers, scarcely Torrens's best friend.

The Governor of South Australia when the Torrens system was actually being developed and passed through Parliament was Sir Richard Macdonnell. He joined *con brio* in the chorus for Torrens. He referred to Torrens as the 'author' of the Act in no fewer than five confidential despatches to the Colonial Office; and on one occasion he added for good measure, as if trying to leave to posterity an answer to the question now being discussed, that Torrens's 'labour' on the subject was 'nearly singlehanded'.⁸⁸

While Macdonnell may not have had access to everything that went on behind the scenes while the Torrens system was being planned and debated, clearly the Governor was very interested in the topic, and supported reform early on.⁸⁹ On 7 August 1856 his secretary wrote to Torrens at the Governor's direction calling Torrens's plan to reform real property law 'one of the most important measures which can be introduced to the Legislature' and urging Torrens to 'endeavour to mature – as soon as possible'⁹⁰ a bill for that purpose. The very fact that the addressee of this letter was Torrens itself speaks volumes : at this point Torrens had not revealed his plans to the public.

⁸⁶ *Real Property Law Amendment Act* [1858]; *Real Property Act* 1860; *Real Property Act* 1861.

⁸⁷ For example, *Register*, 28 November 1862, 3. Note also the Torrens Address Committee referred to in the *Register*, 25 November 1862, 1.

⁸⁸ The despatches are U.K. National Archives, Public Record Office, CO 13/97/101 (Australian Joint Copying Project ("AJCP") reel 797); CO 13/97/274 (AJCP reel 797); CO 13/99/54ff (AJCP reel 798); CO 13/99/258ff (AJCP reel 798); CO 13/102/49ff (AJCP reel 800). One may also be found in South Australian Parliamentary Papers, no. 51/1858, 3.

⁸⁹ The *Register* (5 July 1856, 2) attributed this, in advance of the event, to his 'general desire to reduce everything to consistency with the practical everyday business of life'. In the Melbourne *Argus*, 18 March 1862, 7, is a letter from a person who has spoken personally to Macdonnell and confirmed his support for the measure.

⁹⁰ South Australian Archives, GRG 24/4/29/462.

Macdonnell certainly followed the public debate on the bill closely once it began towards the end of 1856. He was also legally knowledgeable, having graduated in law from Trinity College Dublin and been Chief Justice of the Gambia. Even without postulating that Macdonnell had informal sources of information on which to draw – or even may even just possibly have been Torrens’s unknown helper of ‘high legal authority’⁹¹ – his opinion is that of an educated, informed and well-connected person who was on the spot at the time and was observing the process with interest. His reports were made in what was then an entirely confidential forum in which he had not the slightest incentive to make anything up.

An important omission is worth noting, too. At no stage does Macdonnell report any change in the direction of the proposal as a result of influence from Hamburg, as those in favour of the Hamburg hypothesis suggest occurred in 1857, when Hübbe is supposed to have converted the proposal into a proposal to adopt the law of Hamburg and Hübbe himself claims that he re-drafted the bill. In fact Macdonnell did not report any influence from Hamburg at all, nor any noticeable change in direction, influx of foreign ideas or startlingly new draft bill. We might well expect that an observant, legally trained and interested Governor, who had encouraged the project’s author to begin work in the first place, would have noticed such a thing, or have had it reported to him by one of the many participants in the process or even Torrens himself, and remarked on such a significant development to the Colonial Office in one of his five despatches; but he did not.

VIII. Torrens’s Own Response to Accusations of Plagiarism

The claim that Torrens had copied his system from the report of an English Royal Commission of late 1857 was made (not for the first time) in late 1860 and early 1861 by the Melbourne *Herald*.⁹² The claim of plagiarism was intended to support the system’s introduction into Victoria : if it was really an English system drawn up by lawyers it had more credibility in the newspaper’s view. The claim is however demonstrably false, and nowadays is no longer put forward. It is now established that the English report could not have reached South Australia in time to influence the basic design of the system.⁹³

However untrue, and however benign the newspaper’s intention, the *Herald*’s accusation of plagiarism was of course quite offensive to Torrens. On the very day on which the accusation was

⁹¹ See above, fn 26. Macdonnell was never backward in coming forward with views of his own, a characteristic best brought out in his entry in the *Dictionary of Canadian Biography*.

⁹² 6 December 1860, 4; 8 January 1861, 4.

⁹³ See for example Esposito, *Die Entstehung*, 78f. In the *Register*, 26 November 1857, 2, Torrens is quoted as saying that he received the report on 24 November. He places it a few days earlier in Torrens, *The South Australian System of Conveyancing*, Adelaide, 1859, vii.

made, Torrens personally wrote a reply which the newspaper published and which, as far as I am aware, was lost to historians until I came across it recently. The reply in turn led to a renewal of the accusation of plagiarism by a very well-connected enemy of Torrens – who, however, did not for a moment suggest that the source was German.

Torrens thus refuted the charge brought against him :

The outline of the measure was sketched by me prior to the close of 1855, and the fact that I was throwing it into form as a draft Bill was communicated to the Governor in my official correspondence early in 1856. (See printed despatches of Sir R.G. Macdonnell, Council paper no. 51, p. 4.) At the close of 1856, the draft was submitted for the consideration of several gentlemen interested in land, and some additional provisions were inserted at their suggestion, all of which have been publicly and repeatedly acknowledged by me. These gentlemen, with one exception, are still resident in South Australia.⁹⁴

It is interesting to speculate about who these early helpers may have been to whom Torrens referred in the quoted rebuttal. In early 1857 Torrens named two of them : John Hector and Marshall MacDermott,⁹⁵ two early colonial worthies⁹⁶ without legal training. I have previously wondered aloud whether another helper might have been Charles Mann, the early legal luminary who had, in fact, also advocated lands titles registration (without actually ever doing much about it).⁹⁷ It is rather striking that he fits the bill for the assistant who, Torrens says in 1861, was not still resident in South Australia. This was because he had died the previous year. However, I expressly abstain from suggesting either him or Sir Richard Macdonnell as anything more than a speculative possibility.⁹⁸

Torrens appears to have been slightly in error in stating that he had written to the Governor early in 1856. Unless there is a further letter which is lost, the letter to which he refers was in fact dated 28 July 1856.⁹⁹ This would be an understandable slip-up given that Torrens was in Melbourne at the time and no doubt had not brought his correspondence books with him from Adelaide. If his memory was indeed at fault, it was (as reference to the original sources will show) because he was dating his letter by reference to a statute that had received the Royal assent in June. It would also be natural for Torrens not to write to the Governor and promise something until he was quite sure he could deliver it, having already made considerable progress with the work, and so he is probably

⁹⁴ Melbourne *Herald*, 9 January 1861, 5.

