The University of Adelaide
School of Law

Dissertation for the degree of Master of Laws
(by Research)

The History of the Torrens System of Land Registration with special reference to its German Origins

by
Antonio Kurt Esposito

Supervisor: Prof. Adrian Bradbrook

This dissertation is submitted in fulfilment of the requirement for the degree of the Master of Laws in the Faculty of Law at the University of Adelaide, in September 1999. I, Antonio Esposito, declare that this dissertation contains no material which has been accepted for the award of any other degree or diploma in any other university and, to the best of my knowledge and belief, it contains no material previously published or written by another person, except where due reference is made.

If this dissertation is accepted for the award to me of the degree of Master of Laws, I consent to its being made available for photocopying and loan.

(Antonio Kurt Esposito)
January 2000

I wish to express my sincere gratitude to my supervisor, Professor Adrian Bradbrook for his help, guidance and tireless effort to encourage me to continue. My wish to become an academic is due to him. For the completion of this thesis I also have to thank the employees of the South Australian Archives (Adelaide and Netley), the Lutheran Archives (North Adelaide), the city archives of Hamburg and the Max-Planck Institute for European legal history (Frankfurt a.M.).

ABSTRACT

The origins of the Torrens System of land registration are not yet clear. Whilst Sir Robert Richard Torrens maintained that he drafted the Act alone, along the lines of the Imperial Shipping Act 1854, certain comparative analyses have shown that this could not have been the case. This thesis examines the claim of Torrens' contemporary, Dr. Ulrich Hübbe, a colonist and lawyer from Germany. He asserted that he collaborated with Torrens to bring about the adoption of the land law of his hometown Hamburg in the form of the Real Property Act 1858 (SA). Even though there is strong evidence which supports this claim, there has been no systematical examination of it.

The approach to the problem is two-fold. First, historically, collecting and analysing all relevant historical sources and second, comparative legal, contrasting Hamburg's land law at the beginning of the 19th Century with the first bill of the Real Property Act 1858 (SA). The historical approach categorizes the material systematically. All relevant sources have been incorporated. In particular, material from German colonists in South Australia in the form of statements or newspaper articles have been included. The historical analysis is supplemented by a legal comparison between the original Torrens System and Hamburg's land law which is fundamental to the solution of the possible German origins of the system. Furthermore, the comparative part provides a basic description of Hamburg's land law at the relevant time, which has not yet been available in this context. Regarding the comparative analysis, the author elaborates the particular processes which govern the adoption of foreign laws. In particular, processes of adaptation to which a legal transplant is inevitably subject prove to be important in relation to the possible relationship between the Torrens System and Hamburg's nineteenth Century land law.

The results of the historical examination show that it is likely that Ulrich Hübbe was the actual draftsman of the first bill. The legal analysis, on the other hand, demonstrates two things: first, that there is a strong similarity between Hamburg's land registration system and the original Torrens System; second, that the outstanding differences between the systems can be explained by the natural adaptation processes which are implied by the adoption of laws.

Table of Contents

Chapter 1: Introduction

In 1858 the Torrens System of land registration was introduced in South Australia.[1] It revolutionised the Anglo-Saxon land law system and was adopted in many Common Law countries throughout the world.[2] Yet while the system itself is well known, its origins have remained hidden for a long time. Robert Richard Torrens promulgated the fact that he had been the sole author of the Real Property Act 1858 (SA) which implemented the Torrens System[3], and he based his political career to a great deal on this assertion.[4] Torrens took pains to ensure that rumours of plagiarism which arose during the reform did not gain acceptance,[5] going so far as to hit a journalist in Adelaide on Hindley Street for voicing such insinuations.[6]

In 1880, however, Torrens' sole authorship was called into question on the floor of the South Australian Parliament itself.[7] The impetus for this debate was Torrens' petition for an additional pension *in gratias* for the drafting of the Real Property Act 1858 (SA). This debate drew the attention to yet another man who claimed to have been the legal mind behind the Torrens System, but who had previously kept silent. The MPs Henning[8], Kriechauff[9] and Ross[10] made striking reference to a certain Dr. Ulrich Hübbe, a German émigré lawyer who had arrived in South Australia in 1842.[11]

---

1 Bradbrook, MacCallum and Moore, *Australian Real Property Law*, (The Law Book Company Ltd., Sydney, 2nd. ed. 1997), p. 129.

2 Keeley, Torrens Title, in: If we are so great, why aren't we better?- A critical look at six South Australian political firsts (Old Parliament House, Adelaide 1986), p. 6.

3 Letter from Torrens to Wright Bros., 24 August 1864 (S.A. Archives).

4 Stein and Stone, *Torrens Title* (Butterworth, Sydney 1991), pp. 17 ff.

5 Geyer, *Robert Richard Torrens and the Real Property Act: The Creation of a Myth*, Adelaide, 1991, pp. 29 ff.

6 Cresswell, Former Register General, in: The Advertiser, 13 April 1992; Fox, "The story behind the Torrens System", 23 *ALJ* 492.

7 South Australian Parliamentary Debates 1880, pp. 420 ff.

8 South Australian Parliamentary Debates 1880, p. 427.

9 South Australian Parliamentary Debates 1880, p. 425.

10 South Australian Parliamentary Debates 1880, p. 424.

11 Kelly, "Ulrich Hübbe", Australian Dictionary of Biography, Vol. 4 (D-J), ed. Nairn, Serle, Ward (Melbourne University Press 1972), p. 436 f; Kelly, "Ulrich Hübbe", unpuplished, Lutheran Archives, North Adelaide; Blaess, "One Hundred and Twenty-Five Years ago- the Taglione", Lutheran Almanac 1968, pp. 28 ff.

In this respect MP Henninng's speech is very illustrative:[12]

> "He would believe that all would agree with him that it was perfectly well known that Sir R.R. Torrens brought in the Real Property Act, that Dr. Hübbe provided the ideas, the brains and the work of the measure, and that Sir R.R. Torrens merely fought the battle of the Bill in the House. He would make it a condition upon his voting for the granting of any sum to Sir R.R. Torrens that they also rewarded Dr. Hübbe."

MP Henning's and his fellow MPs' statements on Torrens' and Hübbe's contributions to the success of the Real Property Act 1858 (SA) caused a confusion as to who was the actual draftsman of the Act. At the time this question was important as it decided monetary recognition, reflected in Torrens' petition for a pension. However, one wonders if this question is still of importance today. After all, the question of personal recognition is of minor relevance, now that the claimants to authorship have perished. It is true that Hübbe's descendants, especially his daughter Isabella Hübbe (the later Mrs. May), fought for recognition for their father, prompting discussions in Adelaide newspapers in 1932[13] and 1939[14]. Nevertheless the descendants living today do not make much of whether Ulrich Hübbe is acknowledged as the actual draftsman of the Torrens System or not.[15] Apart from the decreasing importance of personal recognition, the fact that the system in current operation is the child of over 140 years of legislative amendments and judicial shaping could give rise to the assumption that the origins of the Torrens System are now merely a matter of legal history.

This view, however, ignores the fact that the two claimants to authorship had told two completely different stories as to how they had drafted the system. Whereas Torrens claimed that he applied the laws of shipping

---

12 South Australian Parliamentary Debates 1880, p. 427.

13 *The Advertiser* 1932, 8/10/12/15/16/17/18/19/24 February.

14 *The Northern Argus* 1939, 31 March/14 April/2, 9 and 23 June/14 July/1 September/4 August.

property to land,[16] Hübbe alleged that he adopted the land law of his hometown Hamburg and moulded it into the provisions of the Real Property Act 1858 (SA).[17] If Hübbe's assertion is accurate, the Torrens System would be a legal transplant, i.e. a system which was adopted from another country.[18] Qualifying the Torrens System as a legal transplant, however, would go far beyond a mere small historical point concerning authorship, but would offer a completely new way of viewing the system as the establishment and evolution of a very successful legal transplant. This aspect shifts the scholarly interest in the matter from the field of legal history to the field of comparative law and, in particular, to the study of adoption of laws. Despite the wide-reaching consequence of Hübbe's assertion, this issue is yet to be examined thoroughly.

Indeed the gap in research seems to be severe, as it has been acknowledged that Torrens could not have drafted the Act alone on the lines of the Imperial Shipping Act 1854 as he asserted.[19] First, without having received proper legal training he would not have been capable of doing so.[20] Secondly, the bulk of the provisions of the Real Property Act 1858 (SA) cannot be traced back to the Imperial Shipping Act. Robinson has proved this in an impressive synopsis comparing the decisive second draft of the Act and the regulations of the Imperial Shipping Act.[21] Earlier comparisons made by other researchers were misleading because they made no distinction between language and content, and therefore did not consider that the Imperial Shipping Act 1854 might have served only as a model for the wording of the Real Property Act 1858 (SA).[22]

---

15 Interview with Hübbe's great-grandson, Mr. Simpson (Adelaide, Stonyfell), 1 November 1996.

16 Torrens, *The South Australian System of Conveyancing by Registration of Title* (Register and Observer Printing Office, Adelaide 1859), vi.

17 Official Statement accepted by Secretary Office, 1884, SA-Archives, D 5257 (T); 32 Royal Geographical Society Proceedings (SA) 109-112.

18 See for the term: Watson, *Legal transplants: an approach to comparative law* (Edinburgh, Scottish Academic Press 1974).

19 This is why MP Trainer in 1992 demanded Torrens' portrait to be removed from the South Australian House of Assembly, see *The Advertiser*, 4 April 1992.

20 Robinson, *Equity and systems of title to land by registration*, (PhD-thesis, Monash University 1973), pp. 25 ff shows that Torrens's publications bear the internal evidence that he did not fully understand the Torrens System.

21 Robinson, *Equity and systems of title to land by registration*, appendix A, p. 117.

From the position that Torrens was, at least, not the sole author of the Act, the next logical point of inquiry should have been to analyse whether Hübbe's claim to drafting the Real Property Act 1858 (SA) based on the model of Hamburg's land law, was correct or not. After all, Hübbe was the competing claimant to authorship. Nevertheless, researchers have to date neglected to undertake such an examination, but have remained content with the conclusion that, in addition to Torrens, other people must have been involved in the drafting of the Torrens System and that the system is likely to stem from a mixture of different sources.[23] Such a conclusion, however, implies that it can no longer be ascertained which regulation came from which source.[24] Modern textbook writers are content with handling the matter in this manner.[25] It is true that Robinson mostly credits Hübbe's influence and thereby Hamburg's land law as the most likely origin of the Act, but even he shares the opinion that the draft was based on several sources and not exclusively on this source.[26]

Such a non-differentiated consideration of possible sources of the Torrens System is not necessary, since the influence of certain sources, which have been mentioned in connection with the origin of Torrens System can be determined. Foremost, one can differentiate between sources which were merely politically authoritative for systems of land registration and other sources which have had a substantial or, at least, an historical influence on the drafting of the system. For instance, there is no evidence whatsoever that the antiquated Copyhold System had any influence on the drafting of the Act. It is true that Torrens had mentioned the Copyhold System in his essay on the Torrens System, but that was in

---

22 Fox (1950) 23 *ALJ* 489 ff; Whalan, "The origins of the Torrens System, and its introduction into New Zealand" in: *The New Zealand Torrens System Centennial Essays* (Butterworth Wellington 1971), p. 6.

23 Hogg, *The Australian Torrens System* (Clowes & Son, London 1905), p. 21; Howell, "Constitutional and Political Development, 1857-1890", *The Flinders History of South Australia*, ed. Dean Jaensch (Wakefield Press, Netley 1986), p. 158 f; Robinson, *Equity and systems of title to land by registration*, p. 113; Stein and Stone, pp. 22 ff; Whalan, *The New Zealand Torrens System Centennial Essays*, (Butterworth Wellington 1971), pp. 5 f.

24 Bradbrook, MacCallum and Moore, p. 128.

25 Bradbrook, MacCallum and Moore, p. 128; Butt, *Land Law*, (The Law Book Company, Sydney, 3rd. ed. 1996), p. 686 f; Sackville, Neave, Rossiter and Stone *Property Law*, (Butterworth, Melbourne, 6th ed. 1999), p. 418 f.

26 Robinson, *Equity and systems of title to land by registration*, p. 113.

adversary and was said to have refused all of Hanson's suggestions.[39]

Whereas the Copyhold System, the Share Registration System, Fisher's and Hanson's drafts played roles chiefly in the political debate on the Torrens' draft, there were two sources which led directly to the drafting of the Real Property Act 1858 (SA). These sources were the Royal Commission Reports[40] and a series of articles[41] published by the editor of the South Australian Register, Anthony Forster. Both, the reports and the articles, influenced the drafting as they advanced the discussion and elaboration of the principles which were later codified by the Torrens System. Referring to the Royal Commission Reports does not include, however, the famous report of 1857[42] which reached South Australia on the evening of the second reading of the Bill, and therefore far too late to be influential.[43] Moreover the reports of 1830[44] and 1850[45] have been influential. Both reports have been ignored by other authors searching for the origins of the Torrens System because the main part of these reports had not put forward a system of title registration, yet in the *appendixes* of both reports, just such suggestions were made.[46] The series of articles by Anthony Forster, which prompted a discussion on title by registration, made use of these appendixes[47] and even cited whole paragraphs from the 1830 report.[48] Since the reports were produced by highly qualified legal authorities in England, Anthony Forster, having access to the reports, was able to make sound suggestions in his series of articles even without the help of South Australian lawyers.

---

39 South Australian Parliamentary Debates, 20 July 1880, p. 424.

40 Royal Commission Report of 1829/1830 and of 1850.

41 South Australian Register, 3, 4, 5, 9, 11, 12, 15, 17, 23, 31 July, 4, 5 August 1856; See for the correspondence on Forster's suggestions: 8, 14, 19, 22, 29 July; 4 August 1856.

42 This report approved the principles of the Torrens System to a great extent: Report from the Royal Commission on the Registration of Title, with reference to the Sale and Transfer of Land, 1857, pp. 25 ff, 32 ff..

43 Fox (1950) 23 *ALJ* 489 at 491; Robinson, *Equity and systems of title to land by registration*, p.9; Stein and Stone, p.24; Whalan, *The New Zealand Torrens System Centennial Essays*, (Butterworth Wellington 1971), p.4.

44 First and second report made to His Majesty by the Commissioners appointed to inquire into the laws of England respecting the Real Property, 1829/1830

45 Report of the Royal Commission on Registration and Conveyancing, 1850.

46 See in particular: Hogg and Fonnereau, Appendix of the Second Report of the Commission of 1830 and Wilson, Appendix of the Report of the Commission of 1850.

47 South Australian Register, 3 July 1856.

However, descriptions of principles in the reports and their discussion in Forster's articles were purely abstract. It is true that they laid out the principles of a register book[49], title by registration and conclusiveness of the register[50], a map system[51] and the usage of schedules and certificates.[52] However, neither the reports nor Forster's articles provided the concrete provisions for a draft. This is why the search for a model began. Forster, in the last three articles in his series on land law, suggested taking the relatively new Imperial Shipping Act 1854 as a model.[53] Torrens answered Forster's demand to the public, drafting a few provisions which were published by Forster in his newspaper.[54]

Up to this point the story seems conclusive. The question remains, however, as to what happened after Torrens' first attempt to apply the law of shipping property to land. Torrens asserted that he developed a draft based on the Shipping law into the Real Property Act 1858 (SA).[55] Dr. Ulrich Hübbe asserted that he joined Torrens when he was struggling in applying the law of ships to land, i.e. of moveable property to immovable property.[56] Hübbe said that he convinced Torrens to drop the example Imperial Shipping Act[57] in favour of Hanseatic land law system as a model.[58]

Since Torrens' claims have already been discredited, the author has chosen to examine Hübbe's assertions. These can be divided into two parts: first, that Hübbe was the legal mind behind the Torrens System, and second, that the system eventually drafted was an adoption of Hanseatic land law. Both statements are dependent on each other. If the

---

48 South Australian Register, 5 July 1856.
49 South Australian Register, 4 July 1856.
50 South Australian Register 4, 5, 9, 12 and 31July 1856.
51 South Australian Register, 4 and 5 July 1856.
52 South Australian Register, 9 and 11 July 1856.
53 South Australian Register, 31 July and 4 and 5 August 1856.
54 South Australian Register, 17 October 1856. A summary of further provisions followed in the editions of 15 and 16 April 1857.
55 Torrens, *The South Australian System of Conveyancing by Registration of Title*, vi.
56 Official Statement accepted by Secretary Office, 1884, SA-Archives, D 5257 (T), p.2.
57 Also Chief Justice, Sir Cooper and Mr. W. Belt (Adelaidian lawyer) had advised Torrens to drop the Shipping Act as a model, see Jessup, Torrens of the Torrens System (Unpublished essay, South Australian Archives, D 3060 (T)), p. 13.
58 32 Royal Geographical Society Proceedings (SA) 112.