⁹⁵ *Register*, 2 February 1857, 2.

⁹⁶ Respected even by Torrens's opponents : see letter from "Conveyancer", *Register*, 4 February 1857, 2.

⁹⁷ *Southern Australian*, 15 September 1838, 3.

⁹⁸ Cf. Lücke, 'Ulrich Hübbe or Robert Torrens?', 241, where my position is too strongly stated and the point is missed that, while Torrens might well have wanted to claim judicial support, a judicial officer might have forbidden him from doing so.

⁹⁹ In the source Torrens gives in the quotation in the text, the letter of 28 July is referred to only, not quoted. The original is in the South Australian Archives, GRG 59/6/1. It is not lost, *pace* Robinson, *Transfer of Land*, 12 fn 1.

right in substance about having commenced work in late 1855 or early 1856 even if his letter was a bit later than that.

However, none of this affects the substance of the rebuttal. 28 July 1856 is still about sixteen months before the English report was received. It is also well before Torrens and Hübbe met (although no-one at the time actually pointed this out as it was never suggested that Hübbe was a significant source). It is also clearly the Real Property Bill which Torrens referred to in that letter. In it Torrens promised a bill after the Parliamentary recess, which had started in the middle of June. The first publicly released information about Torrens's Real Property Bill was published on 17 October 1856 in the *Register*,¹⁰⁰ and the newspaper report stated that this was the bill on which Torrens had been working over the recess.

In fact Torrens's letters seeking reforms to the system of conveyancing date back to 1853, the year after his appointment as registrar-general. We do not find anything like a draft of the Torrens system as early as that, but we do find Torrens stating apodeictically that '[t]he object of registration is to ensure disclosure of title thereby facilitating the transfer of property and rendering fraud by concealment difficult if not impossible'; he declares that 'a radical change in the entire system is required'; and he proceeds to advocate indexing by property location.¹⁰¹ All these points anticipate the Torrens system. Torrens's reflections on conveyancing reform clearly pre-dated the *Merchant Shipping Act* 1854, which came along conveniently as a vehicle for putting his ideas into statutory form and perhaps suggested further ideas for reform as well.

Torrens's response to the *Herald's* accusation provoked a retort from Sir J.H. Fisher, a colonist of great distinction who had been among the first settlers. From 1857 to 1865, a period which covers the enactment of the original *Real Property Act* 1858 together with all its fine-tuning amendments, Fisher was President of the Legislative Council, the Upper House of Parliament. His comments, published in both Adelaide¹⁰² and Melbourne,¹⁰³ were very detailed, with much information about motions in Parliament and amendments to clauses. The burden of them was that the Real Property Bill had been amended so heavily in late November 1857, after the arrival of the English report, that it had become a new creation and thus based on the English report.

Some of the allegations Fisher makes are however inaccurate. For example, Fisher's best point is that the bill, before the amendments of late November 1857, did not provide for indefeasibility. But Torrens's plan in October 1856 was for "his" titles to 'hold good in reference to all legal

¹⁰⁰ Page 2.

¹⁰¹ GRG 59/6/1; report attached to letter of 3 March 1853.

¹⁰² *Register*, 5 April 1861, 3.

¹⁰³ *Herald*, 2 April 1861, 5.

processes equally with the original title itself,¹⁰⁴ which being from the Crown was infeasible. Early in 1857 Torrens mentioned the concept of a ‘valid and indisputable’¹⁰⁵ title. The draft bill published in mid-April 1857 provided for conclusive certificates of title.¹⁰⁶ Fisher is therefore clearly mistaken on this point. I suspect that Fisher was thinking of some mere change in drafting.

The only other innovations Fisher mentions which allegedly resulted from the English report are the Assurance Fund, which as mentioned is indeed generally conceded to be a crib from that source; and the provision for mortgages to be in form as well as in substance charges over land only rather than transfers of it. Fisher is mistaken here too, for this feature of the bill long pre-dates the English report.¹⁰⁷

Alongside the Assurance Fund, the most notable change from April to November 1857 is that the mechanism of transfer in the mid-April bill, as described in the *Register*, involves the registration of a memorandum of sale at the time of the contract of sale, followed by the issue of a new certificate of title when the property actually passes. At some later stage someone must have suggested telescoping this process, omitting the registration of the contract of sale and the issuing of the new certificate and simply noting the transfer on the official record. It is quite possible that Torrens thought of this himself. This is certainly an important change going beyond mere third-order questions of drafting, but on the other hand it is not a first-order question affecting the basic principles of the system either. As we saw, Hübbe was unlikely to be the source of this change as he made a suggestion in his pamphlet which assumed no such change.¹⁰⁸ At all events, Fisher’s claim that the bill was a new creation was wildly exaggerated.

Fisher makes much of the fact that the bill as passed was much longer than that introduced. The draft bill of March/April 1857 based on the *Merchant Shipping Act* 1854, many provisions of which are still preserved in the Act, had seventy-nine clauses,¹⁰⁹ and the final Act had 123. That is about half as many again, but such an increase in size of proposed legislation as it goes through various drafts and more attention is given to objections, complications and questions of detail, together with a gradual dilution of the original material as a proportion of the whole, is far from an unknown occurrence in legislative drafting – or, for that matter, in other forms of writing. It is not in the least remarkable in relation to a reform of the complexity of the Torrens system. The strong flavour of the *Merchant Shipping Act* 1854 still evident in the Act indicates that Fisher was quite wrong to see

¹⁰⁴ *Register*, 17 October 1856, 2.

¹⁰⁵ *Register*, 2 February 1857, 3.

¹⁰⁶ See above, fn 45.

¹⁰⁷ See above, fn 46.

¹⁰⁸ See above, fn 52.