Torrens System was based on Hamburg's land law, Hübbe must have been the draftsman of the Act as he was the only person involved who had knowledge of Hamburg's law. On the other hand, if Hübbe, as a German lawyer, was the dominant mind behind the Act, one could assume that he would have tried to implement land law of his hometown in South Australia. Indeed, in his 1857 book "The voice of reason" he expresses his conviction of the superiority of Hamburg's land law and of the possibility of its adoption in South Australia.[59]

Due to this interrelationship of Hübbe's assertions the author has chosen a two-fold approach by subdividing the analysis into two main parts. First, the author analyses the sources in their social-historical context (Chapter 2) in order to evaluate the evidence that indicates Dr. Ulrich Hübbe as the legal mind behind the Torrens System. Next, the Torrens System is compared to Hanseatic land law to test whether the former could possibly have evolved out of the latter (Chapter 3).

Chapter 2 identifies two categories of historical sources as objects for interpretation of Hübbe's contribution to the Torrens System. The first is made up of statements made by contemporaries of the reformers (Chap 2.2.). These appear in different media of varying degrees of evidential value: debates in parliament (2.2.1.; 2.2.2.); private letters (2.2.3.); a contemporary biography on famous South Australians (2.2.4.) and several German newspaper articles (2.2.5.). The second category of sources evaluated consists of the undisputed activities of Dr. Ulrich Hübbe in connection with the law reform movement (Chap 2.3.). The author poses the question of what can be inferred from these activities of relevance for Hübbe's contribution the drafting of the Act. In this second category of sources the following of Hübbe's activities are significant: Hübbe's book, "The Voice of Reason" of 1857, published just before the second reading of Act (2.3.1.); his co-operation with Torrens during the debate in parliament (2.3.2.); his work in the registry office immediately after the enactment of the Torrens System (2.3.2.); evidence given before the 1861 Reform Commission (2.3.3.) and before the 1873 Reform Commission (2.3.4.); and the co-foundation of an "association for the

[59] Hübbe, *The Voice of Reason*, (David Gall, Adelaide 1857), pp. 64 f.

protection of the Act" in 1874/75 (2.3.4.). The author suggests that, whereas the inferences from single sources are limited, the sum of all historical sources creates a homogenous picture. This picture affirms Dr. Ulrich Hübbe as the predominant reformer behind the drafting of the Real Property Act 1858 (SA). This suggests that Hübbe succeeded in realising in practice his conviction that Hamburg's land law was capable of adoption in South Australia.

In Chapter 3 the author supplements the historical review with a comparative legal analysis. The Torrens System and Hamburg's land law are compared in order to discern whether the former could have evolved out of the latter by process of adoption. In particular, this analysis requires an understanding of legal adoption processes in general, as adoption of laws is not merely a matter of translation. Moreover, the adoption of a legal system in another country is closely linked with processes of shaping and adapting the system in order to keep it functioning in its new legal environment. These preliminary considerations are set out, before the proper analysis begins (Chap.3, 2). The actual analysis is subdivided into two parts. The first part examines whether the major structural difference between the Torrens System and Hamburg's land law, i.e. the court participation in the German system and the omission of it in the Australian system, can be explained by an adoption process (Chap.3, 3). This analysis precedes the general comparative legal analysis of the most important features of the two systems (Chap. 3, 4). The author has chosen this order for the comparative analysis as it appears that if one were to remove the court participation from Hamburg's old transfer of real property rights, one would be left basically with the Torrens System in its original form. This idea can best be understood when the possible removal of the judicial element from Hamburg's land law in the implementation of the system in South Australia is first discussed.

The final conclusion in Chapter 4 attempts to link the results of the historical and comparative legal analyses. Despite the likely legal relationship between the Torrens System and 19th Century Hamburg land law suggested in Chapter 4, it should be noted here that after the

beginning of 20th Century there was no longer a system in Germany that was similar to the Torrens System. First, as a consequence of Germany's unification in 1871, the German Civil Code came into force in 1900 implementing a federal land law that superseded Hamburg's land law. Second, the process of legislative amendments and judicial shaping of the Torrens System was so intense, that its final version, as reflected in the Real Property Act 1886 (SA), should be regarded a system of its own rather than a "mere" legal transplant.[60]

---

[60] Whalan, *The New Zealand Torrens System Centennial Essays*, (Butterworth Wellington 1971), p. 11 suggests the 1861 version as the basic version.

Chapter 2: Historical analysis: Hanseatic law as the model for the South Australian Real Property Act of 1858

2. 1. Introduction

It seems generally accepted that it had dawned on Torrens that the proposed new land registration system could not be modelled exclusively on the 1854 Imperial Shipping Act, and that, following this realization, Torrens, alone or with the help of friends, managed to draft the very first bill mixing the provisions of several sources.[61] This assumption, however, ignores the claim of Dr. Ulrich Hübbe who asserted in 1884 that after having abandoned the Shipping law as a model, he and Torrens managed to draft a sound bill on the lines of the Hanseatic land law and that the inaugural Real Property Act 1858 (SA) was virtually the adoption of Hanseatic law.

The analysis of this claim has become the main theme of this thesis. This is partly because the research brought about considerable evidence which sustains the theory of the adoption of Hanseatic land law. Part of the reason why Hübbe's claim had to be emphasised is because it had been neglected and therefore yet to be disproved. This gap in the research may be the result of several significant aspects. Mary Geyer, in her thesis: 'R.R. Torrens and the Real Property Act- The Creation of a Myth' (Adelaide 1991) demonstrates clearly that later researchers no longer questioned Torrens' sole authorship because it had been glorified as "fact" for too long. The author submits that the late development of a branch of Australian, as opposed to British, legal history may also have contributed to the gap. It should be noted that even though research neglected the source, Hübbe's descendants, as mentioned, fought for the recognition of Hübbe's work, which led to a controversy in the Adelaide newspapers in 1932[62] and in 1939[63]. In any event from the 1950s

---

61 Bradbrook, MacCallum and Moore, *Australian Real Property Law*, (The Law Book Company Ltd., Sydney, 2nd. ed. 1997), p. 128 f; Butt, *Land Law*, (The Law Book Company, Sydney, 3rd. ed. 1996), p. 687 f; Sackville, Neave, Rossiter and Stone *Property Law*, (Butterworth, Melbourne, 6th ed. 1999), p. 352.

62 *The Advertiser* 1932, 8/10/12/15/16/17/18/19/24 February.

onwards commentators have shown that the "myth" that Torrens drafted the bill by himself on the basis of the Shipping law was uncovered as such. The author submits, however, that it did not necessarily mean that the Real Property Act 1858 (SA) was based on a mixture of sources. Before this conclusion can be drawn Hübbe's claim that after the Shipping law the Hanseatic law was tried as a conclusive model first must be disproved.

Hübbe was a German lawyer who had immigrated from Hamburg for religious reasons.[64] His great-grandson Mr. Simpson says that Ulrich Hübbe used to explain how an angel had appeared and had told him to leave Hamburg because of a fire that would come.[65] He had read law in Jena and Berlin (1826-30) and held a doctorate from the University of Kiel (1837). Before Hübbe left for Adelaide in 1842 he had helped religious groups to immigrate to South Australia. He opened German schools in Kensington and Buchfelde. In 1855 he started to teach languages in Adelaide. When in 1856 the press made land law reform a topic of the elections, Hübbe started to advocate the system of registration used in Hamburg.

This chapter purports to analyse the material that sustains Hübbe's claim. The analysis seeks to establish the likelihood that the Real Property Act 1858 (SA) was actually an adoption of Hanseatic law and for this purpose focuses first on the material with the most convincing evidence. First, statements of contemporary South Australians are analysed, namely the two parliamentary debates of 1880 and 1884, that dealt precisely with the question of the origins of the South Australian system of Land Registration. The 1880 debate concerned Torrens' petition to get monetary recognition and the 1884 debate was prompted by a petition of Hübbe's to obtain a pension. Secondly, a private letter of Mr. Anthony Forster, the former owner of the 'South Australia Register', is analysed and interpreted in this context. In the letter Forster asserts that the

---

63 *The Northern Argus* 1939, 31 March/14 April/2, 9 and 23 June/14 July/1 September/4 August.

64 Blaess, "One Hundred and Twenty years ago, the 'Taglione", Lutheran Almanac 1967 –1968, p. 28 ff.

drafting of the Bill would have not been possible were it not for the help of Dr. Ulrich Hübbe. Equally clear in confirming Hübbe's claim are the contemporary German newspapers in South Australia on the matter. The author has found three articles from 1862, 1882 and 1892 that either confirm that the Real Property Act 1858 (SA) was an adoption of Hanseatic law or assert that Hübbe was the actual draftsman of the Act. Most indicative is also the account on Hübbe given by George Loyau in his collections of biographies entitled "Notable South Australians" of 1885. Loyau gives for the first time a detailed description of how Torrens, Hübbe and Richard B. Andrews collaborated in the drafting of the South Australian Real Property Act.

After having analysed the statements contained in the above sources, the author proceeds to examine Hübbe's undisputed activities during the law reform period of 1857/58 and his activities regarding later amendments. These can be divided into three phases. First, Hübbe's activities during the law reform itself in 1857, when he wrote several articles advocating reform in the newspapers and eventually a book entitled "Voice of Reason", which was given to each Member of Parliament before the second reading of the Bill. In this context it is also evident that Hübbe advised Torrens during the debates in parliament. The second phase of Hübbe's activities is associated with the law reform in 1861, for which Hübbe prepared a pamphlet on Hanseatic law. The third phase begins with another pamphlet on law reform which Hübbe produced at the end of 1872 for the 1873 Law Reform Commission. In February 1873 Hübbe gave evidence before the commission and in the wake thereof founded an association for the protection of the Real Property Act which became active in 1874/75. All the above statements and Hübbe's activities are interpreted in an historical context.

After the analysis of the primary evidence the author deals under the heading "The cover up" with the question of why the draftsmen kept the drafting process a secret for such a long time. A thesis published in the University of Adelaide's History Department by Mary Geyer, entitled

---

65 Interview with Hübbe's great-grandson, Mr. Simpson (Adelaide, Stonyfell), 1 November 1996.

"R.R. Torrens and the Real Property Act- The Creation of a Myth" provides some explanation. The author believes, however, that the theory of the adoption of Hanseatic law adds a further reason for this when the rising fear of a Germanization of South Australian Institutions in the 1850s is taken into consideration.

The order in which the author presents the material, described above, relates to the weight to be attached to the respective sources. The analysis attempts therefore to evaluate the probative weight of the available material which is clearly difficult and, of course, can not be measured exactly. Nevertheless it cannot be ignored, for instance, that a statement in a parliamentary debate is distinctly different from a statement in a private letter, even though they may carry the same meaning. This applies equally to the comparison of a newspaper article and the publication of a contemporary historian.

2. 2. Contemporary statements

Of the evidence available, the two debates of 1880 and 1884 within the South Australian Parliament are of high significance. Both debates made it a central question as to the respective contributions of Torrens and Hübbe regarding the origin of the Real Property Act 1858 (SA). This evidence is special also because it reflects the public opinion of contemporary Adelaideans.

2. 2. 1. The debate of 20 July 1880: The Granting of a Pension to Sir R. R. Torrens

On 20 July 1880, the Attorney General W. H. Bundey introduced in parliament a petition on behalf of Sir R. R. Torrens.[66] The petition asked the South Australian Government to grant an additional pension to Torrens and his wife. At that stage Torrens already received a monthly sum of 325 pounds. With the petition Torrens requested an additional 500 pounds for his services in connection with the Real Property Act

1858 (SA). According to Hansard, 15 members of the South Australian parliament participated in the debate and gave their statements.[67] The first speakers, however, did not raise the issue of the origins of the Act itself. Rather, it was discussed whether it made sense at all that inventors and benefactors of the colony should be able to claim a reward[68] and whether it was not too bold of Torrens to ask for an pension amounting to 825 pounds.[69] Only the eighth speaker, Mr Ross, brought up the question as to what contribution Torrens actually made in the drafting of the Act. Surprisingly he did not describe Torrens' part in the drafting, but referred to the work of Dr. Ulrich Hübbe. Mr. Ross (Member for Wallaroo) is quoted as follows:

> "He was sorry that no reference had been made to a gentleman who had done a great deal of hard work in connection with the Real Property Act, viz. Dr. Hübbe."[70]

The following speaker Mr. Kriechauff took up Mr. Ross' statement:

> "He thanked the member for Wallaroo for mentioning the name of Dr. Hübbe. He had been requested by several parties to forward that gentleman's name...He hoped that the house would pass this small sum of 500 Pounds (to Hübbe)..."

Even though the debate was supposed to discuss a pension for R. R. Torrens in return for his work in connection with the Real Property Act, at this point it seemed that some Members of Parliament wanted to grant financial recognition to Hübbe instead. After Kriechhauff's remarks the following speakers Bray, Furner and Cavenagh all agreed that Torrens should only be remunerated for services performed. Whereas the three of them discussed whether the remuneration should be in form of a pension

---

66 South Australian Parliamentary Debates 1880, pp. 420 ff.
67 South Australian Parliamentary Debates 1880, pp. 420 ff.
68 E.g. Hardy, South Australian Parliamentary Debates 1880, p. 421.
69 E.g.. Glyde, South Australian Parliamentary Debates 1880, p. 422.
70 Ross, South Australian Parliamentary Debates 1880, p. 424.

or a lump sum, the previously cited statement of the next speaker, Mr. Henning, is worth repeating:

> "The honorable member of Wallaroo (Mr. Ross) had mentioned the name of Dr. Hübbe. He would believe that all would agree with him that it was perfectly well known that Sir R.R. Torrens brought in the Real Property Act that Dr. Hübbe provided the ideas, the brains and the work of the measure, and that Sir R.R. Torrens merely fought the battle of the Bill in the House. He would make it a condition upon his voting for the granting of any sum to Sir R.R. Torrens that they also rewarded Dr. Hübbe."[71]

With this statement the debate had clearly reached a turning point. Instead of discussing Torrens' demand for an additional pension, it seemed that the parliamentarians felt compelled to recognise Hübbe's contribution. Whenever the actual drafting of the Real Property Act 1858 (SA) came up for discussion the attention had been drawn to Dr. Ulrich Hübbe instead of recognising Torrens' work, and Henning's comments tried to establish clearly how the work associated with the law reform was divided between Torrens and Hübbe. Although Hübbe had not yet publicly claimed recognition for his services in connection with the Real Property Act 1858 (SA), the 1880 debate inevitably also had to discuss his part in the founding of the Act. After all, Torrens' petition asked for a pension solely on the grounds of his services connected with the drafting of the Real Property Act.

Even though Henning's statement in the debate ("Hübbe provided the ideas, the brains and the work of the measure") clearly expressed the view that Hübbe was the main draftsman of the Real Property Act 1858 (SA), the statement needs to be considered in more depth. It is not enough merely to quote from Henning's statement as Robinson does in his examination of the debate.[72] Rather, the statement needs to be set in

---

71 Henning, South Australian Parliamentary Debates 1880, p. 427.

72 Robinson, *Equity and systems of title to land by registration*, p.50.

context. It raises the questions as to what intention can be read from the exact wording of the statement, what follows from the reactions of the other parliamentarians to it and what can be said about the probative weight of the debate in general. All these aspects are crucial in order to judge the importance and the evidential significance of Henning's statement, which the author regards as central for the drafting of the Real Property Act 1858 (SA). As noted the accuracy of the statement that Hübbe was the main founder of the South Australian Real Property Act is a basic presupposition for the hypothesis that this system is really an adoption of Hanseatic law.

As regards the veracity of Henning's statement, the author submits that his statement in parliament in 1880 is particularly persuasive because of the approving reaction of the other Members of Parliament present. No one stood up and accused Henning of misinterpreting the history of the Real Property Act. None of the other speakers even voiced any doubts about the description of Hübbe's contribution. There were not even any interruptive remarks. The converse is the case. The two other speakers that followed Henning confirmed his view that Torrens' work had been merely of a political character. Mr. Haines said:

> "He believed Sir R.R. Torrens had done good work in introducing the Real Property Act, but he also believed that every member of the house at that time did an equally good work in supporting the Act."[73]

Mr. Bright then concluded the debate on Torrens' pension saying that:

> "He hoped, after the expression of opinion that had fallen from all sides of the House, that the Government would consent to withdraw the resolution, and instead place a sum of money to the Estimates"[74].

---

73 Haines, South Australian Parliamentary Debates 1880, p. 427.

74 Bright, South Australian Parliamentary Debates 1880, p. 428.

To evaluate these reactions of the politicians it has to be taken into consideration that a number of the parliamentarians present had already been members of the parliament when the Real Property Act had been passed 22 years before in 1857. The apparent agreement with Henning's statement can therefore not be explained through a lack of knowledge or indifference in 1880. In particular Kriechauff[75], Hardy[76], West-Erskine[77] and Hare[78] referred in their speeches to their active part in the passing of the Act and their knowledge of the circumstances of the bill's origins in 1857/58. It is likely that these politicians who partly favoured Torrens' petitions for a pension would have objected to a misrepresentation of Hübbe's contribution at the expense of R.R.Torrens.