¹⁰⁹ *Register*, 13 April 1857, 2.

the Act as a new creation compared to the bill. Nor, of course, is every addition and change necessarily to be ascribed to Hübbe.

Most importantly, Fisher, who had no reason at all to spare Torrens, ascribed absolutely nothing to Hübbe and did not even mention him. It would moreover have been incredibly stupid for Torrens, in his rebuttal of the *Herald's* accusation, to make the claim that several people in South Australia knew that he had conceived the Torrens system and was principal author of the bill to November 1857 if that were not so. In fact Sir J.H. Fisher indirectly but distinctly confirms the correctness of this claim. He argues that the bill was so heavily amended in November 1857 as a result of the receipt of the English report that it was a new production, and thus no longer Torrens's work. The Act could be said not to be Torrens's work, he thus concedes, only if the bill had been almost entirely remodelled at some time around November 1857. He makes no claim that it was not Torrens's work from the beginning, or had ceased to be so at some earlier point or as a result of some influence other than the English report. Fisher well knew who had really written the early drafts. He had been consulted by Torrens himself no later than January 1857 on a draft of the bill, although even then he was doubtful whether success would attend Torrens's efforts.¹¹⁰ Thus, not even a man who had had some insight into a considerable slice of the process of designing the Torrens system, but was now putting forward allegations of plagiarism, thought the alleged German contribution worthy of the slightest mention in his indictment for plagiarism, the substance of which is now disproved.

Torrens responded to Fisher's salvo only indirectly. Five days later a letter appeared from Torrens in the *Register*¹¹¹ in which he provided the most interesting information that he had asked his group of advisers in late 1856 whether the system proposed by the bill should be made compulsory. He thought that it should not be but they disagreed. Torrens says that he went along with this view, although not convinced by it, and therefore the bill as originally introduced contained a clause (which he quotes) making registration of all land transactions compulsory from 1864. This idea was however objected to by the Legislative Council and thus never became law.¹¹² Torrens adds to his generosity in sharing the credit for what was already an extremely popular and successful system by stating that he now considers that on the point in question he was wrong, and his circle of advisers right. It is obviously unlikely that he would give details of these debates among his advisers and with him in late 1856 if there were someone around who might be stirred up by such assertions into

¹¹⁰ *Register*, 2 February 1857, 3. There was a dispute about precisely what Torrens said about Fisher's help which is not worth pursuing here as all agreed that Fisher had seen a draft bill by the end of January 1857. For the dispute see *Register*, 6 February 1857, 2; 9 February 1857, 3; 11 February 1857, 2. See also *Register*, 17 May 1859, 3.

¹¹¹ 10 April 1861, 3.

¹¹² See the letter quoted in Robinson, *Equity and Systems of Title*, 33; 23 *South Australiana* (1984), 17.

pointing out a fact that Torrens would prefer to have kept secret, for example his having plagiarised a German system or any other source. No-one wrote in to correct Torrens's statements or suggest an alternative view.

Torrens noticed Fisher's accusations more directly at a public meeting later in April, where he said that he was 'so fully occupied in defending the Real Property Act itself that his want of leisure did not enable him to defend Robert Richard Torrens'.¹¹³ He also said that he had a note signed by some gentlemen to whom he had shown the bill twelve months before the English report arrived, and that Fisher himself had seen the bill at about that time. We know that the latter statement is true,¹¹⁴ but unfortunately the note does not appear to have been published. This was however the same public meeting at which Mr Magarey M.P. asserted that everyone in the colony knew that Torrens was the author of the Act, which assertion produced spontaneous applause from the audience. The audience's reaction was the best answer to the claims Fisher made. Torrens probably felt, after this, that no more was required from him. That was, moreover, the end of the public debate on this question.¹¹⁵

IX. The Tanunda Demonstration of October 1862

In advance of Torrens's imminent departure for England, the German colonists organised a demonstration in October 1862 in thanksgiving for the Torrens system. Torrens was personally present at it. Dr Esposito makes much of the fact that that, according to a German-language newspaper report of the same demonstration, the Rev'd Dr Mücke stated at it that the Torrens system was really a German system taken over virtually unchanged. Dr Mücke's opinion may be disregarded as a worthwhile source in itself, because there is nothing to indicate that he had any involvement at all in the conception of the system, or the drafting of the Act. But Dr Esposito puts forward the view that this statement is credible because Mücke would not have said something in Torrens's presence that might cause offence, such as a false ascription of his great invention.¹¹⁶

This sounds initially very plausible. But Anthony Forster, in his insider's account of the Act's history in 1866, also describes this demonstration, at which he was present. He depicts the German-

¹¹³ *Register*, 25 April 1861, 3.

¹¹⁴ See above, fn 110. Note also that, when Fisher procured a correction of some other presently irrelevant statements made at that meeting (*Register*, 30 April 1861, 3; *Advertiser*, 30 April 1861, 3) he did not have the one referred to corrected, so we may regard this statement too as having been tacitly confirmed by him.

¹¹⁵ Even though Fisher did have Magarey write to the newspaper in order to correct another presently irrelevant statement made at the public meeting, the newspapers for the succeeding several months contain no further comments from anyone at all. (The statement was about Fisher's own proposal for a system of lands titles registration many years before : see above, fn 114.)

¹¹⁶ Esposito, 'Ulrich Hübbe's Role', 265-268.

born colonists solely as the grateful recipients of Torrens's innovation, not as claiming to be, or actually being, its true source. Although this of all places would be the ideal spot for doing so, nowhere does he even hint at the possibility that the Torrens system could be German in origin, or that any Germans had claimed that it was.¹¹⁷

This disjunction caught my eye, and on further research I discovered that Mücke spoke in German.¹¹⁸ If anything at all can be concluded from what he said, Mücke therefore appears to be engaged in the rather underhand trick of saying something in Torrens's presence to which Torrens would have objected, as he had objected to Fisher's statements, had he been able to understand it.¹¹⁹ At all events, the fact that Mücke spoke in German disproves Dr Esposito's hypothesis. The statement is irrelevant.

It is also rather noticeable, turning to statements by people who did actually have an involvement in the conception of the system, that in the *Register's*¹²⁰ report of this event (written presumably by Forster, who was there) Torrens is yet again called the 'originator' and the 'initiator' of the system. The system is however one which Germans have recognised as 'an institution long familiar to us in the land of our forefathers' and 'one of the institutions of their fatherland'. It is extraordinary how well this fits in with my theory that Torrens had designed a system that was coincidentally similar to the German one. Is there another theory which allows both of these sets of statements to be true simultaneously? Certainly it would not have been right for Forster to call Torrens the 'originator' of a system, in this of all contexts, if he had merely copied a German one. On the other hand the Germans can sensibly be said to have recognised the system as similar to their own even if the similarity was merely coincidental.

¹¹⁷ A. Forster, *South Australia : Its Progress and Prosperity*, London, 1866, 233. There is a very long report of this event in English in *Register*, 1 November 1862, 2, which may be justly attributed to Forster himself.

¹¹⁸ *Advertiser*, 1 November 1862, 2. From a personal conversation with him, I know that when he wrote Dr Esposito was unaware that Mücke spoke in German, as indeed was I until the point occurred to me and I looked up the report in the *Advertiser* some time after having read Dr Esposito's thesis and having assisted my nominal opponent with the publication of his findings.

¹¹⁹ I have found no positive statement that Torrens did not speak German (or for that matter any other language), but it is a virtual certainty that he did not. Trinity College Dublin, from which he graduated B.A., did not teach the language in his time (an e-mail from Aisling Lockhart of the Manuscripts Department in the College to me has confirmed this).

¹²⁰ 1 November 1862, 2. It is also possible, given that Torrens is stated in some reports to have responded to Mücke, that the gist of the utterances of Mücke were translated to Torrens, but Mücke is said to have spoken rapidly and thus a word-for-word translation is unlikely.

X. The German Newspapers

Many of early South Australia's German-language newspapers (like some of its English-language newspapers) have not survived in complete sets.¹²¹ But in the Melbourne-based *Melbournier deutsche Zeitung* of 27 April 1860¹²² is what is stated to be a reprint of the death notice of Rudolf Reimer, which had appeared in the *Südaustralische Zeitung* in Adelaide, of which he was editor. That newspaper was certainly being published then but copies from April 1860 have not survived.

Reimer's obituary notice, as copied in Melbourne, contains the following passage :

Seine gründliche Kenntniß der Landessprache setzte ihn mit Hülfe langjähriger juristischer Studien in den Stand, nicht nur vor den Deutschen als Lehrer und Erläuterer der ihnen größtentheils fremden Landesgesetze zu erscheinen, sondern auch Mängel und Widersprüche in der Gesetzgebung nachzuweisen, und insofern es einem Privatmanne möglich, mit Einsicht und Energie zu bekämpfen. So haben z.B. die Reimer'schen Aufsätze über die preußische Hypotheken-Ordnung in den englischen Zeitungen wesentlich dazu beigetragen, die Idee des von Herrn Torrens verfaßten Real Property Akts, der anerkannt wohlthätigsten Maaßregel, welche die Colonie ihrem ersten Parlamente zu verdanken hat, in dem Kopfe dieses talentvollen Staatsmannes zur Reife zu bringen.

I translate :

His thorough knowledge of the local language enabled him, with his many years of legal study, not merely to be a teacher and expounder of what were for the Germans largely strange local laws, but also to point out defects and contradictions in legislation, and, as far as a private citizen could do so, to combat them insightfully and energetically. Thus Reimer's essays on the Prussian *Mortgage Law* in the English newspapers contributed considerably to the intellectual maturation of the concept of the *Real Property Act* drawn up by the talented statesman Mr Torrens, which was acknowledged to be the most useful measure which the colony owed to its first Parliament.

Without putting too fine a point on it : whatever the lost issues of South Australia's early German-language newspapers did contain, this does not suggest that they were vigorously protesting that Torrens was promoting what was really a German idea. Only if this obituary contained what, for this context, would be an uncommonly inappropriate exercise in irony could such a hypothesis be maintained.

The standard and always rather desperate explanation of the Hübbe camp for inconvenient statements naming Torrens as the man behind the bill which became the *Real Property Act* – including some by Hübbe himself in his pamphlet!¹²³ – is that they use Torrens' name merely to avoid confusion with other bills before Parliament at the same time, and not with any wider implication.¹²⁴ But this obituary (like many of the English-language statements in question) is not suscepti-

¹²¹ That has not however stopped speculation on the part of Hübbe's champions that they contained evidence of German involvement in the development of the Torrens system : Esposito, *Die Entstehung*, 52.

¹²² Page 205.

¹²³ *Voice of Reason*, e.g. 3, 70, 78f, 90, 97.

¹²⁴ For example, Esposito, *The History*, 70f.

ble even of that explanation of last resort.¹²⁵ It states unequivocally that Torrens, as a talented statesman, drew the Act up; no other meaning can plausibly be attributed to the word *verfaßt* in this context; a different word in German (*eingeführt*) would be necessary if the meaning were that Torrens had merely introduced into Parliament someone else's idea or someone else's drafting.

Like Mücke, the unknown author of this obituary did not necessarily have any special insight into the question. But my point is a different one. It is that we can conclude that even at this very early point this German-language newspaper in South Australia, while certainly aware of the existence of Dr Hübbe,¹²⁶ was also generally in the habit of regarding the Torrens system as one conceived and drawn up by Torrens. The editors of this South Australian German-language newspaper did not believe that the Torrens system was a copy of a German system. No-one had suggested to them, surely a receptive audience if ever there was one, that that was so. Not even where one would most naturally expect such a contemporary assertion to be made is anything even remotely like it found. Rather, the opposite, Torrens's authorship, is asserted almost casually, without explanation, as a fact known to everyone. In this the German-language newspapers did not differ from the usual practice of the English-language ones, and the *Südaustralische Zeitung* was also not deviating from the views it expressed in later issues which have survived and to which scholars have also curiously not had resort to this point. On 26 January 1861 for example it opined (rather remarkably in view of the treatment of Torrens by scholars of our own time) that Torrens's achievements will 'remain alive in the memory of this nation in later times, and will occupy an outstanding place on the historical canvas of our young colony'.¹²⁷

¹²⁵ It also does not explain the use of expressions such as "Mr Torrens's Bill" before its introduction into Parliament, e.g. *Register*, 12 February 1857, 2.