It appears that the confirming reaction of the colleagues in parliament had been anticipated by Mr. Henning. This follows from his introductory remarks in connection to his statement. Henning had said that:

> "He would believe that all would agree with him that it was perfectly well known that... Dr. Hübbe provided the ideas, the brains and the work of the measure"

In order to believe that everyone would agree with him and that the stated facts were "perfectly well known", Henning had to be quite sure of what he was about to say. He did not expect any objections when he gave Hübbe full credit for drafting the Real Property Act 1858 (SA). There seems to be no other explanation for this other than that Henning started from the assumption that South Australian members of parliament in 1880 knew that Hübbe and not Torrens was the founder of the Real Property Act 1858 (SA). The confirming statements of the following speaker appear to prove Henning correct in this assumption.

If one takes the course of this debate into consideration, it is not surprising that the outcome was that Torrens was not granted an

---

75 Kriechauff, South Australian Parliamentary Debates 1880, pp.425 f.
76 Hardy, Parliamenatary Debates 1880, p. 421.
77 West-Erskine, South Australian Parliamentary Debates 1880, p.422.
78 Hare, South Australian Parliamentary Debates 1880, p. 424.

additional pension by the South Australian Parliament.[79] It appears that the parliamentarians were convinced or had become convinced during the debate that Hübbe and not Torrens did the work of drafting the Bill and that, even though Torrens' political devotion to the reform had to be honoured, it did not justify an additional pension amounting to 825 pounds.

2. 2. 2. The debate of 17 September 1884: Remuneration of Dr. Ulrich Hübbe for the drafting of the Real Property Act 1858 (SA).

Four years after Torrens' petition in parliament, Hübbe submitted a petition of his own.[80] On 17 September 1884 the petition was presented by Mr. Hawker, who asked on Hübbe's behalf for some kind of monetary recognition for the services rendered in connection with the Real Property Act 1858 (SA). Among the speakers who participated in the debate were also a number of politicians who had joined the debate in 1880 regarding Torrens' petition, namely MP's Hardy[81], Henning[82], Furner[83] and Kriechauff.[84]

Despite the fact that the 1884 debate was precisely about Hübbe's contribution to the Real Property Act 1858 (SA), the statements describing Hübbe's work were of a more general kind than in 1880.[85] The statements given in the speeches did not specify what Hübbe had actually done in the process of drafting the Real Property Act 1858 (SA). Hübbe's petition would have been an excellent opportunity to do so. However, the statements were limited to acknowledging Hübbe's role in general. At first glance, it is open to question what role Hübbe eventually had played in relation to others, such as Sir R.R. Torrens. Yet the speeches given in the debate become clearer when they are seen in the light of the statements of Dr. Ulrich Hübbe which he had produced in connection with the petition. In these statements Hübbe had produced a

---

79 He received a lump sum however.
80 South Australian Parliamentary Debates, 17 September 1884, pp. 1024 f.
81 Hardy, South Australian Parliamentary Debates 1884, p.1024.
82 Henning, South Australian Parliamentary Debates 1884, p.1025.
83 Furner, South Australian Parliamentary Debates 1884, p.1025.
84 Krichauff, South Australian Parliamentary Debates 1884, p.1025.
85 South Australian Parliamentary Debates, 17 September 1884, pp. 1024 f.

written account of the history of the Real Property Act 1858 (SA) and his share in it. It is likely that the politicians had read these statements which supported the petition before it was discussed. The 1884 debate on Hübbe's petition can therefore not be analysed independently of Hübbe's statements attached to it, a part that Robinson appears to miss in his account.[86]

Hübbe's account is found in a folder of the former chief secretary's office (1884, No.2230)[87], in the Proceedings of the Royal Geographical Society for the 1930-31 Session[88] and in a summary of notes provided by Mrs. Isabella May, née Hübbe of 1932.[89] In his statements Hübbe gave at first a general account of how he became acquainted with Sir R.R. Torrens, then described how they worked together and what he did in connection with the drafting of the Real Property Act 1858 (SA). According to this account, Hübbe's activity in the drafting process can be divided up in three stages:

In the first phase Hübbe convinced Torrens of the superiority of the system implemented in Hanseatic cities.[90] He supported his argument by a comparative overview of other continental systems like the French system.[91] Hübbe stayed at Torrens' house for several days and by the end of these discussions Torrens dropped the idea of applying the shipping laws to land and decided to establish a form of a continental system.[92] In the second phase Torrens sought Hübbe's detailed explanation of the Hanseatic system. Hübbe translated certificates of titles which were the crux of the register books in Hamburg.[93] From this point he explained the basic principles and institutions of the system of his hometown. On the basis of these notes Torrens tried to remodel his first draft. In the third phase Hübbe redrafted the bill since Torrens had not succeeded in

---

86 Robinson, *Equity and systems of title to land by registration*, p. 50 f on one hand and p. 56 ff on the other.

87 Official Statement accepted by Secretary Office, 1884, SA-Archives, D 5257 (T).

88 32 Royal Geographical Society Proceedings (SA) 109-112.

89 South Australian Archives, No: D 2558 (T).

90 Official Statement 1884, SA-Archives, D 5257 (T), p.3.

91 32 Royal Geographical Society Proceedings (SA) 111.

92 32 Royal Geographical Society Proceedings (SA) 112.

93 Official Statement 1884, SA-Archives, D 5257 (T), p.3 f.

incorporating the principles sufficiently. He worked many days on revising the draft.[94] The product of that work was the final version of the bill which was introduced into parliament.[95]

In order to examine Hübbe's statements it has to be borne in mind that these statements were connected to the debate on his petition for a pension. Considering his account in connection with the 1884 petition, however, the speeches often appear to make reference to it. A few examples are illustrative of this:

> Mr. Hawker said:
> "No doubt Dr. Hübbe did assist the late Sir R.R. Torrens to work out the details of the measure, and sent to Germany for information as to the certificates of title from that Country"[96]
>
> Mr. Hardy said:
> "The late Sir R.R. Torrens was staying with him at the time he started the ideas of the Real Property Act, and he knew that the information which Dr. Hübbe had obtained from the continent was of great service"[97]
>
> Mr. Coglin said:
> "If it had not been for Dr. Hübbe's assistance Sir R.R. Torrens would not have been able to frame this act as perfectly as he did"[98]
>
> Mr. Hawker at the end of the debate again:
> "The late Sir R.R. Torrens found great difficulty in getting help to perfect his measure, and it was due to a

---

94 Notes by I. May, nee Hübbe, 1932: SA-Archives D 2558 (T), p.3.
95 32 Royal Geographical Society Proceedings (SA) 112.
96 Hawker, South Australian Parliamentary Debates 1884, p. 1024.
97 Hardy, South Australian Parliamentary Debates 1884, p. 1024.
98 Coglin, South Australian Parliamentary Debates 1884, p. 1025.

> great extent to the labours of Dr. Hübbe that the Act was framed and introduced to Parliament."[99]

In light of Hübbe's account these statements seem to support his view of the past. None of the speakers questioned the accuracy of Hübbe's account which he gave to justify the petition. Rather the speeches gave Hübbe great credit for his work and related often to aspects (certificates from Germany; translations; collaboration with Torrens) that corresponded with Hübbe's account. Since Hübbe's vindication of his petition and the debate on it have to be considered together, it follows, at least, that the parliament did not want to contradict Hübbe's account. If the 1884 debate is interpreted without a view to Hübbe's vindication attached to it, inappropriate inferences may arise. Stein and Stone[100] for instance say that Hübbe's legal advice during the drafting of the Act must have been limited because the outcome of the 1884 debate was that he was paid expressly for translation work. Declaring Hübbe's work as 'translation work', however, appears in a different light when one takes a closer look at the relevant part of his statement of 1884 :

> "I translated the German system as used in Hanseatic cities, of which Hamburg was one. [...] Mr. Torrens adopted the system and I drafted the Bill finally on those lines..."[101]

In this context it may be also said that if Hübbe's account were accurate, i.e. that the Real Property Act 1858 (SA) was an adoption of Hanseatic law, then it is not likely that he and/or his contemporaries regarded him as the inventor of the system. In this case the name 'translator of the system' would have been more correct, even though it goes without saying that drafting the Bill was not merely a matter of simple translation. It is noteworthy that it is reported that there had been an inscription on Hübbe's grave which said: "Der geistige Vater des Real Property Acts" (The spiritual father of the Real Property Act).[102]

---

99 Hawker, South Australian Parliamentary Debates 1884, p. 1026.
100 Stein and Stone, *Torrens Title* (Butterworth, Sydney 1991), p.22.
101 32 Royal Geographical Society Proceedings (SA), 112
102 Dr. Ian Harmsdorf in: *The Advertiser*, 13 April 1992.

In order to interpret the 1884 debate as regards Hübbe's contribution to the drafting of the Real Property Act, the 1880 debate also has to be taken into consideration. It seems that the 1884 debate confirms the view which gained acceptance in the 1880 debate, i.e. that Hübbe and not Torrens was responsible for the drafting of the system. It seems that during the four years between the debates no other view had been expressed. Hence it has to be taken into consideration that all the draftsmen who possibly took part were still alive at this time and could have given their accounts of the story. Even though Torrens had moved to England, Hübbe, Andrews, Forster and Hanson were still present in Adelaide.

However, an important difference between the 1880 and the 1884 debate has to be pointed out. In 1880 the politicians argued about Torrens' petition without asking for Hübbe's view. In 1884, on the other hand, Hübbe had provided written statements which could then form the basis for the discussion. These written statements supplemented the aspects already discussed in 1880 by the assertion that Hübbe modelled the Real Property Act 1858 (SA) on the Hanseatic land law. For the overall examination of the origins of the Torrens System this aspect is more important than the question of who was the actual draftsman. It is true that these questions are linked, but the scope of this analysis is not a matter of personal recognition, but of establishing the actual legal source of the system.

According to the analysis of the 1880 and the 1884 debates, it seems that both confirm Hübbe's later claim to having drafted the Real Property Act 1858 (SA) in the form of an adoption of Hanseatic law. The question does arise, however, as to what extent probative weight can be reasonably attributed to such political debates. Admittedly the weight of statements in political debates is usually limited, since the character of such debates is based quite often on political goals instead of a quest for truth. It is submitted, however, that the two controversial debates on basically the same subject would not have allowed much misrepresentation of the facts. In both debates there had been opponents

who were against any form of remuneration for the drafting of the Real Property Act and who would not have hesitated to produce evidence against Hübbe. Equally, it cannot be ignored that persons who had been involved in the drafting process were still alive and present in Adelaide at the respective time. Thus, although it cannot be established precisely how much evidential significance should be attached to the debates, they form the primary evidential record being an officially documented controversy of Torrens' and Hübbe's contemporaries on the question of the origins of the Real Property Act 1858 (SA).

2. 2. 3. Letter from Mr. Anthony Foster to Miss Annie Ridley, 15th May 1892.[103]

An important aspect in the interpretation of the 1880 and 1884 debates is the reaction of the contemporaries to the statements and speeches given. A contemporary of Torrens and Hübbe, who knew a lot about the activities of the law reform process, was Anthony Forster. In 1857 he had been an ardent law reformer. He advocated such reform in his capacity as the Editor of the South Australian Register and also fought for it as a member of the Legislative Council.[104] His collaboration with Torrens is proved by letters between the two.[105]

Even though it is not known what Forster's immediate reactions were to the 1880 and 1884 debates, a letter that Forster had written to his niece Annie Ridley on 15 May 1892 has been preserved.[106] In this private letter, eight years after the debate on Hübbe's petition, Forster described his view of the history of the Real Property Act 1858 (SA). The relevant passage reads as follows:

> "I may however say, at the close of a long life, that the Real Property Act originated in a series of leading articles that I wrote in the South Australian Register

---

103 Forster to Ridley, 15 May 1892, South Australian Archives, A 792.
104 Stein and Stone, p. 24.
105 Letter Summary Record: Anthony Forster, South Australian Library, PRG 1043/8.
106 Forster to Ridley, 15 May 1892, South Australian Archives, A 792.

> calling attention to the great and unnecessary expense of the transfer of land under the system then prevailing. I pointed out the absurd and apparently unfair practice of charging heavy fees for the retrospective investigation of title in every separate transaction, although the same title had been investigated a dozen of times before. Mr. Torrens was attracted by the articles and he received the idea of getting rid of deeds altogether and substituting for them an indefeasible certificate of title which was to be registered in the Real Property Office, a counterpart being issued to the transferee.
>
> But as all the lawyers of the colony were hostile to the proposed new measure, it never could have been brought to a final consummation but for the efficient help of a German lawyer, Dr. Hübbe who has unfortunately had too little recognition in connection with it. The provisions of the bill were settled by Mr. Torrens and a few friends and put into proper form by Dr. Hübbe and passed triumphantly through the local legislature, notwithstanding fierce and uncompromising opposition of the lawyers. Mr. Torrens took charge of it in the House of Assembly and I in the Legislative Council."

Even though this letter is written in very concise language, the part referring to Hübbe needs to be analysed further. It is not enough just to summarize it, as did Stein and Stone,[107] by saying that Forster admitted in the letter that Hübbe played an important part in originating the Act. Nor does Robinson[108] give the letter enough credit when he merely contrasts the view given in the letter with the story promulgated by Torrens himself. The author submits that the letter has considerably

---

107 Stein and Stone, p. 22.

108 Robinson, *Equity and systems of title to land by registration*, p. 45.

greater evidential weight than other sources and warrants therefore a closer examination.

According to Forster's account, the story of the Real Property Act 1858 (SA) can be divided chiefly into three sections. The first section was the initiation of the whole law reform by Forster himself by publishing articles calling for land law reform. In the second section Torrens took over the matter and tried with the help of friends to settle provisions for a draft bill. Then Hübbe joined Torrens in the third section and was responsible for the "final consummation" of the draft, and it was he who "put [the provisions] into proper form". It is obvious that Forster's account contained in the letter of 1892 corresponds closely with the account given by Hübbe in his statement with regard to his petition to parliament in 1884. Yet Hübbe had explained additionally why he had to redraft the Bill. According to Hübbe, Torrens had not succeeded sufficiently in incorporating the principles explained by Hübbe.[109] Hübbe and Forster also agree that the draft as revised by Hübbe became the final version of the Bill which was eventually introduced into parliament.[110] In this respect Forster's letter obviously confirms Hübbe's account.

It cannot be overlooked though that Forster's letter also incorporated an evaluation of Hübbe's work in drafting the legislation. When Forster said that the bill "never could have been brought to a final consummation but for the efficient help of a German lawyer, Dr. Hübbe", it meant more than acknowledging Hübbe as a mere legal adviser amongst others. Rather Forster's expression qualified Hübbe's work as indispensable in the creation of the Torrens' Act. In this evaluation Forster evidently agrees with what MP Henning said in the debate on Torrens' petition twelve years earlier in 1880 insofar as Henning too thought that Hübbe had been the crucial draftsman because:

---

109 32 Royal Geographical Society Proceedings (SA) 112.

110 32 Royal Geographical Society Proceedings (SA) 112.

> "...Dr. Hübbe provided the ideas, the brains and the work of the measure, and Sir R.R. Torrens merely fought the battle of the Bill in the House." [111]

Thus, Forster's letter confirms views given in the 1880 debate and in Hübbe's statements produced for the 1884 debate. It is likely that Forster knew of the outcome of the debates. He was a member of the upper echelons of Adelaide society and interested in all public affairs, especially those connected with the land law reform. After all Adelaide was still a rather small and close community at that time.[112] Forster might also have been referring to the outcome of those debates when he said that "Dr. Hübbe has unfortunately had too little recognition in connection with it [the Real Property Act]".

Despite the fact that Forster's letter underlines the prior analysis of the debates in 1880 and 1884, it has to be pointed that the sources are quite different. As distinct from the parliamentarians of 1880 and 1884 Forster had been a part of the inner circle in which Torrens discussed details of the intended legislation.[113] Undoubtedly he was one of the contemporary Adelaideans who had most inside knowledge of the drafting work. Another aspect that makes Forster's letter special is that unlike political debates and newspaper articles it cannot be accused of having a political goal or personal interest. It is true that one might suggest that Hübbe's statements were of a biased character as they purported to give him a monetary recognition. Forster in his letter to his niece, however, would have had no reason whatsoever to make Hübbe look better than he really was. On the contrary it made no sense to take away credit from Torrens. Forster had been a very close ally of Torrens during the reform debate in 1857. Strategically they had shared the political battle over the introduction of the Act. Torrens took care of it in parliament and promulgated it in his election campaign. Forster, on the other hand,

---

111 Henning, South Australian Parliamentary Debates 1884, p.1025; see also above.

112 In 1872 the City of Adelaide still had less than 30.000 inhabitants: See Harmsdorf, *Germans in the South Australian Parliament, 1857-1901* (PhD-thesis, Adelaide 1959), appendix.

113 Whalan, "The origins of the Torrens System, and its introduction into New Zealand" in: *The New Zealand Torrens System Centennial Essays* (Butterworth

fought for it in the Legislative Council[114] and noted it in his newspaper "The South Australian Register".[115] This collaboration led to a close friendship,[116] confirmed by several letters between the two which also touched on personal matters.[117] Hence there was no reason for Forster to take away credit from Torrens. Indeed Forster, prior to his letter to his niece, had always given Torrens full credit for the creation of the Act.[118] He had even hushed up his own major role in the initiation of the reform debate in 1856/1857. Geyer argues that Forster in his book even deliberately misrepresented the order of the events in order to give Torrens all the credit for the reform.[119]

Nor can it be argued that Forster tried to do Hübbe a favour. First, the letter to his niece was strictly personal and was evidently not meant to be made public. Secondly, Hübbe died at Mt. Barker in February 1892,[120] three months before the letter in question, so that he would not have been able to enjoy the late acknowledgement. The author submits therefore that the letter from Forster to Ridley in May 1892 is of great evidential weight, being a private letter which reflects the memories of a person who has been very much involved personally in the land law reform, knowing Torrens as well as Hübbe.

2. 2. 4. "Notable South Australians" by George Loyau (1885)

A further source distinct from those previously discussed is the account of Dr. Ulrich Hübbe given by George Loyau in his book: "Notable South Australians", published in 1885. [121] Whereas neither the statements in the 1880 and/or the 1884 debate, nor Forster's letter to his niece purported to

---

Wellington 1971), p. 7 speaks of 'committee' quoting from a letter from Torrens to Forster, 14 November (SA-Archives No. 1055/6).

114 Stein and Stone, p. 24.

115 Pike, "Introduction of The Real Property Act in South Australia", *The Adelaide Law Review*, 1960-1962, Vol. 1, p. 178.

116 Stein and Stone, p. 22; Geyer, *Robert Richard Torrens and the Real Property Act: The Creation of a Myth*, Adelaide, 1991, p. 30.

117 Torrens to Forster, SA- Archives: 2 April 1858 (No 1055/7); 16 May 1858 (no 1055/8); 2 March 1865 (No. 1055/9).

118 Forster, *South Australia: Its Progress and Properity* (Sampson Low, Marsden and Co., London 1866), p.219 ff.

119 Geyer, *The Creation of a Myth,* p. 30.

120 Brauer, "Dr. Hübbe", The Australian Lutheran Almanac, 1934, p. 48 f.

121 Loyau, *Notable South Australians* (Adelaide, Carey & Page) 1885, p. 156 f.

give an historical account for the public, that was indeed Loyau's intention. Loyau's book was independent of any special occasion. It is a collection of brief biographies of outstanding South Australians from the beginnings of the colony. The book is the successor of a prior publication of Loyau called "Representative Men of South Australia"[122] from 1883. Both books purport to give objective historical accounts, and therefore claim impartiality. Loyau's historical account on Hübbe from 1885 is relevant for this analysis because it provides, apart from personal data, a detailed description of the drafting of the Real Property Act 1858 (SA). The relevant part of the work is as follows:

> "Dr. Ulrich Hübbe, who has rendered great services to this colony in connection with the Real Property Act is a native of Hamburg.... Though the working of the Real Property Act is now universally known, few of those most benefited thereby have the slightest idea of the prominent part which Dr. Hübbe played in its construction. He it was who explained to Sir R. R. Torrens the form of certificates of title and encumbrances in force in the Hanseatic towns of his native land; and Sir Robert Torrens was so much pleased with the simple way in which the charges were detailed that, with Dr. Hübbe's assistance, he transferred the idea as far as was practicable into the Bill. From this source in particular was embodied the principle that mortgages should not change the freehold property, but they should simply be charges on the property in priority one over the other. The result of the disclosure of these facts led to the re-drafting of the Bill by Mr. R. B. Andrews; but on its being submitted to Dr. Hübbe, he expressed his disapproval of it, chiefly on the grounds that it did not contain an efficient repeal of the old system, the absence of stringent provisions for bringing equitable estates and interests under the Act, and the necessity that existed

---

122 Loyau, *Representative Men of South Australia* (Howell, Adelaide 1883).

> for providing more definitely that no estate or interest on such lands should pass at all by deed or any documentary evidence, but exclusively by registration of each special transaction in the public books of the colony. He thereupon drew the very comprehensive repeal clause printed in the Act, and he subsequently spent several days in remodelling the draft. He submitted his alterations to Sir R. R. Torrens, and the draft Bill thus revised was placed before parliament... A recent government voted him a sum of money, but of so small an amount that it cannot be said he has been compensated for his services in connection with the R.P.A."[123]

Loyau, as a contemporary, provides a very detailed description of the drafting of the Real Property Act 1858 (SA). Nevertheless this account has been largely neglected by other authors. Pike[124], Whalan[125] and surprisingly also Robinson[126], who did most of the work on Hübbe, do not even mention Loyau. Stein and Stone[127] recite from the source, but do not interpret or evaluate it. Even though the form of a short biography differentiates Loyau from other sources it still falls into the category of statements of contemporaries. It cannot be treated like a biography which was written a hundred years later. In 1885 Loyau was a contemporary Adelaidean of Hübbe, Andews and Forster. It needs therefore to be treated like any other source of that period. In order to make up for this gap in analysis, Loyau's account needs to be interpreted and put into context.

Evidently Loyau's account gives Hübbe the most credit for the drafting of the Act. This corresponds with the statements in the 1880 and 1884 debates and Forster's letter to his niece. The congruence between these

---

123 Loyau, *Notable South Australians* (Carey & Page, Adelaide 1885), p. 156 f.

124 Pike, "Introduction of The Real Property Act in South Australia", *The Adelaide Law Review*, 1960-1962, Vol. 1, pp. 169-189.

125 Whalan, *The New Zealand Torrens System Centennial Essays*, (Butterworth Wellington 1971), pp. 1-32.

126 Robinson, *Equity and systems of title to land by registration*, pp. 1-147.

127 Stein and Stone, p. 21.

sources might be partly explained by the possibility that they had been related to each other. This ignores, however, the fact that in some aspects the sources differ considerably. In any case Loyau's description is more detailed. According to Loyau, Hübbe was the one who explained the system to Torrens and he was the one who was responsible for the final version of the Act which eventually became law: "he (Hübbe) subsequently spent several days in remodelling the draft [...] and the draft Bill thus revised was placed before parliament." Loyau's account also confirms therefore Hübbe's statements made in connection with his petition in 1884[128], a year before Loyau's publication.[129]

Before the accuracy and credibility of Loyau's account is further discussed however, one should note a peculiarity in this source which distinguishes it from all other sources: the fact that Loyau mentions the lawyer Richard Bullock Andrews for the first time in connection with the actual drafting of the Act. It had been known that Torrens had befriended R. B. Andrews and supported him in his election campaign. Only because of Torrens did Andrews win the by-election.[130] Nevertheless, until Loyau's biographical account on Hübbe, Andrews' part in the drafting process had never been mentioned. It is noticeable that neither the 1880/1884 debates nor Hübbe's statements mentioned Andrews' contribution. Forster's private letter to Ridley had mentioned that Torrens with the help of "friends" had tried to settle the provision of the first draft. It is true that this could have been a reference to Andrews' help but his name was nonetheless not mentioned by Forster either. The importance of the mention of Andrews' participation in the drafting has not yet been sufficiently recognized by other authors. Besides the fact that some authors have not even mentioned Loyau's account at all, those authors who do discuss it do not appear to realize its true importance.[131]

The author submits that the participation of Andrews in the drafting process as described by Loyau would explain partly why it was so easy

---

128 32 Royal Geographical Society Proceedings (SA) 109-112; Official Statement 1884, SA-Archives, D 5257 (T).

129 See Chapter 2 (2.2.2), pp. 19 ff.

130 Pike, "Introduction of The Real Property Act in South Australia", *The Adelaide Law Review*, 1960-1962, Vol. 1, p. 179.

for Torrens to claim the sole authorship without risking much objection. The fact that Torrens had, for a long time, never been seriously challenged in his claim is important because it was seemingly a major reason why Torrens' account was later only questioned by very few historians. Given that Torrens really divided the drafting work between Andrews and Hübbe, as Loyau described it, it is likely that neither Hübbe nor Andrews really thought that the final draft was their sole product. Andrews would have just seen himself as a mere tool of Torrens. According to Loyau's account, Andrews had little say in the modelling of the system itself. He was only charged by Torrens to transfer the system into the provisions of a draft which corresponded with Torrens' directions. At the latest when Hübbe considerably changed the draft before it became law Andrews must have thought that he could not claim to be the author of the first draft.

Hübbe, on the other hand, even though he was the one who explained the system to Torrens, would not have regarded himself as the one who actually produced the very first draft. He could not even have said that he created the system. After all, in the first place, he merely translated and explained the Hanseatic land law. According to Hübbe's statement he might not even have been aware that Andrews helped Torrens to draft the Bill. Thus, from Hübbe's point of view it appeared as if Torrens (maybe with the help of friends) had drafted the first draft himself on the basis of Hübbe's description of the Hanseatic law. It was not the same thing to explain a system in detail as to draft a proper Bill. Even the fact that Hübbe, according to Loyau, "subsequently spent several days in remodelling the draft" would not have changed this perspective.[132]

It therefore seems important for the overall interpretation of the facts to establish whether Loyau's account regarding the division of work between Hübbe, Torrens and Andrews is likely to be accurate or not. It is true that the large consistency of Loyau's account with the other sources suggests that the account is likely to be accurate. It is still necessary to evaluate its reliability, however, because no other source describes the

---

131 See Stein and Stone, p. 21.

132 Loyau, *Notable South Australians,* p. 157.

collaboration between these persons in so much detail. That there was a general probability that Andrews helped Torrens and Hübbe to draft the first bill of the Real Property Act cannot really be doubted. Whereas Andrews had first opposed the land law reform, Torrens had won his support by the time when he helped him to win the by-elections in June 1857.[133] In a speech at Andrews' electorate in June 1857 Torrens had asked the people to support Andrews because he "had no lawyer to assist him" and he "sought for some time for a sensible man, who would have courage enough to throw off the prejudice of his craft"[134]. This alliance started and continued Andrews' career. Andrews had come to Australia only in 1852 and worked as a criminal lawyer with rather little success.[135] In the short-lived Torrens ministry Andrews was appointed as Attorney General and in 1865 he became a Queen's Counsel.[136] In 1870 he was appointed Crown Solicitor and Public Prosecutor.

Despite the fact that there is a high probability that Andrews was considerably involved in the drafting process, it is not self-evident that the work was divided between him and Hübbe as Loyau described it. The author submits though that there are two aspects that speak in favour of the reliability of Loyau's account from 1885. First, Loyau's account was published in a collection of biographies which are noteworthy for their attempt to report with high accuracy. Secondly, Loyau as a contemporary Adelaidean had direct access to first hand information because he was able to question all people involved in the matter while they were still alive. As regards the first aspect, the account of an independent historian can not be categorized in the same way as a possibly biased parliamentary debate, an occasional newspaper article or even a private letter. In the introduction to his book "Notable South Australians", Loyau points to the research that preceded the publication and the sources on which it was based. He thanks the newspapers, especially the "South Australian Register" and the "Advertiser", for allowing him access to their files. Besides that Loyau also makes clear that he drew on oral

---

133 The Cyclopedia of South Australia, p. 244.

134 *The South Australian Register*, 1 and 2 June 1857.

135 Australian Dictionary of Biography, Vol. 3., ed. Nairn, Serle, Ward (Melbourne Press 1969), p. 35.

136 Australian Dictionary of Biography, Vol. 3., p. 36.

interviews. He describes himself as indebted to numerous "authorities on matters relative to the early days".[137] In evaluating Loyau's accuracy, a second aspect, the fact that Loyau was a contemporary of Torrens, Hübbe, Andrews and Forster, should not be underestimated. Unlike other authors, Loyau had the chance to interview in person people allegedly involved in the drafting process. Moreover it must be remembered that at the time of Loyau's account in 1885 the history of the drafting of the Real Property Act 1858 (SA) was in particular stirred up by relatively recent debates in parliament. In 1880 it had been discussed what contribution Torrens made to the drafting and in 1884, just a year before Loyau's publication, the parliamentarians argued about Hübbe's part in the creation of the system. Hence Loyau's book was published at a time in which the matter was still likely to have been under discussion, so that Loyau exposed himself to the criticism of persons who were acquainted with the matter.

To sum up it can be concluded that Loyau's account on Hübbe in his book "Notable South Australians" from 1885 stands out for several reasons. It is an account of a contemporary historian working in Adelaide who tried to base his statements on an impartial inquiry. The account confirms other sources in the view that Hübbe played the determinative role in the drafting of the Act. The importance of the account lies, however, in its description of how Torrens divided the drafting process between Hübbe and Andrews. According to this account, Torrens functioned as a kind of conduit. Hübbe explained the land registration system to Torrens who subsequently charged Andrews to draft a bill which implemented that system. Subsequently Torrens made Hübbe check this draft and re-draft it where necessary.

2. 2. 5. German Newspapers in the relevant time period

Regarding the origins of the Real Property Act 1858 (SA) contemporary German newspapers have been neglected until now as a source of research. Unfortunately the editions preserved in the South Australian Archives start only four years after the enactment of the Torrens System

---

137 Loyau, *Notable South Australians*, preface.

in 1862. Nevertheless the author has found three articles that refer directly to the German origins of the Real Property Act, respectively from 1862, 1882 and 1892. Whilst the 1880/1884 debates, Forster's letter to his niece and Loyau's account point to Hübbe's indispensable contribution to the drafting of the statute, the contemporary reports in these newspaper articles show that the Germans in South Australia were convinced that the Real Property Act 1858 (SA) implemented a German system and that this was basically due to the work of Dr. Ulrich Hübbe. Hence the German reports are important as they supplement the views given in the debates, Forster's letter and Loyau's account with an important point. They do not merely confirm the above statements that Hübbe did most of the work in the drafting process. They additionally characterize his work on the draft as an attempt to transplant the land registration system of Hübbe's German hometown.

The earliest preserved report can be found in the "Adelaider Deutsche Zeitung" (Adelaidean German Newspaper) from 1862.[138] In the edition of 7 November of that year the paper reports a celebration given by a German community in honour of Torrens at Tanunda (a German-settled town in the Barossa Valley north-east of Adelaide). The celebration had been organised by the German community on the occasion of Torrens' imminent departure for England.[139] Besides Torrens, Forster, Barrow, Hall, Milne, Hart and MacEllister were also invited and brought in a festive vehicle from Adelaide to Tanunda. The "Adelaider Deutsche Zeitung" reports[140]:

> "Nahe dem Tanunda-Hotel redete Herr Pastor Mücke die Versammlung an und sagte etwa Folgendes: 'Deutsche Brüder.- Ihr habt einen Ehrenmann in eure Mitte geladen, lasset uns ihn hier willkommen! Doch nicht mit bloßen Worten. Herr Torrens hat eine Gesetzesreform ins Leben gerufen, welche einen neuen Grundstein der Kolonie legte. Diese Reform ist ein

138 South Australian Archives, Microfiche.
139 Australian Dictionary of Biography, Vol. 6, (R-Z), p. 292.
140 *Adelaider Deutsche Zeitung*, 7. November 1862.

> deutsches Kind, das wir wohl kennen....Wie ein britischer Mann ein deutsches Kind einführte; lasset es uns geloben, alles Große der britischen Nation anzunehmen....'
> "...Der Redner (Herr Pastor Mücke) sprach über den Wert des Real Property Actes, der Neigung der Deutschen für diese eigentlich vaterländischen Maßregel und drückte dann dem Mr. Torrens die Anhänglichkeit aller Kolonisten speziell der Deutschen aus... ."
>
> Translation of the author:
> "Close to the Tanunda Hotel Pastor Mücke talked to the assembly and said something to the effect: "German Brothers. You have invited an honourable man in your midst, let us welcome him here. But not just with words. Mr. Torrens has called a law reform into existence which has laid a new foundation for this colony. This reform is a German child that we know well... like a British man introduced a German child let us all solemnly promise to adopt all great things of the British Nation."
> "The speaker (Mr. Pastor Mücke) then talked about the value of the Real Property Act, the inclination of the Germans for this actual German measure and then assured Mr. Torrens the fidelity of all the colony's settlers, especially of the Germans..."

Pastor Mücke, to which this German newspaper report refers, held a Doctor of Philosophy from Jena (Thuringia). In 1850 he went to Tanunda and became a Lutheran pastor.[141] Mücke was very influential in the German community, especially in the 1860s.[142] The author submits that when Pastor Mücke addressed Torrens, Forster and the others in

---

141 Geyer, pamphlet on the Germans in South Australia, Migration Museum, Adelaide 1992; Harmsdorf, *Germans in the South Australian Parliament*, 1857-1901 (PhD-thesis, Adelaide 1959), p. 29.

142 Harmsdorf, *Germans in the South Australian Parliament*, p. 12.

public he would not have said something in his welcoming speech which would have been expected to be debated by any of the present guests. Moreover, the whole tenor of the speech was to express Mücke's devotion to Torrens as the guest of honour. The interpretation of the speech therefore cannot overlook its character as a welcome speech. Mücke called the Real Property Act 1858 (SA) a 'German child introduced by Torrens'. This cannot be equated with merely pointing out that German law resembled the South Australian system. Mücke rather stated that the South Australian land registration system was an adoption of German law. According to this the system was indeed not a South Australian first,[143] i.e. a South Australian child. Mücke emphasises this when he contrasts the introduction of the Real Property Act 1858 (SA) with the adoption of British things by the German colonists: "As a British man introduced a German child let us ... adopt all great things of the British Nation."