¹²⁶ The edition of 12 January 1861, 13, praises his services in the cause of the *Real Property Act* in vague terms as one who had 'contributed so much towards the introduction' of the system ('so viel zur Einführung des süd-australischen Real-Eigentum-Gesetzes beigetragen hat'). Hübbe was also a regular advertiser in its columns as he assisted Germans wishing to bring their land under the Act and these services are probably what is here referred to.

¹²⁷ Page 29. The original is 'und wir glauben nicht zu irren, daß Torrens und seine „Errungenschaften“ noch auf späte Zeiten in der Erinnerung dieser Nation leben, und eine hervorragende Stelle auf dem Geschichtsbild unserer jungen Kolonie einnehmen werden [*sic*]'. (I am not quite sure why the quotation marks are there but they assuredly do not have the function of conveying a sneer. I suspect they are there either because the word was considered slightly odd or amusing in association with the metaphor of a painting, because the word in question was also a term of property law (signifying joint matrimonial property) or by analogy with the enclosure of books' titles in inverted commas.) Further statements asserting Torrens's leading role are in the editions of 6 August 1862, 251; 20 September 1862, 303; 20 November 1862, 383. The edition of 29 October 1862, 345, mentions Torrens in similar terms while suggesting (for the first time) a German link only on the inadequate grounds that the system is simple and thorough.

In Victoria, the German-language newspapers, when they noticed the bill to introduce the Torrens system into Victoria, referred to it occasionally as Torrens’s measure.¹²⁸ On one occasion there is an express reference to ‘Mr Torrens, der Urheber der Bill’¹²⁹ (“Mr Torrens, the originator of the bill”). *Urheber* is also quite a strong word; although not quite as unequivocal as *verfaßt*, it strongly suggests authorship, not merely introduction into Parliament, as might the English word “initiator”. (The German word for copyright law is *Urheberrecht*.) Of course there is no reason to suspect that these authors in Melbourne had any inside knowledge, but clearly they read the German-language newspapers from South Australia. They neither record a protest in them at this attribution nor abstain from it themselves as the result of any such protest. As we have seen, the Germans in South Australia were shortly afterwards also to be found using the expression “Torrens’s Act”, so this is not a surprising state of affairs.¹³⁰

When a *Real Property Act* along South Australian lines was passed in Victoria, the *Australische Monatzeitung für die Colonien und Deutschland*¹³¹ gave it the slightly unwieldy name of the law about ‘wohlfeilere und erleichterte Übertragung von liegenden Gründen (*Real Property Act*)’¹³² but again did not suggest any German influence. The process of enacting the *Real Property Act* in Victoria had extended for nigh on three years. Over that time not a single German newspaper in Victoria that has survived (and around a hundred issues have) suggested that it had any German content at all – with one exception.

I feel obliged to record the existence of this exception, although I do so with some hesitation. The obligation arises because this is a contemporary source that contradicts my argument, while my hesitation arises because the link that it happens to assert does not seem to make much sense. Reviewing Victoria’s Real Property Bill on 4 May 1860, and in the very same issue as that in which it referred to Torrens as the originator of the bill, the *Melbournner deutsche Zeitung*¹³³ also stated :

Augenscheinlich hat die – insoweit sie den Handel mit liegendem Eigenthum betrifft – äußerst einfache und praktische deutsche Gerichtsverfassung dem Verfasser als Vorbild gedient; er läßt das alte System, als der Verbesserung unfähig, gänzlich außer Acht, und sucht das System, welches in unserer Heimath befolgt wird, mit den Principien des englischen Gesetzes in Einklang zu bringen.

¹²⁸ *Germania*, 4 April 1862, 279, in addition to later footnotes.

¹²⁹ *Melbournner deutsche Zeitung*, 4 May 1860, 207.

¹³⁰ See above, fn 56.

¹³¹ June 1862, 53.

¹³² The German means “cheaper and easier transfer of immovables”, using what is now a somewhat archaic word for “cheaper”. Italics added (the original is in the *Fraktur* script which I have not attempted to reproduce here).

¹³³ Page 207.

Evidently the extremely simple and practical German court structure, so far as it affects the conveyancing of immovable property, has been adopted by the drafter as a model; he completely dispenses with the old system as incapable of reform, and attempts to reconcile the system which is followed in our [German] homeland with the principles of English law.

This article is not copied from South Australia but rather is the newspaper's own commentary on the bill to introduce the system into Victoria. I have reproduced the whole passage in the article concerned above; nowhere in the whole article is Hübbe or Hamburg mentioned, or anything said about the actual system of conveyancing prevalent there. There is only this puzzling reference to the Court structure.

The word I have translated as "Court structure" (*Gerichtsverfassung*) was at that time as nowadays a compound noun meaning, literally, the constitution of the Courts. The word is not susceptible, by any stretch of language, of any broader meaning embracing a system of land conveyancing unconnected with the Courts. The passage is therefore quite baffling. Even those who say that the law of Hamburg was adapted for South Australia are compelled to explain why Court proceedings like those for which the Hamburg system provided were omitted from the Torrens system, as they clearly were.¹³⁴ The charge brought against Torrens is not that he adopted the Hanseatic Court structure; nothing changed in the South Australian or Victorian Court structures as a result of the introduction of the Torrens system.

Someone has obviously got his wires crossed. I suggest however that the quoted extract makes perfect sense, as a layman's-eye view¹³⁵ of what the system looks like, if we recall Torrens's system of Lands Titles Commissioners, who were to be laymen adjudicating with the help of lawyers on legal questions relating to lands titles, especially in relation to the state of title when it was sought to bring land under the system for the first time. To the German layman's eye this could appear to resemble the German system of lay Judges sitting with legally trained Judges, which exists both in the criminal law and in some civil cases. In German law this system definitely falls under the label of *Gerichtsverfassung*, and indeed even to this day it is the *Gerichtsverfassungsgesetz* (the Law on the Constitution of the Courts) that makes provision for such Courts with lay Judges.¹³⁶ Strictly speaking the Lands Titles Commissioners were not a Court, but they were adjudicating on legal questions and could easily be mistaken for one. In fact one of the many faults found with the

¹³⁴ See above, fn 22.

¹³⁵ The author implies that he is not a lawyer by commending the bill for being understandable even to non-lawyers, and not written in the usual lawyers' gobbledegook (*Kauderwelsch*).

¹³⁶ For example, para. 109 provides for lay Judges in commercial matters.

Torrens system by its opponents was precisely this delegation to non-lawyers of judicial powers properly belonging, they thought, to Courts.¹³⁷

Unfortunately our author's conclusion that the Lands Titles Commissioners were taken over from German law, while not an entirely silly guess for a lay writer, is based on uninformed speculation, as indeed the writer himself suggests by his use of the word 'evidently'. Torrens's Lands Titles Commissioners were a means of bringing land under a new system and thus had no equivalent in Hamburg. The Lands Titles Commissioners were moreover already in Torrens's plan of April 1857¹³⁸ at the very latest – earlier reports are not detailed enough to permit a conclusion about this – and for the reasons given earlier we can dismiss the possibility that Hübbe influenced that version of the scheme.

A system of lay commissioners to adjudicate on titles had in fact been proposed by a writer of a letter to the editor of the *Register* on 29 July 1856.¹³⁹ The letter-writer was "Conveyancer", who, rather oddly, later became one of Torrens's chief critics in the same newspaper's columns! It is generally assumed that "Conveyancer" was Charles Fenn,¹⁴⁰ so this feature of the system may be attributable to him, or more accurately to the Irish precedent for it which he mentioned, the three Commissioners for Sale of Incumbered Estates in Ireland created by 12 & 13 Vic. c. 77 (1849) (U.K.) s. 1.¹⁴¹

XI. Forster's Claims

The editor of the *Register*, Anthony Forster, claimed in 1892, once the success of the system was an established fact and Torrens himself was dead, that the system 'originated in a series of leading articles that I wrote'.¹⁴² He also expressly mentioned Dr Hübbe's contribution as a drafter of the system and praised him for his role in making it a better system at that level. Now Forster's agitation had certainly helped put the issue on the agenda thanks to a series of editorials he wrote starting in early July 1856.¹⁴³ In addition, Dr Antonio Esposito, in a most carefully researched article which reflects great credit upon him, has recently provided much valuable information about Forster's own contribution to the development of the Torrens system, not only as an advocate of its principles

¹³⁷ One of many, many possible examples of this is the opinion of the Victorian Attorney-General and Minister of Justice in Victorian Parliamentary Papers, Legislative Assembly, 1862-63 vol. I, 663.

¹³⁸ *Register*, 14 April 1857, 2.

¹³⁹ Page 3.

¹⁴⁰ E.g. Esposito, *Die Entstehung*, 153.

¹⁴¹ See further Dowling, 'Landed Estates Court', 148-150, 176.

¹⁴² Forster to Miss A. Ridley, 15 May 1892, South Australian Archives A792; quoted in Esposito, *The History*, 24.

¹⁴³ Pike, 'Introduction', 178; Robinson, *Transfer of Land*, 3.

in his newspaper but also as provider of information about otherwise obscure earlier English proposals to assist in the development of the Torrens model. But Dr Esposito also claims to have shown that Forster began work ‘long before Torrens had considered the matter’.¹⁴⁴ Not a single line of his article shows anything of the sort, as he does not consider the conclusive evidence presented here that Torrens started serious work, at the latest, by mid-1856, at virtually the same time as Forster’s public advocacy began. As we have seen, Torrens’s thoughts on the topic of improving land conveyancing long pre-date the middle of 1856 and can be traced, on the written record alone, back to 1853. I must also leave it to Dr Esposito to explain how he reconciles his more recent work with his earlier hypothesis of a reception of the law of Hamburg.

Furthermore, Forster’s contemporary statements about this question, even though in obscure places, have not been evaluated. It is worth concluding with a note about them given that I have also found new evidence bearing on this question and because Forster so clearly identifies the principal figure in the reform movement and clearly identifies him in a number of roles : as the initiator of the idea, the chief drafter of the bill and the leader of the public campaign for it.

In 1859, when memories were much fresher and contemporaries were alive, Forster went out of his way to claim only to have rendered ‘subordinate service’ – subordinate to Torrens that is – and pointedly disclaimed ‘the shadow of a desire to appropriate his well-earned laurels’.¹⁴⁵ In 1862 his newspaper, on the eve of Torrens’s departure for England, referred to Torrens as ‘having pointed out the course which others were ready to follow’, which was the product of ‘one mind’.¹⁴⁶ In 1866 Forster referred to ‘the wonderful Act which he [Torrens] framed’.¹⁴⁷ He also mentioned that Torrens ‘drafted a Bill which was laid before a more advanced set of law reformers’ – the comparison he is making here is with earlier persons asked to comment on the bill, who had rejected it –

¹⁴⁴ A.K. Esposito, ‘A New Look at Anthony Forster’s Contribution to the Development of the Torrens System’, 33 *University of Western Australia Law Review* (2007), 251-288, at 252. That article is a translation with adaptations of most of Esposito, *Die Entstehung*, Ch. 3 Part II. I was responsible for the first draft of the translation and adaptation, a project which I undertook in the interests of scholarship.

Prof. Horst Lücke has drawn my attention to a note on the English proposals mentioned in the text that was published by an extremely prominent jurist of the day : K.J.A. Mittermaier, ‘Englische Verhandlungen über Einführung von Grund- und Hypothekenbüchern’, 4 *Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes* (1832), 235-260. While it is certainly possible that Hübbe had come to know of this work, there is no evidence to that effect, let alone that he communicated anything he would have discovered from it to Forster.

¹⁴⁵ *Register*, 16 May 1859, 2.

¹⁴⁶ *Register*, 26 November 1862, 2.

¹⁴⁷ Forster, *South Australia*, 220.