Bearing in mind the results of the analysis of the parliamentary debates, Forster's letter to his niece and Loyau's account, it appears that Mücke's reference to an adoption of German law could have only possibly made sense if the German lawyer Dr. Hübbe had really played a prominent part in the drafting of the Act. Whereas the sources from 1880 onwards partly arouse the suspicion of being biased because they turned up in connection with or in the wake of petitions for pensions, Mücke's speech in 1862 cannot be related to such personal claims for recognition. Indeed Mücke did not mention Hübbe at all.

The source, however, stands out for two further reasons. The first is that unlike all the other sources, Mücke's speech was not only held in the presence of Torrens, it was also addressed to Torrens as the guest of honour. According to its character as a welcome speech it is unlikely that Mücke would have said something that Torrens would have not agreed with. Secondly, Mücke's speech is seemingly the earliest preserved source which clearly refers to the German origins of the Torrens system. In 1862, only four years after the enactment of the system, undoubtedly

---

[143] Keeley, *If we're so great, why aren't we better- a critical look at six South Australian first*, Adelaide 1986.

the memory of the colonists was fresher than some twenty years later in 1880 or 1884. Nevertheless the possible interpretation of Mücke's speech is limited because of its broad terms. After all, Mücke's remark that the Torrens System was a German child could have been a mere reference to the fact that there had been similar systems in Germany before the Torrens System was introduced in South Australia. Such an interpretation would ignore, however, that Mücke as the editor of the then "Australische Zeitung" (Australian Newspaper), almost twenty years later explained what he had meant when he was talking about a German child. In 1882, the "Australische Zeitung", in a series of articles headed "Die Richter und der Real Property Act" (The judges and the Real Property Act), reported on the emerging discussion on the need for further reform of Australian land law. On 28 March 1882 Mücke and his co-editor of the "Australische Zeitung", Basedow, commented on an article of a certain Mr. Opie that had appeared in the South Australian Register.[144]:

> "Wie schwer es aber für den einsichtsvollen Briten ist, sich von solchen Vorurteilen ganz frei zu machen, zeigt Herr Opie selbst, indem er fortfährt: 'Frankreich, Deutschland und einige andere Länder haben ähnliche Systeme als unser Real Property Act, jedoch mit dem Vorzuge, daß sie Beamten besitzen, welche das Gesetz so verwalten wie sie es geschrieben finden.' Hier kann Herr Opie sich nicht überwinden einzugestehen, dass der Vater des Real Property Actes in Südaustralien es aus Deutschland im Ganzem einführte und nur in unbedeutenden Einzelheiten es veränderte, wahrlich nicht zu seinem Vorteile, und gerade in diese Veränderungen liegt ein wichtiger Grund, dass dies Real Property Verfahren sich immer noch nicht völlig eingebürgert hat, so dass es jeder Richter vermag, daran rumzuzupfen, zu mäkeln und zu beschneiden."[145]

---

144 *The South Australian Register*, 2 March 1882.

145 *Australische Zeitung*, 28 March 1882.

Mr. Opie himself provided a translation of this German article in a pamphlet in which he compiled relevant sources on the discussions on law reform in 1882:[146]

> "How difficult it is even for this intelligent Englishman to free himself entirely from such prejudices, is shown by Mr. Opie himself, when he continues: 'France, Germany and some other countries have similar systems to our Real Property Act, but with the advantage that they have officers that administer the law as they find it written.' Here Mr. Opie cannot constrain himself to admit that the father of the Real Property Act in South Australia introduced it as a whole from Germany, and altered it only in unimportant details, but certainly not to its advantage, and there is an important reason in these alterations that the procedure of the Real Property Act is not yet fully known to everyone, so that every Judge dares to pull at it, to find fault in it, and to curtail it."

This article of Mücke and his co-editor Basedow stands out for two reasons. First, as regards the German origins of the Real Property Act 1858 (SA), the statement is much clearer than the one of 1862. Secondly, the German authors ask the British colonists indirectly to admit this allegedly known fact of the adoption of German law. It implies the allegation that the German origins of the system were not publicly acknowledged even though sufficiently well-known. Mücke and Basedow establish that the Torrens System not only took some ideas or basic principles from Germany. They allege that "the father of the Real Property Act in South Australia introduced it as a whole from Germany".[147] This is an important difference to the article from 1862 which was talking broadly of a German child. The article from 1882 leaves no room for the view that besides the German law other sources

---

146 Opie, *Correspondence on the Real Property Act* (Carey and Page, Adelaide 1882), p. 35 f.

147 Opie, *Correspondence on the Real Property Act* (Carey and Page, Adelaide 1882), p. 35 f.

merged additionally in the first version of the Real Property Act. Rather, the statement expresses the conviction that the Real Property Act 1858 (SA) was exclusively an adoption of German law.

It is noteworthy that the statements in the article of 1882 are made without any attempt to sustain the point of view with further arguments. This is surprising because seemingly until 1882 the German origins of the Torrens System had not been seriously discussed. Even the debate in 1880 on Torrens' petition for a pension had only discussed the persons involved in the drafting, not the underlying law. Mücke's article from 1882 seemingly presupposes therefore that the German-Australian reader takes it for granted that the Real Property Act is a system adopted completely from Germany. In this respect there are parallels to the speech of Mücke given at celebration of Torrens at Tanunda in 1862. Furthermore Mücke apparently saw no need to give explanations for calling the Real Property Act "a German child".

Mücke's and Basedow's newspaper article is also special for another reason. That is because Mr. Opie himself refrained from objecting to the criticism given in the article. In his pamphlet called the "Correspondence on the Real Property Act" Opie compiled relevant newspaper correspondence in South Australia on land law reform in the years 1881 and 1882. In this pamphlet he incorporated both his own article in the South Australian Register and the German commentary of the "Australische Zeitung". Even though the German commentary accused Opie of not admitting publicly the German origins of the Real Property Act, Opie even provided his reader with a proper translation of the German article without any comment. The author submits that it is likely that Opie, in his pamphlet, would have objected to the German criticism if he felt unjustifiedly attacked. Even if Opie did not comment on the article for other reasons, the fact that he incorporated the German commentary in his collection shows that he thought it had to be taken into consideration.

Ten years after Opie's publication, in 1892, Dr. Ulrich Hübbe died. On 10 February 1892 the "Australische Zeitung", still under the editorship of

Mücke and Basedow, published an obituary on Hübbe. This writing, as distinct from the two articles above, in its character as an obituary emphasised Hübbe's personal role as a German lawyer in the creation of the Act:[148]

> "Dr. Ulrich Hübbe, der eigentliche Vater des Real Property Acts, dem Sir R. Torrens die Standeserhöhung verdankte, ist gestern im Alter von 86 Jahren in Mt. Barker gestorben. Die letzte Ehrbezeigung, welche unserem verdientem Landesmanne zu Teil wurde, fand 1862 bei dem Torrensfeste in Schlinke's Creek bei Tanunda statt, sonst hatte der bescheidene Advokat wenig Vorteil von dem durch ihn ins Leben gerufenen Gesetz, welches so bedeutenden Einfluß auf die Sicherheit des Grundbesitzes ausübte. Er war die rechte Hand des Sir Robert. ... Leider wurden seine Verdienste um den Real Property Act niemals ordentlich von Südaustralien anerkannt, andere schöpften das Fett ab, und Dr. Ulrich Hübbe hatte nicht an Überfluß zu leiden, im Gegenteil, da er sein Licht unter den Scheffel stellte, so fiel es dem Staat nicht ein, ihm eine klingende Anerkennung, vielleicht zur Verschönerung seines Lebensabend zukommen zu lassen."
>
> Translation of the author:
> "Dr. Ulrich Hübbe, the actual father of the Real Property Act, to whom Sir R. Torrens owes his rise of class, died yesterday at the age of 86 in Mt. Barker. The last token of honour, which was received by our meritorious countryman, took place in 1862 in Schlinke's Creek at the Torrens Celebration, other than that he was little rewarded for the law that he called into existence, which was of such immense importance

148 *Australische Zeitung*, 10 February 1892.

> for the security of land ownership. He was the right hand of Sir Robert Torrens.
> Unfortunately his merits on the Real Property Act have never been properly acknowledged by South Australia. Others got all the rewards, whereas Dr. Ulrich Hübbe never received any remuneration. The converse is the case, since he hid his light under a bushel, it did not occur to the government to give him a monetary recognition for his services, perhaps also to improve the autumn years of his life."

Mücke's and Basedow' s view given in this obituary is clearly that Hübbe was the founder of the Act. That is why Hübbe is called the "actual father of the Real Property Act". Since R.R. Torrens was knighted for his implementation of the Real Property Act[149], the editors conclude that Torrens "owes his rise in class" to Dr. Ulrich Hübbe. The most striking statement of the obituary regarding Hübbe's role in the drafting of the Act, however, is that the editors call the Real Property Act 1858 (SA) the "law that he (Hübbe) called into existence". Distinct from the articles previously referred to, the obituary does not expressly state that the system was based on German law. The author submits, however, that this goes without saying if it is remembered that the editors of the German newspaper presupposed that their readers knew of the German origins of the system already. By giving a German lawyer all the credit for the creation of the Real Property Act, the obituary therefore strengthens the assertion that the system was based on German law.

It can be surmised that the importance of the analysis of articles of German newspapers in South Australia naturally lies partly in the fact that they had not yet been considered in the examination of the German origins of the Real Property Act 1858 (SA). The German newspaper articles, however, also differ from the other sources in what they say. The articles from 1862 and 1882 both emphasise the legal source, i.e. German land law, more than the personal recognition. They do not limit themselves to claiming credit for Dr. Ulrich Hübbe like the statements in

the 1880/1884 debate, Forster's letter to his niece or Loyau's account. As distinct from those sources the articles established what Hübbe actually did within the process of drafting. In other words these articles asserted that Hübbe tried to transfer German law into a British, or better, into a South Australian Act. It is noteworthy that only in Hübbe's obituary did the German newspaper see a need to point out to whom the allegedly German origins of the South Australian land registration system were due.

2. 3. Hübbe's undisputed activities in connection with the land law reform

Distinct from the sources discussed hitherto are the actual activities that Hübbe had undertaken in relation to the South Australia's land law reform. The other sources provided clear cut statements as a starting point, whereas Hübbe's recorded activities need a further contextual interpretation. Of what importance, for instance, was Hübbe's book "The Voice of Reason"[150] written and published in 1857? Why did Torrens consult Hübbe during the debate of the second reading? Why did Hübbe have a desk at the Registry Office until 1861, even though he never had a position at that authority ? Why did the South Australian Parliament order him to write a pamphlet on Hanseatic law two years after the passing of the Act? These and other activities of Hübbe during and after the time of the reform are undisputed yet they lack proper interpretation.

2. 3. 1. Voice of Reason (1857)

Hübbe's activities regarding the land law reform seemingly started with letters which he had written to the editor of the South Australian Register, Mr. Anthony Forster, and which supported Torrens' motion.[151] Hübbe had joined the newspaper discussion on land law reform in February 1857 under the pseudonyms 'Sincerus'[152] and 'A reformer'[153].

---

149 Australian Dictionary of Biography, Vol. 6 (A-Z), p. 292.
150 Hübbe, *The Voice of Reason*, (David Gall, Adelaide 1857).
151 32 Royal Geographical Proceedings (SA) 110
152 *The South Australian Register*, 18, 26 February 1857 and 29 April 1857.

These letters, however, were only a forerunner, to a proper publication on the land law reform that followed in mid 1857. Just before the second reading of the Torrens bill, Dr. Ulrich Hübbe published his 100-page book entitled "The Voice of Reason and History brought to bear against the present absurd and expensive Method of Transferring and Encumbering Immovable Property." (The Voice of Reason)[154] George Fife Angas, a big landowner, had encouraged Hübbe to write the book to advance the land reform. Angas had also paid for the printing of the book.[155] Pike asserts that Angas also ordered Hübbe to draft a bill[156], but no evidence was found for this. Every parliamentarian was furnished with an edition of Hübbe's book, and it allegedly helped a great deal in the passing of Torrens' bill at the second reading after which the Real Property Act 1858 (SA) eventually became law in South Australia.[157]

The author submits that Hübbe's book presents evidence for Hübbe's personal attitude towards the law reform and Torrens' bill. Stein and Stone[158] overlook the significance of the book when they quote from it, but do not make the book itself an object of research. The analysis of the book shows, however, that Hübbe advocated the land law reform in the form of an adoption of Hanseatic law. The book also unveils Hübbe's attitude towards the draft presented by Torrens in the first reading: despite suggesting some amendments, he did not want to change the first draft, but rather to strengthen and supplement it.

In order to recognize this connection, Hübbe's book from 1857 needs to be analysed. The structure of the book indicates where this analysis has to start. The book tried first to describe the old British feudal land law and point out its weaknesses. For this purpose Parts I and II of the book contained an historical sketch and a critical analysis of the traditional Anglo-Saxon land law. Part III described the French land law due to the

---

153 *The South Australian Register*, 11 February 1857.

154 Whalan, *The New Zealand Torrens System Centennial Essays*, (Butterworth Wellington 1971), p.6.

155 Pike, "Introduction of The Real Property Act in South Australia", *The Adelaide Law Review*, 1960-1962, Vol. 1, p. 179.

156 Pike, "Introduction of The Real Property Act in South Australia", *The Adelaide Law Review*, 1960-1962, Vol. 1, p. 179.

157 Robinson, *Equity and systems of title to land by registration*, p. 59.

158 Stein and Stone, p. 1 ff.

Napoleonic Code, which provided a registration of charges on land only. The fourth part, which concluded Hübbe's book, was subdivided into three sections. In the first section a comparative overview of several land law systems throughout the world was given. The emphasis in this section, however, was clearly put on the description of the Hanseatic land law. The second section referred to the form of registration that was already in existence in South Australia, i.e. the registration of deeds. The third section discussed the so-called Torrens' bill.

Hübbe's suggestions to amend the draft of the first reading

With regard to Hübbe's latter claim to have modelled the Real Property Act 1858 (SA) on Hamburg's land law, Part III of his book of 1857 is the most important. Here Hübbe indirectly expresses his attitude to the first draft bill as well as to the role that his hometown law, i.e. of Hamburg, played in his thinking. Other authors have also made this part of the book the centre of their attention. In this regard the emphasis was rather put on Hübbe's seemingly opposing position than on his corresponding explanation of the system. Whalan takes the view that Hübbe's suggestions for improvement show that he had not been involved in the drafting process at all.[159] He argues that no one would criticise a draft if he were the draftsman himself. Robinson, on the other hand, has taken a closer look at the suggestions in relation to the provisions of the later amended draft.[160] He provides an impressive comparative analysis of Hübbe's suggestions and the sections of the draft presented for the second reading. Robinson's comparison shows that almost all of Hübbe's suggestions were incorporated into the consequent draft. From this Robinson draws the conclusion that, although Hübbe only had a consultative function for the drafting of the first copy, he was very influential in the production of the second draft, which eventually was passed by parliament.[161]

---

159 Whalan, *The New Zealand Torrens System Centennial Essays*, (Butterworth Wellington 1971), p.7.

160 Robinson, *Equity and systems of title to land by registration*, 79 ff.

161 Robinson, *Equity and systems of title to land by registration*, p. 77.

The author submits, however, that both Whalan and Robinson overlook the very character of the suggestions that Hübbe made in his book. Almost all these suggestions have a supplementary character and indeed do not contradict the first draft bill. It is true that the suggestions did propose alterations to the first draft, but exclusively in order to enforce, secure and complete the regulations and the principles contained therein. This is important because suggestions of this kind do not exclude the possibility that Hübbe was involved in the first drafting. For example, Hübbe demanded a strengthening of the punishment for counterfeiting instruments[162]. He thought that he had found a better penalty rule in an earlier legislation (sec. 27 of 5 Vict. 8). With regards to identifying witnesses he also traced down prior legislation (sec. 15 of Vict. 8) which he wanted applied instead of the prior draft provisions, because of its "sound principles".[163] Hübbe also pointed out that New Zealand had been overlooked in the draft regarding the gazetting provisions.[164] The general aim of the draft to lower the costs of land transactions was met by Hübbe's specific suggestions in connection with the introduction of the land registration system. Hübbe suggested that as opposed to Ordinance 6 of 1845 it should be legal also for non-professionals to conduct land dealings.[165] Introducing inexpensive arbitration meant that poor people also could afford litigation to bring their land under the Act.[166]

Whereas the above proposals lacked a binding link, a whole set of Hübbe's suggestions aimed for one common goal, which was to enforce and secure the main principles of the system, i.e. the conclusiveness of the register and the indefeasibility of title. In his book Hübbe argued that the draft had to provide boundaries so that the old law could not undermine the new principles.[167] That is why Hübbe wanted it to be made clearer in the draft that exceptions to the principle of indefeasibility of title should be limited to cases of fraud only.[168] It should be ensured that circumstances that did not appear on the register should not affect

---

162 Hübbe, *The Voice of Reason*, p. 81.
163 Hübbe, *The Voice of Reason*, p. 95.
164 Hübbe, *The Voice of Reason*, p. 84.
165 Hübbe, *The Voice of Reason*, p. 95.
166 Hübbe, *The Voice of Reason*, p. 84.
167 Hübbe, *The Voice of Reason*, p. 82.
168 Hübbe, *The Voice of Reason*, p. 82 f.

the situation of real property rights. This purpose also served Hübbe's suggestion to ask for the land grants to be deposited when land was brought under the Act.[169] In this way the land grants could not be simultaneously used to create land rights under the old system. Under the same category fell Hübbe's demand that declarations of trust should not be effective unless they were registered (and optionally deposited) themselves.[170] Accordingly the equitable principle of constructive notice should not be applied.[171]

The author argues that this analysis of Hübbe's suggestions shows that Hübbe tried to enforce and secure what was already intended by the first draft anyway. The most striking aspect of his proposal was to shift clause 68 to an earlier part of the draft in order to emphasise its importance.[172] Clause 68 provided that an instrument was only effective when it was registered and accordingly endorsed. This provision derived directly from the principle of the conclusiveness of the register and Hübbe wanted it to be made clear at the outset in the first sections of the legislation instead of being lost "somewhat late in the vineyard"[173]. Hübbe's critique purported to complete and enforce the regulations already in existence in that draft. For this reason these suggestions do not prove that Hübbe did not participate in the drafting process, nor that he was only influential in the second draft that implemented his suggestions. Rather, Hübbe's discussion of the draft's bill between the first and second reading leaves his part in the drafting process open. According to the supplementary character of his suggestions it appears possible that he was already the dominant force in bill's drafting before the first reading and only tried to refine the system before the second reading.