‘and which, after embodying suggested amendments, was introduced into the Legislature and passed’.¹⁴⁸

I suspect that Forster’s newspaper articles in the 1850s, prior to the revealing of the first draft of the Torrens system to the world, were a means of softening up the public to receive a reform which Forster knew was being worked upon by Torrens and his helpers behind the scenes. The articles appeared during the same Parliamentary recess of 1856 during which Torrens’s final burst of activity occurred before his bill was revealed to the world. In 1859 Forster, perhaps choosing his words carefully, claimed that he advocated reform before Torrens ‘was known to have entertained any idea of taking legislative action on the subject’ and that he ‘helped prepare the popular mind for the reception of Mr Torrens’s measure’.¹⁴⁹ When Forster told the story in 1866, ten years after the events, he said that his newspaper articles merely led Torrens to promote the idea of reform actively; Torrens had already begun thinking about the topic independently, and Forster’s articles motivated Torrens to present the fruits of his deliberations to Forster.¹⁵⁰

Forster was an insider in the process of developing the Torrens system, and had the carriage of the bill in the Legislative Council, of which he was a member. It is therefore worth concluding with the observation that, in his contemporary statements and for at least a decade after the Act was enacted, Forster does not merely relegate himself to a secondary position; he too has no role at all for the supposed German influence, and even when he does mention it almost four decades on it is merely assistance at the level of drafting.

XII. Conclusions

Geoffrey Blainey has recently said, although not in reference to the Torrens system :

Most [...] advances are usually attributed to a single inventor, an obsessive person working alone. In fact most depended on other inventors and theoreticians, often in foreign lands. The great inventor usually knelt on the shoulders of earlier inventors. As historians, we tend to remove the shoulders from our memories.¹⁵¹

Stripped of the prominent reference to ‘foreign lands’, what is said here might well be applied to the Torrens system too. It is right that we should remember the ‘shoulders’. Until recently they tended to be forgotten in scholarship about the Torrens system.

But in remembering the ‘shoulders’ we should therefore not forget the head either – the obsessive person who convinces society to do something about a problem. It is obvious from the contemporary record that as well as being principal architect of the system both in concept and in draft-

¹⁴⁸ Forster, *South Australia*, 220f. Forster does not say who these ‘more advanced set of law reformers’ were.

¹⁴⁹ *Register*, 16 May 1859, 2 (emphasis added).

¹⁵⁰ Forster, *South Australia*, 219f.

¹⁵¹ Blainey, *A Short History of the Twentieth Century*, Camberwell, 2005, 46.

ing the bill, Torrens was its chief public promoter. Without him nothing would have been done at all, at least not then and there. Society has to be persuaded; law reforms do not come about simply because they happen to be beneficial; someone must be their advocate.

While the record of public advocacy is clear, we shall never know exactly what went on behind the scenes as the Torrens system was being developed from 1856 to 1858. Clearly Torrens, as he himself stated, was not alone as he developed the Torrens system. However, the concepts behind the reform were certainly his, as Forster tells us. In fleshing out the details, Torrens was the principal actor, and the services of all Torrens's helpers took place under Torrens's leadership, as we are informed by both insiders such as Forster and the independent intelligent observers such as Sir Richard Macdonnell. This article has shown too that independent evidence such as the timing of Hübbe's letters and the contents of the bill backs them up.

Torrens is entitled to the credit for conceiving the principles of the system even though he was of course aware of existing systems of registration and used some of them as bases from which to develop his own system. If we took any stricter view to the question of originality we should find that we have more or less ruled out the possibility of any original inventions for several millennia in the past. That would unduly restrict the concept of original invention.

The Torrens system was very controversial from the start, as anyone who reads the historical sources will quickly see. Thus there are many viewpoints about various aspects of it in the contemporary sources. Despite variations on other points, statements by contemporaries overwhelmingly support the view put forward here – always unequivocally, often with determination and even ferocity born of the need to respond to the attacks on the beneficial new system. The number of statements is overwhelming both in absolute terms and compared to the minuscule number of statements to the contrary. The statements come from a large variety of independent sources, some of which are often in conflict on other matters. There are statements by numerous people in the public arena and further statements in private and indeed official correspondence such as Sir Richard Macdonnell's. There are statements by opponents of the Torrens system such as Fisher as well as by its supporters. There are surviving statements in German-language sources as well as English-language ones. As far as the English-language sources supporting Torrens's claim are concerned, I have only scratched the surface here, wishing to avoid giving repeated examples of the same thing. I could easily have made this article much longer than it is. Anyone who troubles to read the *Register* for the period 1857 – 1862 will see what I mean.

It is easy for us to underestimate the amount of interest that existed in the subject of lands titles law among the general public of South Australia in the 1850s. Two phenomena explain it : the wide distribution of landownership in the colonies, which meant that the circle of landowners and would-be landowners was much wider than in England; and the defects of the old system of con-

veyancing. Ulrich Hübbe was but one of many who put ideas forward for Torrens's assistance as his bill took on more definite shape. In South Australia there were lots of people who were interested in the reform of land conveyancing and desiring to help. As Torrens was drafting the first prototype bill in the Parliamentary recess of 1856 two other laymen even took it upon themselves to draft their own schemes and put them forward for the public's consideration via the newspaper.¹⁵² Shortly afterwards, another detailed proposal (by a lawyer) appeared in the newspaper.¹⁵³ We must not imagine that Torrens was working alone and unaided until rescued from his own ignorance and incompetence by the good Dr Hübbe. Hübbe and his suggestions of second- and third-order detail based on his knowledge of the Hamburg system were just one among many voices competing for Torrens's attention as leader of the reform party.¹⁵⁴ From this article alone three new names have emerged: John Hector, Marshall MacDermott and perhaps also Rudolf Reimer through his writings on the law of mortgages, still to be unearthed. Prof. Horst Lücke has uncovered several others.¹⁵⁵

We have also seen how eclectic Torrens was in his sources of ideas. English bills, Irish Commissioners and merchant shipping law are all at least likely sources. One of Torrens's newspaper opponents called his bill "a thing of shreds and patches", picked up wherever he [Torrens] could lay his hands upon them'.¹⁵⁶ Its predictions that the system would fail turned out to be wrong, but this statement of fact was spot on.

Despite all the public interest in reform and the numerous competing proposals, Torrens established himself as the leader of the reform movement and attention focused on his proposal to the exclusion of others'. This seems to have occurred towards the end of 1856, even before Torrens was elected to Parliament in March 1857: by February of the following year he and he alone was being asked questions through the press by persons wishing to know about the coming reform.¹⁵⁷ The reasons why he became leader of the reform movement are easy to see: his role as colonial treasurer for some of 1856 and 1857; his experience as registrar-general; his access to the newspapers, especially to the *Register* through his ally Anthony Forster; his grasp of the problem and the sound thinking behind his proposal; the sweeping nature of his reform in an area in which that was needed; his not being a lawyer and thus free from the suspicion of acting to preserve legal fees; and his efforts to bring others into his camp as advisers.