Robinson has pointed out, however, that two of Hübbe's suggestions had not been realised in the draft for the second reading. One was to call all certificates land grants, no matter whether issued the first time or not. That should have made the underlying principle clear that every new

---

169 Hübbe, *The Voice of Reason*, p. 86.
170 Hübbe, *The Voice of Reason*, p. 94.
171 Hübbe, *The Voice of Reason*, p. 93.
172 Hübbe, *The Voice of Reason*, p. 86.
173 Hübbe, *The Voice of Reason*, p. 86.

certificate guaranteed that the title was equally indefeasible as the first title granted by the Queen.[174] The second suggestion subsequently ignored was that the Registrar General should be liable for damages and the full cost of the litigation if he made mistakes. Hübbe based this suggestion on legislation already in existence.[175] It is not surprising that the latter suggestion could not have been carried through by Hübbe since Torrens wanted to become Registrar General himself and would have not had much interest in attracting liability. The former suggestion to call all certificates land grants would have been a matter of mere terminology not affecting the legal substance. The fact that these suggestions have not been followed is irrelevant as regards the question whether Hübbe was the predominant drafter or not.

Hübbe's description of Hanseatic law as the central purpose of his book

Whereas other authors have limited their analysis of Hübbe's book to Hübbe's suggestions for the amendment of the first draft of the Torrens' bill, the author submits that the overall structure of the book and the particular description of Hamburg's legal system need further examination because both strongly suggest that Hübbe wanted to adopt Hanseatic law. Apart from the critical description of the old common law[176], there are only two systems that are fully described: the French system of conveyancing[177] and Hamburg's land law system[178]. The legal systems of other countries are only considered in topical discussions such as "Taking securities" or "How will registration work, either with or without deeds?" Under such headings Hübbe discusses briefly the land law of Belgium[179]; the Netherlands[180]; the American colonies[181]; Scotland[182]; Prussia[183]; Bavaria[184] and Italy[185]. Among non-English law

174 Hübbe, *The Voice of Reason*, p. 80.
175 Hübbe, *The Voice of Reason*, pp. 81 f.
176 Hübbe, *The Voice of Reason*, p. 8-25.
177 Hübbe, *The Voice of Reason*, p. 33-50.
178 Hübbe, *The Voice of Reason*, p. 64-75.
179 Hübbe, *The Voice of Reason*, p. 55.
180 Hübbe, *The Voice of Reason*, p. 55.
181 Hübbe, *The Voice of Reason*, p. 52f, 58.
182 Hübbe, *The Voice of Reason*, p. 58.
183 Hübbe, *The Voice of Reason*, p. 60.

systems, Hübbe clearly emphasises the French and Hanseatic land law system. By taking just pagination into consideration, it would appear that the book focuses rather on the French system (17 pages) than on the Hanseatic system (10 pages). These proportions were, however, not intended by Hübbe. In the preface of his book he stated that both chapters on French law and British Feudal law had accidentally taken too much space because they had been given to the press beforehand.[186] He also clarified that these chapters had not been incorporated because he thought they were necessary, but "at the desire of some friends" and "the wish of others".[187] Taking these circumstances into consideration, it can be established that apart from discussing the draft bill, Hübbe wanted to draw attention chiefly to Hanseatic law. Even if the reader of the book was not aware of this intention, there were substantive reasons which made Hanseatic law inevitably a crucial point of Hübbe's book. First the Hanseatic law was the only system which Hübbe described at length and which, being a system of complete registration, corresponded with Torrens' draft proposal. The French system only provided registration of charges, and ownership only as exceptions. Hübbe emphasised this difference by classifying all systems in one of two categories of registration.[188] According to Hübbe, land registration systems were either systems of complete registration (ownership and charges) or systems similar to the French system, which chiefly registered charges. Since Torrens' draft proposal discussed by Hübbe in the end of his book suggested a system of complete registration, the Hanseatic system and not the French system corresponded to it.

A second aspect that makes the description of Hanseatic law a crucial point in Hübbe's book is that on reading one gets the distinct impression that he indirectly suggests the adoption of Hamburg's land law system in South Australia. This is because Hübbe did not limit himself to merely describing the law, but gave an actual original example of a certificate of

---

184 Hübbe, *The Voice of Reason*, p. 60, 63.
185 Hübbe, *The Voice of Reason*, p. 61.
186 Hübbe, *The Voice of Reason*, preface.
187 Hübbe, *The Voice of Reason*, preface.
188 Hübbe, *The Voice of Reason*, p. 55 ff.

a title to land from Hamburg and showed how it would look if those regulations were applied to a possible register book in Adelaide.

The example reads:

> "[Vol.XVI.] Section No. 100, in Hundred of Adelaide, containing 80 acres. [Folio 8.]
>
> 1840. Jan. 24--The above section is hereby recorded as being property of A.
>
> 1841. Oct. 9--The same section is recorded as the property of B.
>
> 1844. May 19--100 Pounds and interest at 10 per cent are hereby recorded as a charge on the same section for C, with priority before any of the following.
>
> 1846. Oct. 6--120 Pounds and interest at 12 1/2 per cent are hereby recorded as a charge on the same section for D, with priority before any following.
>
> 1847. Jan. 5--Those 100 Pounds charged on the above section for C are hereby transferred to E.
>
> 1848. Feb. 6--All the above section is recorded as being the property of D.; and those 100 Pounds charged on the same section for D are hereby cancelled.
>
> 1851. March 5-- Those 100 Pounds charged on the above section for E are hereby cancelled."

This section of Hübbe's example should be sufficient to give an impression of what Hübbe wanted to show.[189] The fictitious certificate covered various important land dealings and thereby applied the Hanseatic law to a parcel of land situated in Adelaide, South Australia. Hübbe's certificate can be regarded as a draft sheet of a possible South Australian register book, modelled on a certificate from Hamburg. Since the register book is the crux of a system of title by registration, Hübbe indirectly suggests the adoption of Hamburg's land law in South

---

189 The original example went on to show that the property was partitioned off and eventually sold by the way of mortgage.

Australia. This underlying suggestion, however, becomes clearer when Hübbe explains the fictitious certificate by outlining Hamburg's land law in 12 points. In this respect his concluding explanation of how the mortgage worked in Hamburg (point no. 12) is remarkable. After having set out the basics of mortgages by way of charge he referred to Hamburg's law quite openly as a possible model for South Australia:[190]

> "...this system... is improved in process of time to suit a commercial community, and will be readily adopted in its most useful features, where ever the freeholders and general public will take care of their own laws as well as the Hamburg freeholders have done".

At this point it must have been clear to the reader of the book that Hübbe intended to transfer Hamburg's land law into the provisions of a South Australian draft bill. Bearing this intention in mind the overall structure of the book makes more sense. The preceding analysis of feudal British land law and the systems of other countries had served Hübbe only to demonstrate that the principles of title by (complete) registration were superior to other existing concepts. Hübbe thus successively presented the Hanseatic land law as a sound system that indeed implemented the principles previously discussed. Hübbe might have assumed that if he succeeded in convincing the reader of the superiority of the system of title by registration, the following description of Hamburg's law would be approved, and accordingly Hübbe's suggestion to adopt Hanseatic law would be considered to make sense. Alongside this interpretation of Hübbe's argument, it is noteworthy that he positioned the description of Hamburg's law right before the discussion of Torrens' draft bill[191]. The reader was supposed to understand Hübbe's suggestion regarding Torrens' draft bill as the attempt to implement Hamburg's land registration system.

It is suggested therefore that the book 'Voice of Reason' which became public in mid-1857 basically showed that Hübbe wanted to adopt

---

190 Hübbe, *The Voice of Reason*, (David Gall, Adelaide 1857), p. 67.

191 Hübbe, *The Voice of Reason*, p. 75 ff.

Hanseatic law in the course of law reform in South Australia. From this perspective Hübbe's discussion of Torrens' first draft bill appears in a different light. It would seem that Hübbe's suggestions to alter Torrens' first draft were merely supplementary, implying that Hübbe thought that the draft already implemented the basic principles of Hanseatic law. This analysis of Hübbe's book is relevant as regards Hübbe's later claim that the Real Property Act 1858 (SA) was modelled on the Hanseatic land law. First it shows that Hübbe already had the adoption of Hanseatic law in mind at the time of the law reform. Secondly, Hübbe's discussion of Torrens' draft shows that Hübbe also believed that he could push his plan through. The supporting character of his suggestions to alter the first draft indicates also that the draft corresponded already to a great extent with his conception of the system. It might have been for these reasons that the "Voice of Reason" was the first book at the time that discussed at length the legal aspects of the Torrens System.

2. 3. 2. Hübbe's presence during the debate of the second reading and in the register office

The book, "Voice of Reason" did not remain Hübbe's only contribution to promoting the Torrens System. During the parliamentary debates as well as after the enactment in the registry office, it seems that he advised Torrens in a remarkable way. Regarding his activity in parliament, the Royal Geographical Proceedings record:

> "...and the late Sir Edwin Smith used to tell how Dr. Hübbe sat outside the bar of the House during the passage of the Bill in 1858 and was frequently consulted there by Sir Robert R. Torrens"[192]

It raises the question of what relevance can be attached from this record to Hübbe's function in the drafting of the Bill. Whalan[193] and Pike[194]

---

192 32 Royal Geographical Proceedings (SA) 110; Hague, *History of South Australia* (unpublished; South Australian Archives) cited by Robinson, *Equity and systems of title to land by registration*, p. 52.

193 Whalan, *The New Zealand Torrens System Centennial Essays*, (Butterworth Wellington 1971), p.6 ff.

totally omit this important aspect of Hübbe's presence during the debate. Stein and Stone merely establish that it showed Hübbe's political helpfulness in the passing of the Act.[195] Of course his consultative presence was in line with his publication of a book immediately before the second reading. However, it does not seem enough to speak of pure political help.

It seems odd that Torrens needed a consultant at all if he himself was the actual draftsman. If he really was the draftsman, why did he want to discuss things with Hübbe during the debate? When Stein and Stone speak of "help in parliament", this cannot merely refer to political advice. Hübbe was no political character. Torrens, on the other hand, was a fully-fledged politician. Thus, if Hübbe gave any useful advice it must have been of a legal kind. Robinson argues that Torrens did not really understand the interrelatedness of the final provisions.[196] His own explanation of the system in 1862[197] showed some considerable contradictions. Torrens' deficiencies might have necessitated Hübbe's advice and his insight into the system which he had demonstrated in his book. In any case it is reasonable to conclude that Hübbe's legal skills were needed and somehow special, otherwise it cannot be explained why Hübbe and not someone else was consulted during the debate. By the time of the second reading a few lawyers had abandoned their opposition and favoured the law reform. Andrews, for instance, was such a lawyer and accordingly had his career promoted by Torrens.[198] Why did Torrens then pick a German lawyer instead of an English one to give him legal advice? One reason might have been that Hübbe had worked with Torrens on the matter all along, so they were a good "team" from the beginning. However, what made Hübbe particularly special compared with other lawyers in South Australia was obviously his knowledge of German/Hanseatic law, i.e. of a system of title by registration already in practice. Hübbe had not studied or practised English law, but German

---

194 Pike, "The introduction of the Real Property Act in South Australia" (1960-1962) 1 *ALR* 180.

195 Stein and Stone, p.24.

196 Robinson, *Equity and systems of title to land by registration*, p.77.

197 Torrens, *An Essay on the Transfer of Land by Registration under the Duplicate Method operative in British Colonies* (Cassel and Company, London 1862).

198 Andrews did not participate in the debate because he was sick.

law. Here lay the real difference between himself and English lawyers who favoured the system. Hence when Torrens picked him and not someone else, it must have been partly due to the importance of Hübbe's specific knowledge of German law.

It shows also that Hübbe's ideas published in his book shortly before the debate had pleased Torrens. Torrens must have at least agreed with Hübbe's basic views, otherwise he would not have engaged him for further legal advice. Hübbe's suggestions had been convincing. Considering that his central suggestion in the book was to apply the principles of Hanseatic law, it may also be submitted that Torrens might have adopted the idea, so that, in the wake of it, Hübbe's skills were indispensable. In any case, Hübbe's book shows that his legal advice given during the second reading would have been guided by the idea of adopting Hanseatic law in South Australia.

Taking into consideration that Hübbe was frequently consulted by Torrens during the debate, Torrens might have been referring to Hübbe when, at the end of his speech in the second reading, he thanked "a member of the legal profession from whom he had received great assistance, but whose name he was not at liberty to mention".[199] Already at an earlier stage in November 1856, Torrens had spoken of a "high legal authority that helped him".[200] It has been suggested that Torrens could also have been referring to Andrews or Hanson[201]. At least until the end of January 1857 he could have not been referring to Andrews, because until then Andrews was still expressly opposed to any kind of Real Property Reform.[202] Moreover, Torrens had never concealed before that he collaborated with Andrews. On the contrary, in an election campaign he had publicly asked the people to vote for Andrews because Torrens needed a lawyer to help him.[203] As regards Hanson, it is true that he had also changed sides and supported the reform by the middle of

---

199 *The South Australian Register*, 13 November 1857
200 *The South Australian Register*, 21 November 1856.
201 Whalan, *The New Zealand Torrens System Centennial Essays*, (Butterworth Wellington 1971), p. 6.
202 *The South Australian Register*, 26 January 1857.
203 *The South Australian Register*, 1 and 2 June 1857.

1857[204]. Nevertheless, Hanson had drawn up his own scheme of registration which differed considerably from Torrens' bill; Hanson advocated this scheme in parliament instead.[205] Apart from that, Mr. Hare, MP reports that Torrens, because of this rivalry, was reluctant to accept any of Hansons' suggestion whether they made sense or not.[206]

The impression that Torrens had indeed been referring to Hübbe in his speech in parliament is strengthened by the fact that Torrens seemingly drew on Hübbe's advice even after the enactment of the Real Property Act 1858 (SA). The fact that Hübbe had a desk at the registry office speaks in favour of this hypothesis. This is affirmed by the evidence of Mr. Gawler, a solicitor employed at the Land Titles Office, given before the reform commission of 1861. Mr. Barrow, a member of the reform commission, questioned Mr. Gawler on 24 April 1861[207]:

> Question 788: Do the Germans avail themselves as much as they did of this Act?- Quite as much, I believe.
>
> Question 789: Was not Dr. Hübbe engaged in some capacity in this office some time ago?- No, he was not engaged in any capacity; he was allowed a desk.
>
> Question 790: Has he that desk now?- No.
>
> Question 791: How came he to be allowed to have a desk here?- I do not know.

Surprisingly this evidence has been disregarded by other authors. It is important, however, because Hübbe's activities after the enactment of the Torrens System cannot be explained merely by Hübbe's political help. Hübbe seemingly held the desk at the registry office until January 1861. The "Süd-Australische Zeitung" (South Australian Newspaper) at least makes mention of the Attorney General expelling Dr. Hübbe from the

---

204 Whalan, *The New Zealand Torrens System Centennial Essays*, (Butterworth Wellington 1971), p. 10.

205 South Australian Parliamentary Debates, 12 November 1857.

206 South Australian Parliamentary Debates, 20 July 1880.

registry office on 12 January 1861.[208] The editor of the "Süd-Australische Zeitung" made a point that the Attorney General expelled Hübbe while Torrens was on leave. It raises the question why Hübbe had a desk at the registry office to begin with. After all, he had no position there and was thus not paid for any work. In his statements attached to his petition for a pension in 1884, Hübbe had emphasised that his hope for a position in the office had been rejected by Torrens.[209]

If Hübbe had no proper position at the office, he may voluntarily have been working there occasionally as a translator. It seems that Mr. Barrow was referring to that when he asked Mr. Gawler:[210]

> Question 792: Are you aware whether any difficulty has been experienced by the Germans in bringing their property under the Act, since the removal of Dr. Hübbe's desk?- I am not aware of any complaint on that score.

Nevertheless, it seems rather unlikely that Hübbe would have worked as a translator at the registry office without his 'colleagues' knowing it, as this would have necessitated at least some collaboration with the other employees. After all, the purpose of a German translator would have indeed been to help the employees of the Register Office in dealing with German clients.

The fact that the employees at the registry office seemingly did not know why Hübbe had a desk at the office indicates that Hübbe did not do the same work as they did. He was apparently not involved in the daily business of the registry office, yet Hübbe must have done some work at the office that required a desk. He probably did work in writing on a rather regular basis, which necessitated his presence for more than just

---

207 Report of the Real Property Law Commission with Minutes of Evidence and Appendix (Adelaide, Cox, Government Printer 1861).

208 *Süd-Australische Zeitung*, 12 January 1861.

209 Official Statement 1884, SA-Archives, D 5257 (T), p.6.

short periods. Furthermore, it must have been some kind of work which was useful to Mr. Torrens, or he would not, as Registrar General, have furnished Hübbe with a desk at the office. That is in line with the Süd-Australische Zeitung's reporting on Hübbe's expulsion from the office in January 1861.[211] The editors had implied in the article that Torrens would have not allowed Hübbe to be expelled if had been present.

Taking into consideration that Hübbe had already advised Torrens during the debate of the Act in 1857, it suggests that Hübbe continued to be a legal adviser to Torrens in the registry office even after the debates. In the first years after the enactment of the system several problems appeared in its application.[212] Hübbe may have helped Torrens in finding solutions for these problems. In this respect it is noteworthy that the first proposals for the amendments to the Act came almost exclusively from the registry office.[213] If Hübbe really was the legal mind behind the Real Property Act 1858 (SA), i.e. if he had been the chief draftsman of the Act, it is plausible that he was so devoted to the Act that he continued to work with Torrens without salary even after the enactment. In any case, Hübbe's consultative presence during the crucial debate in parliament, as well as in the registry office immediately after the enactment of the system, would have been in line with the prominent role that he allegedly played in the drafting of the Act according to the historical statements (especially the debates in 1880/1884 and Forster's letter and Loyau's account) analysed above.

2. 3. 3. Hübbe's evidence before the 1861 commission and the questioning of Mr. Schuhmacher

After Torrens guided the Act through parliament with Hübbe's assistance, the Real Property Act passed through the Legislative Council

---

210 Report of Commission appointed to inquire into the Intestacy, Real Property, and Testamentary Causes Acts (Adelaide, Cox, Government Printer 1873).

211 Süd-Australische Zeitung, 12 January 1861, p.1.

212 Stein and Stone, p. 25 f.

213 Whalan, *The New Zealand Torrens System Centennial Essays*, (Butterworth Wellington 1971), pp. 9 f.

with some delay and became law in January 1858.[214] Anthony Forster forwarded the measure in the Legislative Council with the support of a petition signed by 2700 colonists.[215] However, after the Bill had won the battle in parliament, it was attacked in the courts. A Supreme Court decision in April 1860 required the Act to be altered.[216] The court had established that certificates of title had no greater validity than the title surrendered for it. The new Act of 1860[217] had tried without much effect to remove this defect and even under this Act the Supreme Court still declared certificates defective.[218] In the wake of these decisions the parliament decided to call for a commission to correct the defects of the Real Property Act.[219] The leading persons of the commission were Sir Charles Cooper, R.D. Hanson, G.M. Waterhouse, J.H. Barrow and R.R. Torrens.[220]

Throughout the commission's work two aspects are of significance here. First, the Legislative Council ordered a description of Hanseatic law by Dr. Ulrich Hübbe to be printed. Second, an inquiry was held in which Torrens asked colonists from Hamburg about the law in their home towns in order to show the similarity to the Real Property Act 1858 (SA). Both aspects illustrate that at least three years after the enactment of the Real Property Act 1858 (SA) the Hamburg system of land registration was still regarded as a possible model.

Hübbe's description of Hanseatic law, 1861

Hübbe's 25 page pamphlet on Hanseatic law entitled "Title by registration in the Hanse Towns" was ordered by the Legislative Council. It was published on 27 November 1861 in the Parliamentary Papers.[221]

---

214 Pike, "Introduction of The Real Property Act in South Australia", *The Adelaide Law Review*, 1960-1962, Vol. 1, p. 180 f.

215 *South Australian Register*, 6 January 1858.

216 *Hutchinson v. Leeworth, South Australian Register*, 29 May 1858.

217 No. 6 of 1860.

218 *Payne v. Dench,* cited by Pike, "Introduction of The Real Property Act in South Australia", *The Adelaide Law Review*, 1960-1962, Vol. 1, p. 186.

219 Pike, "Introduction of The Real Property Act in South Australia", *The Adelaide Law Review*, 1960-1962, Vol. 1, p. 186.

220 Whalan, *The New Zealand Torrens System Centennial Essays*, (Butterworth Wellington 1971), p. 10.

221 South Australian Parliamentary Papers 1861, No. 212.

Whalan regards this pamphlet as Hübbe's first translation of Hanseatic law which therefore could not have influenced the drafting in 1857.[222] That is not true, however. The above analysis of the book "Voice of Reason" (1857) proves that Hübbe had written an earlier description of Hanseatic law. Accordingly, Hübbe, in his statement given with respect to the debate about his petition in 1884, had stated that the pamphlet printed in 1861 was based on earlier translations.[223] Hübbe's brief report on Hanseatic law in 1861 appears therefore to be a combination of translations made between 1857 and 1861. Thus, contrary to Whalan's conclusion, it is possible that the translations which were printed in 1861 were influential much earlier, for instance to the amendment of the Act in 1860. Whalan was also incorrect in referring to Hübbe's pamphlet as translations of a "Hanseatic code of 1860". There had not been any consolidating codification of Hanseatic law in 1860.[224] It was still based on a mixture of ancient ordinances, case and customary law.[225] The provisions that Hübbe had referred to in the pamphlet had not been from an official code, but from a draft of a textbook writer (Lührsen)[226] which purported to put the law in existence in the form of comprehensible provisions. According to this lack of statutory law Hübbe had used only textbooks and manuals to complete the description. It is suggested that the selection of those textbooks and manuals to which Hübbe referred to indicate that he had been using textbooks already in 1857:[227]

> "1. Daniel Christian Anderson, Dr. Juris, Pronotary of Hamburg. Advice to all Persons desirous of transcribing Land, or Moneys secured thereon, in Hamburg and its Dependencies. Hamburg, 147 pages, 8vo, 1810."
>
> "2. Dr. Geo. Lührsen. The Book of the city of Hamburg, of Hereditaments and Rents; or, the Order of

---

222 Whalan, *The New Zealand Torrens System Centennial Essays*, (Butterworth Wellington 1971), p. 6.

223 Official Statement 1884, SA-Archives, D 5257 (T), p.3.

224 Only in 1868 Hamburg's law was consolidated.

225 See below.

226 Lührsen, *Der Stadt Hamburg Erbe- und Rentenbuch oder Grund-Eigenthum- und Hypothekenbuch-Ordnung. Ein Gesetzesentwurf.* (Hamburg, 1860).

> transcribing Land and Hypotheks. Hamburg, 35 pages, 8vo., 1860."
>
> "3. Motives for the Deviations in the Prussian Code from the Civil Law, reported to the King's Majesty in the Privy Council. By Suarez, K.C., 1793-94. Published by authority in Ven Kamptz Annals of Prussian Jurisprudence."
>
> "4. The Silesian Householder's Friend. A Manual for the Business at the Public Office, 5th edition, Breslau, 1837, 448 pages, 8vo."

According to the references given in Hübbe's pamphlet, the first two sources were chiefly used to explain the Hanseatic law. Hübbe first listed a set of rules from Lührsen's brief pamphlet (1860)[228] in the form of short paragraphs; he then explained these rules with reference to Anderson's textbook (1810)[229], calling the explanations "observations by the translator". It is striking that majority of references in the pamphlet (three quarters of the footnotes) are taken from Anderson's book. This suggests that Hübbe had used Anderson's book for his descriptions of Hanseatic law prior to 1861. Assuming that Hübbe first started his work in 1861 by order of the Legislative Council, it can hardly be explained why Hübbe was using a textbook that was over fifty years old instead of availing himself of more current material.[230] At the least it is likely that Hübbe, in 1857, had sent not only for certificates of title from Hamburg, but also for textbooks on land law.

Even if the above inferences from Hübbe's activities prior to 1861 are disregarded, the fact that Hübbe was asked by a parliamentary reform commission to produce a description of Hanseatic land law is of

---

227 South Australian Parliamentary Papers 1861, No. 212, p. 5.

228 Lührsen, *Der Stadt Hamburg Erbe- und Rentenbuch oder Grund-Eigenthum- und Hypothekenbuch-Ordnung. Ein Gesetzesentwurf.* (Hamburg, 1860).

229 Anderson, *Anleitung für diejenigen welche sich oder anderen in Hamburg oder dem Hamburgischen Gebiete Grundstücke oder darin versicherte Gelder zuschreiben lassen wollen* (Nestler, Hamburg 1810).

considerable significance. It affirms Hübbe's recognition as a legal advisor particularly for Hanseatic land law and also suggests that, given his involvement in the drafting in 1857, this was his function then, too. It also raises the question, however, of why the Legislative Council placed such importance on a description of Hanseatic law as to order a report of it. No other law in any country was given this much attention and no one suggested, for example, producing a report on the law regulating the transfer of shipping property.[231] It may have simply been that having a German lawyer at hand led to this decision. It seems, though, that it would have sufficed to question Hübbe similar to the other lawyers rather than commission a report.

The author submits that the demand for a general description of Hanseatic law showed that there was an interest in the system as a whole, especially in the interrelatedness of its regulations. All things considered, this would make sense if Hübbe's later assertion, that the South Australian Land Registration System was originally modelled on Hamburg's land law in the first place, was correct. Given that the members of the commission viewed Hamburg's land law as the original model, they would most likely have taken a closer look at it in order to perfect the South Australian Land Registration System. On the other hand, one might argue that the Hanseatic system became a model later on, i.e. first in 1861, once the South Australians realized that the system of title by registration they had enacted was not adequate. This would ignore the fact, however, that Hübbe had already intensively collaborated with Torrens in 1857. If one admits that Hamburg's system was received as an appropriate model in 1861, then one should also admit that it was received as such in 1857. Otherwise, it is difficult to explain why Torrens drew on the help of a specialist in Hanseatic law during the second reading of the Act. That Torrens already regarded Hamburg's law as a model for the original system seems to be supported by questions that Torrens as a member of the Reform Commission posed to the

---

230 E.g. Baumeister, *Das Privatrecht der freien und Hansestadt Hamburg* (Hamburg 1856).

231 Torrens had claimed that he had been inspired by the Imperial Shipping Act 1854: Torrens, *The South Australian System of Conveyancing by Registration of Title* (Register and Observer Printing Office, Adelaide 1859), vi.

German colonist, Schuhmacher. Robinson argues that the questioning purported to show that the Hanseatic system of title by registration was basically identical to the original South Australian land registration system enacted in 1858, and accordingly, that the Hanseatic system was worthy of further examination in the course of the reform.[232] The questioning of Schumacher is recorded in Hansard:[233]

> Question 1127: You Schumacher, are a German?- Yes
>
> Question 1128: Have you been acquainted with the model of transacting business in transfer and dealings with land in the Hanse Towns or any part of Germany?-At Hamburg, where I resided, I had some general knowledge of dealings with landed property.
>
> Question 1129: Do you perceive any resemblance between the methods of procedure under the South Australian Act and the system at Hamburg?- Yes; to a great extent they agree, but in some points it varies- but in general it is the very same system here and there.
>
> Question 1130: Would you kindly point out to the Commission the points in which the variance obtains?- I must confess it would require more time to consider all these matters than I can give to them at the present moment.
>
> Question 1143: Comparing the law of this Colony, under the English law of real property, with your own country, in which do you think there is the greatest amount of litigation arising out of transactions and dealings in land?- Undoubtedly under

---

232 Robinson, *Equity and systems of title to land by registration*, pp. 82 ff.

233 South Australian Parliamentary Papers 1861 No. 192.

> the English law; I should say there was no comparison.
>
> Question 1153: You have stated, Mr. Schumacher, that there are some points of mere variance between the Real Property Act of South Australia and Hamburg, but cannot call them to mind; but, at your leisure, will you furnish a memorandum of them, as they occur to you?- I will do so, with pleasure."

It is not recorded whether Schuhmacher eventually handed in a memorandum, but it seems unlikely, since Hübbe, being more competent, was subsequently commissioned to produce a pamphlet. Schumacher's questioning, however, demonstrates that Torrens intended to show that the South Australian Land Registration System was identical with the system that was working successfully in Hamburg. Robinson infers from this that Hübbe must have been responsible for this similarity between the systems.[234]

The author agrees with Robinson's basic evaluation. From the mere questioning alone, however, this inference is difficult to draw. Rather, the questioning must be put in context with the pamphlet that Hübbe was ordered to produce as well as his earlier activities, i.e. his assistance during the law reform in 1857/58. If it is acknowledged that Hübbe was one of Torrens' most influential assistants, especially in the last phase of the final drafting, and if it is additionally acknowledged that Hübbe intended to transfer Hanseatic land law into the South Australian law, as expressed in his book in 1857, then Torrens' questioning in 1861 appears in a different light. From this standpoint the questioning by Torrens seems to be an indirect concession that he adopted, with Hübbe's assistance, the Hanseatic land registration system in form of the Real Property Act -bill. Torrens' striving for a deeper analysis of Hanseatic law in the course of his task as member of the 1861 reform commission to correct the defects of the Real Property Act 1860 (SA) appears to

confirm this. Lastly, the question is whether it is more likely that Hamburg's law was recognised as an appropriate model for the South Australian land registration system first in 1861. The author submits that Hübbe's tight collaboration with Torrens during the law reform, Hübbe's engagement in the registry office immediately after the enactment and eventually Torrens' questioning of Schumacher in 1861 suggest that this is not the case.

2. 3. 4. Hübbe's activities in 1872/1873

The work of the 1861 Commission culminated in the reform of the Real Property Act 1861 (SA).[235] In the wake of these amendments it turned out that the reform had been only half-hearted. The High Court still found problems in the application of the Act. In the Supreme Court decision in *Lange v. Ruwoldt*, the court decided that contracts for sale were not recognised by the Real Property Act.[236] The general dissatisfaction with this decision led, to a great extent, to the appointment of a new Reform Commission in December 1872.[237] It was called the "Commission to inquire into the Intestacy, Real Property, and Testamentary Causes Acts" (called the 1873 Commission). The commissioners (Belt, Brind, Kriechauff and Thrupp) began their work at the beginning of 1873.[238]

As already seen, Hübbe played an important role in the inquiry of the 1861 reform commission. Similarly the work of the 1873 commission gains importance in regard to the examination of the German origins of the Real Property Act 1858 (SA) because Hübbe was again involved in the inquiry to a great extent. Hübbe's questioning by the 1873 Commission is therefore examined in the following paragraphs in regard to Hübbe's latter claim of authorship of the original Real Property Act. In this light, two further points which have not been considered by other

---

234 Robinson, *Equity and systems of title to land by registration*, p. 84.

235 Whalan, *The New Zealand Torrens System Centennial Essays*, (Butterworth Wellington 1971), p. 10.

236 *Lange v. Rudwolt* (1872) 6 *S.A.L.R.* 75.

237 Hogg, *The Australian Torrens System* (Clowes & Son, London 1905), p. 56.

238 Report of Commission appointed to inquire into the Intestacy, Real Property, and Testamentary Causes Acts (Adelaide, Cox, Government Printer 1873).

authors are significant. First, by the beginning of January 1873, Hübbe had prepared a pamphlet on the subject, like the one he had written in 1861.[239] This was even before the questioning of the 1873 commission had even started. Secondly, Hübbe founded an association for the protection of the Real Property Act after the report of the Commission was issued[240].

When the 1873 Commission commenced its work Hübbe was about 68 years old. Despite his age he was called three times before the commission for questioning about the working of the Real Property Act and the Intestacy law.[241] Hübbe's extensive evidence totalled 226 separate statements. Nevertheless, only Robinson[242] and Hogg[243] considered this activity by Hübbe in connection with the development of the Real Property Act 1858 (SA). Robinson, however, draws no inferences from Hübbe's evidence in 1873 as to the origins of the first drafts of the Act.[244] Of course, this applies to Hogg also, who seemed not even to know about Hübbe's possible involvement in the very first drafting in 1856/1857, and who mentions Hübbe only in connection with his evidence given in 1873.[245] The author, however, submits that one can draw important conclusions from the questioning of Hübbe in 1873 for his contribution to the early drafts of the Act. There are three important aspects which are in line with the assumption that Hübbe was the chief draftsman of the Real Property Act 1858 (SA). First, the 1873 questioning shows once again that Hübbe was regarded an expert on the system, even though he was not especially trained in English law. Secondly, Hübbe's evidence demonstrates that his knowledge of the interrelatedness of the provisions of the Act proved to be particularly valuable. Thirdly, Hübbe's answers to the questions evidently implied that he claimed to know the original purpose behind the provisions of the Real Property Act.