¹⁵² *Register*, 31 July 1856, 3; 23 September 1856, 2.

¹⁵³ *Register*, 24 October 1856, 2, 3; 25 November 1856, 3.

¹⁵⁴ Cf. Lücke, 'Ulrich Hübbe or Robert Torrens?', 241f.

¹⁵⁵ Lücke, 'Ulrich Hübbe or Robert Torrens?', 241.

¹⁵⁶ *Adelaide Times*, 30 November 1857, 2.

¹⁵⁷ See above, fn 43.

I have not attempted to consider here to consider the further allegation of a massive cover-up of the German influence on the Torrens system which has been put forward most strongly by Dr Esposito.¹⁵⁸ Like many allegations of a cover-up this one can turn out to be somewhat elusive, because it is also alleged that the cover-up was itself covered up, and therefore the absence of evidence demonstrating its occurrence is taken by its proponents as a further indication of its success.

The motive for this grand conspiracy is said to have been the animosity that existed towards the early German settlers in South Australia, and the need to prevent the Torrens system from falling into disrepute among the British settlers by association with them. Prof. Horst Lücke has shown however that that wildly overstates the degree of feeling between the British and German settlers in South Australia.¹⁵⁹ While there was certainly friction as there is in any human society, the German settlers had come freely to South Australia just after the creation of the colony in 1836, relying on its promises of religious liberty. This was at a time when the colony desperately needed and welcomed settlers. The Germans were generally considered good, hard-working citizens. There is no reason why any involvement by them should have been covered up. There is no reason to think that a cover up would have succeeded. This is because the Torrens system remained extremely controversial after its enactment as a result of teething problems and several judicial decisions undermining its main principles.¹⁶⁰ South Australia was also a very small community in which secrets were not easily kept – particularly not given the large number of people involved in the development of the system.

In fact there was the opposite of a cover-up. Torrens openly admitted as early as June 1857, shortly after he met Dr Hübbe, that he had, without knowing it, designed a system similar in broad general outline to the system in Hamburg.¹⁶¹ Torrens was at this point still proposing law reform in a difficult area in which a number of others had failed, and which involved valuable assets. He was furthermore faced with repeated criticism that he was a non-lawyer poking his ignorant nose into an area which he did not understand, so that his proposed reform would only make things worse. Advice that his proposal was similar to an existing system in operation elsewhere was very welcome to him, and so far from covering the coincidental similarity up, he gleefully proclaimed its existence to anyone who would listen as soon as he was advised of it. Where does this leave the cover-up alleged to be necessary only a few months later because of the animosity it would have elicited?

Despite all the controversy and debate to which the system gave rise there is only a very small number of statements that can be used to support the idea that Torrens deliberately copied the Ham-

¹⁵⁸ Esposito, *The History*, 70-80.

¹⁵⁹ Lücke, 'Ulrich Hübbe or Robert Torrens?', 217-235.

¹⁶⁰ See for example Hague, *A History*, 265.

¹⁶¹ South Australian Parliamentary Debates, House of Assembly, 4 June 1857, col. 210.

burg system. Some dissenting views about the Act's origins by contemporaries are only to be expected given the sheer number of statements about the Act and the variety of viewpoints on it. Many allegations of plagiarism have clearly been disproved, such as Fisher's. The even smaller, indeed minuscule, number of statements naming Dr Hübbe as its alleged 'brains' or similar do not appear for some decades. Almost without exception anti-Torrens statements, whenever they appear and whomever they name as the true source, are by people who were obviously not able to have an informed opinion of their own. Thus Sir Dominick Daly was in Prince Edward Island when the events he presumes to describe were occurring and must have had poison poured into his ears by someone else; the German M.P. Rudolph Henning and the Rev'd Dr Mücke were talking through their respective hats about events in which they had absolutely no part; the Melbourne *Herald's* view that the system was an import from England is clearly discredited and probably came from some renegade South Australian in Melbourne at the time, perhaps a disgruntled lawyer.

This is not the place to trace how it was that Dr Hübbe became the favoured candidate of those putting forward the view that the Torrens system was simply a reception of the law of Hamburg. We have seen however that he was not elevated to that station by anyone at all until the 1880s, and the prominence of the forum first chosen for Hübbe's apotheosis (Parliament) rather than the knowledge his acolytes brought to the topic accounts for most of the rest of the exaggerations of the Hamburg contribution. Not only did Hübbe have the good fortune to live long; he also assisted with the fine-tuning of the Act after the first version had been enacted, and with its administration in the German-speaking community. For example, one improvement that may be attributable to him is that made in 1860 under which non-lawyers were permitted to take fees for conducting transactions under the Act¹⁶² – the origin of the calling of land broker still practised in South Australia today. A similar system existed in Hamburg, and so this may well be a Hübbe contribution, but of course if the Torrens system had from the beginning been a copy of the Hamburg system this significant but second-order improvement would have been there from the start rather than being a later add-on.

The historical record about the origins of the Torrens system is becoming clearer – despite the hopes of German lawyers who would like to believe that what they see as their highly advanced and logical system was copied in Australia and has spread from there to the world, and despite the hopes of those who would have us see the Torrens system as a shining example of early if unsung multiculturalism.

The historical record is as close to unequivocal as they ever are. The Torrens system benefited from the input of a number of people. But the reform was Torrens's idea in the first place, as was

¹⁶² *Real Property Act 1860 (S.A.)* s. 133.

the chosen means of converting the *Merchant Shipping Act* 1854 into a system of land conveyancing. He was its chief Parliamentary and public advocate throughout. He drew up the original bill to achieve that goal over the Parliamentary recess of 1856 and perfected it with the help of a circle of advisers. One of those was Dr Ulrich Hübbe, but he was only one of many, and a late-comer (through no fault of his own). The project remained based on Torrens's principles and under Torrens's leadership throughout. It was never about adapting the law of Hamburg.