---

239 *Deutsche Australische Zeitung*, 2 January 1873.
240 *Australische Zeitung*, 2 February 1875.
241 4 February/ 27 March/ 21 April.
242 Robinson, *Equity and systems of title to land by registration*, pp. 96 ff.
243 Hogg, *The Australian Torrens System*, p. 58.
244 Robinson, *Equity and systems of title to land by registration*, pp. 96 ff.
245 Hogg, *The Australian Torrens System,* pp. 14 ff.

The first aspect, i.e. that like the 1861 Commission the 1873 Commission still held Hübbe to be an legal authority worth consulting is evident from his extensive questioning. Unlike 1861, it cannot be argued that Hübbe was perhaps only involved because not enough British lawyers were willing to support the Reform Commission. By 1873, the system had been successfully working for 15 years and had been adopted almost everywhere in Australia.[246] Accordingly there were enough Property lawyers in 1873 who were experienced with the system and who would have been willing to give evidence before the Reform Commission. Why then did the commissioners care so much about the statements of a German lawyer who had not been practising for more than thirty years? Hübbe's involvement in 1873 cannot only be explained by his knowledge of Hanseatic law and the curiosity of the commissioners in ascertaining how certain problems of a system of title by registration were resolved in Germany. This can be seen from the type of questions the Commissioners posed to Dr. Hübbe; only a small portion of the questions referred directly to the Hanseatic system.[247] The bulk of the questions sought to obtain Hübbe's opinion on the problems of the South Australian statutes under discussion. Accordingly, Hübbe avoided expounding the Hanseatic system and instead referred to his description from 1861 in the Parliamentary Papers.[248] Thus, Hübbe was not questioned particularly as an adviser on Hanseatic law. Rather, it must be acknowledged that he had been accepted as a legal authority on the system under the Real Property Act of South Australia itself.

The second inference which can be drawn from Hübbe's evidence in 1873 is that he knew the interrelatedness of the provisions of the Real Property Act 1858 (SA) in particular detail. Indeed the questions and answers show that it was not Hübbe's suggestions regarding specific problems, but his view of the working of the system as a whole that were of central importance. Robinson's and Hogg's analyses of Hübbe's evidence reflect this. Robinson stresses in particular Hübbe's opinion on the relationship between caveats and priority rules, equitable rights and

---

246 Bradbrook, MacCallum and Moore, *Australian Real Property Law*, (The Law Book Company Ltd., Sydney, 2nd ed. 1997), p. 129.

247 See Questions 66 to 71; 95; 115; 116; 133; 160 and 1725.

248 Answer to Question 37.

the conclusiveness of the register.[249] Similarly, Hogg refers specifically to Hübbe for to his views of equitable rights in relation to the conclusiveness of the register.[250]

The third aspect which needs to be pointed out in connection with Hübbe's later account of the drafting of the Bill, is that his answers imply that he claimed to know which legal principles the original provisions of the Act purported to establish. Hübbe was seemingly of the attitude that the law, which was inaugurally meant to be enacted by the Real Property Act 1858 (SA), was a well-functioning concept and that the task in 1873 was merely to bring the influence of those principles to bear. Some extracts from Hübbe's answers to the Commissioners illustrate this point:[251]

Answer to question 75:

> "...I think it desirable that forms of nomination of trustees should be introduced and improved upon. In the first Real Property Act we had nominations of trustees; in the present Act we have no form for that."

Answer to question 103:

> "It appears to me that in order to maintain the principles of the Real Property Act, three classes of rights should be kept constantly distinct..."

Answer to question 110:

> "I am inclined to think that the practice (*re judicial functions of the Land Title Commission*) should be more elaborately laid down and defined with proper safeguards. The principle, I beg to say decidedly, should be retained."[252]

---

249 Robinson, *Equity and systems of title to land by registration*, p. 105.

250 Hogg, *The Australian Torrens System,* pp. 58 f.

251 Report of Commission appointed to inquire into the Intestacy, Real Property, and Testamentary Causes Acts (Adelaide, Cox, Government Printer 1873).

252 Author's italics.

Robinson suggests that the principles Hübbe wanted to preserve were actually "sought to be embodied in the Original Act".[253] This may remain unresolved. It is, however, suggested that Hübbe's aim to retain those "original" principles is in line with the hypothesis that he was a chief draftsman. Given that he was the main instigator of the principles in the first place, it follows that he would have held them as valuable and worth preserving.

The above results, i.e. the acknowledgement of Hübbe as a legal authority for the original Real Property Act 1858 (SA) and Hübbe's intention to preserve the original principles of the Act, seem to be confirmed by Hübbe's activities associated with the working of the 1873 Reform Commission. First he wrote another pamphlet covering the whole of Real Property Law and Intestate Inheritance. This pamphlet was so elaborate, however, that the cost of its printing was not feasible.[254] Secondly, Hübbe was active in the "Verein zum Schutze des Real Property Act" (Association for the Protection of the Real Property Act) of which he was a founding father no later than 1874 or 1875.[255] Neither the pamphlet nor the Association for the Protection of the Act have yet been considered by other authors who inquired into Hübbe's 1873 evidence. That is perhaps due to the fact that neither activity appears in the official records. References to these activities can be found only in the German newspaper "Australische Deutsche Zeitung" (Australian German Newspaper).[256], On 2 January 1873, just before the beginning of the 1873 Commission's work, the "Australische Deutsche Zeitung" asked the public for financial support (30 Pounds) for the printing of Hübbe's pamphlet. Two years later, in February 1875, the "Verein zum Schutze des Real Property Act" inserted an article in the "Australische Zeitung" asking the candidates running for election to promise to protect the Real Property Act.

---

253 Robinson, *Equity and systems of title to land by registration*, p. 104.

254 *Deutsche Australische Zeitung*, 2 January 1873.

255 *Australische Zeitung*, 2 February 1875.

256 In 1875 the paper was renamed and called "Australische Zeitung" (Australian Newspaper).

The author submits that Hübbe's pamphlet, as well as the foundation of the "Verein zum Schutze des Real Property Act", confirm the results of the interpretation of Hübbe's evidence given in 1873. Writing an elaborate pamphlet suggests that Hübbe preferred to discuss problems in a larger context instead of providing separate answers to specific aspects. This confirms the above interpretation of his questioning, i.e. that the commissioners chiefly asked Hübbe to give evidence because of his insight on the interrelationship of the principles and regulations of the system. Even though the 1873 pamphlet remained unprinted, it is likely that Hübbe gave the commissioners a hand-written copy as he, in his answers to the questions No. 1819 to 1822, referred to papers that he had handed in.[257] The foundation of an 'Association for the Protection of the Real Property Act' also backs up claims as to Hübbe's evidence. It shows that Hübbe did not want to change the law, but only wanted to make sure that its influence was brought fully to bear. Of course, this does not in any way prove that Hübbe was a chief draftsman, but the fact that he stood so strongly behind its principles is clearly in line with his latter claim that he had worked on drafting them.

The significance of Hübbe's activities connected with the 1873 Reform Commission regarding the origin of the Real Property Act 1858 (SA) is based on circumstantial evidence. This evidence flows from the attitude of Hübbe and the Commissioners which is expressed and implied by Hübbe's questioning and the writing of another pamphlet. It can be concluded that these activities constitute evidence which is in line with the hypothesis that Hübbe was a major draftsman of the inaugural system. Given that he was a central draftsman, it made sense that the commissioners recognized him as a legal authority on the matter. It might also be noted in this context that one of the commissioners, Mr. Kriechhauff, later participated in the 1880 and 1884 debates, and gave statements favouring the recognition of Hübbe's services in founding the Act. In any case, it would have made sense that Hübbe became a spokesman for the preservation and/or protection of the original system given that he himself had to a great extent introduced it.

---

257 Report of Commission appointed to inquire into the Intestacy, Real Property, and Testamentary Causes Acts (Adelaide, Cox, Government Printer 1873).

2. 4. The Cover up

There is strong evidence to support the theory that the Real Property Act 1858 (SA) was actually an attempt to adopt Hanseatic law in South Australia. Therefore, the above evidence poses the question how Torrens could uphold the belief of his sole authorship so successfully for such a long time. Geyer's thesis[258] titled "*Robert Richard Torrens and the Real Property Act: The Creation of a Myth*" from 1991 seeks to answer this question. In her analysis Geyer elaborates on the mechanisms and the social background that led to the "Myths" of Torrens' sole authorship at the very beginning.[259] Even though Geyer begins her analysis from the currently widespread assumption that the Real Property Act 1858 (SA) was based equally on a mixture of sources, her analysis proves to be important in evaluating the possible influence of the specific sources.[260] In her third chapter, "The Myth is sustained by later writers", Geyer examines how Torrens' misrepresentation of history had been adopted and perpetuated by historians and legal writers without questioning or even an examination of the relevant sources.[261]

Geyer finds two major reasons for Torrens' success in establishing the belief that he was the sole author of the Act. First, there is Torrens' strong and ambitious character combined with his talents as a politician.[262] Secondly, there appears to be an agreement among the most important people involved in the drafting process to give him the freedom to let the populace believe his simple account.[263] Before taking a closer look at these aspects, however, the author submits that the basic circumstance that enabled the facts to be misrepresented has to be pointed out. A clear distinction between "Torrens' draft bill" and the "Bill drafted by Torrens" was never made. The fact that the bill was initially called Torrens' bill, however, was merely based on the fact that the South Australian Government had refused to introduce the bill as a

---

258 Geyer, *Robert Richard Torrens and the Real Property Act: The Creation of a Myth*, Adelaide, 1991.
259 Geyer, *The Creation of a Myth,* pp. 30 ff.
260 Geyer, *The Creation of a Myth,* pp. 29 ff.
261 Geyer, *The Creation of a Myth,* pp. 48-60.
262 Geyer, *The Creation of a Myth,* pp. 12 ff; 29 ff.
263 Geyer, *The Creation of a Myth,* p.30.

governmental bill, so that, according to the procedure, the bill had to be introduced as a private bill, namely the "Torrens' bill".[264] From the introduction in parliament onwards, whenever the matter was discussed, everybody referred to the draft as 'Torrens' draft', 'Torrens' bill' and later even as 'Torrens' System'. From this it follows that Torrens could actually talk of "his bill" without risking any criticism.

Geyer does not give these circumstances enough attention in relation to the 'Creation of the Myth'.[265] The author submits that people at the time, according to the way Torrens presented the history, most likely assumed that calling the bill "Torrens' draft" meant that Torrens actually drafted the bill himself. After all, naming the bill after its main draftsman was and is not unusual in Anglo-Saxon legislative tradition. Quite often bills bear the name of the chairman of a legislative committee. That is the case for instance with the legislation on Share Registration, called Gladstone's legislation.[266] As distinct from this case, however, the naming of Real Property Act Bill reflected initially only a certain parliamentary procedure and an association of political responsibility. Calling the bill Torrens' bill meant merely that the bill was a private bill. If the South Australian Government in 1857 had been willing to introduce the bill as a governmental bill perhaps the name "Torrens' bill" never would have come into existence. It is noteworthy, however, that unlike other states South Australia officially preferred the name 'Real Property Act' and not 'Torrens' Act'.[267]

On the basis of the ambiguous naming of the draft bill it was easy for Torrens to manifest the belief of his draftsmanship as long as informed persons did not object. Geyer points out that Forster seemed to be Torrens' most devoted ally in this.[268] Not only did he hush up important facts, but he deliberately misrepresented the order of events in order to

---

264 Whalan, *The New Zealand Torrens System Centennial Essays*, (Butterworth Wellington 1971), p. 5.

265 Geyer, *The Creation of a Myth,* p 33.

266 Corcoran, "Nature and Characteristic of Companies", *Australian Corporation Law: Principles and Practice*, Vol. 1. (Butterworth, Sydney 1991), sec. 2.1.0050.

267 Howell, "Constitutional and Political Development, 1857-1890", *The Flinders History of South Australia*, ed. Dean Jaensch (Wakefield Press, Netley 1986), p. 162.

eliminate any doubts about Torrens' claims to draftsmanship. Whereas Forster's series of articles had obviously been published before Torrens had even joined the law reform debate, Forster in his book says that these articles merely coincided with Torrens' activities.[269] Forster and Torrens had seemingly agreed about this since Torrens even used the same wording describing it as a "coincidence" that the articles appeared at the same time as his proposal.[270] This seems even more bold in the light of the fact that Torrens' first attempt to convert the Shipping Act of 1854 into a statute on land law was based on the very suggestions made by Forster in his articles.[271] Geyer misses, however, an important point on which Forster is also inaccurate. Apart from concealing his own contribution in his book Forster gives no credit to Hübbe at all. This evidently contradicts his later account in his private letter to his niece, in which he gives Hübbe great credit for helping to draft the Act.[272]

When Forster said: "I may however say, at the close of a long life, that the Real Property Act originated in a series of leading articles that I wrote in the South Australian Register...(and)... it (the Act) never could have brought to a final consummation, but for the efficient help of a German lawyer, Dr. Hübbe" he was stating that for a long time he did not feel at liberty to come out with these facts. What prevented Forster from doing so, if it was not an agreement with Torrens not to put in doubt Torrens' sole authorship? Such an agreement would be in line with their friendship which grew out of their collaboration in the law reform process.[273] This friendship was linked to a sharing of the political work. Whereas Torrens fought the battle in parliament, Forster took care of the bill in the Legislative Council.[274] It also has to be noted that both were members of the Adelaide 'gentry', i.e. an inner political influential circle of the South Australian colonial society.[275] This suggests that keeping alive the "myth" of Torrens' sole authorship of the Act was also to

---

268 Geyer, *The Creation of a Myth,* p.30.

269 Forster, *South Australia: Its Progress and Properity* (Sampson Low, Marsden and Co., London 1866), p. 219 ff.

270 Torrens, *The South Australian System of Conveyancing by Registration of Title* (Register and Observer Printing Office, Adelaide 1859, pp. v-vii.

271 See Chapter 1, p. 7.

272 Forster to Ridley, 15 May 1892, South Australian Archives, A 792 A 2.

273 Stein and Stone, p. 24.

274 Forster to Ridley, 15 May 1892, South Australian Archives, A 792 A 2.

Forster's advantage. There appears also to have been a similar agreement of silence for mutual advantage between Andrews and Torrens. Torrens had helped Andrews to win the elections and promoted his later career considerably.[276] On the other hand, Andrews must have helped Torrens in the drafting in some way. On one occasion Torrens had even admitted publicly that he needed Andrews because of his legal skills.[277] Nevertheless Andrews also never made his contribution to the drafting public. Andrews' silence and his support through Torrens seem therefore to have gone hand in hand.

As regards to Hübbe, however, one cannot recognise any mutual agreement between him and Torrens which would have been to Hübbe's personal advantage. Nonetheless one can find aspects which explain why Hübbe did not reveal with his role in the drafting, when one believes Hübbe's and Loyau's accounts. Their description of the technical aspects of the drafting as well as the assertion that the draft was eventually modelled on German law gain importance in this context. Both aspects have not been considered by Geyer in the examination of the "Creation of the myth".

The technical aspects of the drafting as described in Loyau's and Hübbe's accounts suggest that it is likely that neither Hübbe nor Andrews regarded themselves as the real drafters of the Act. According to these accounts, Hübbe explained the system to Torrens who then ordered Andrews to draft the first bill according to those explanations.[278] Therefore Hübbe did not actually draft the first draft, even though he redrafted it later on. Hence Hübbe hardly could have called the bill his draft. Andrews, on the other hand, just put into provisions what he was told by Torrens. Hence, regarding the drafting itself, Andrews was little more than a mere legal secretary. Andrews must have been aware of this, at the latest, when he learned that Hübbe was allowed to remodel "Andrews' draft". The author submits that, assuming that Hübbe's and Loyau's description of the division of the drafting work is true, it is likely

---

275 Interview with Ian Harmsdorf, 20 November 1996.
276 Australian Dictionary of Biography, Vol. 3., p. 36.
277 *The South Australian Register*, 1 and 2 June 1857.
278 Loyau, *Notable South Australians*, p. 156 f.

that there was a confusion as who was responsible for the draft. This confusion coincided with the misleading naming of the 'private bill' after Torrens. This explains why Hübbe as well as Andrews did not object the bill being called "Torrens' draft", even though they both knew that Torrens himself had made little contribution to the actual drafting, but only to its organization. It should be noted that Hübbe had put the word "author" in inverted commas when he was talking of Torrens as the author of the Act in 1873.[279]

Nevertheless those technical circumstances can only partly explain Hübbe's silence. Even though he did not actually draft the first draft with his own hands, according to his accounts he provided the actual concept of the system, or to use the words of MP Henning "the ideas, brain and the work of the measure".[280] Why then did Hübbe keep silence about his pre-eminent part in the drafting process for such a long time? Like Forster, he had waited many years before giving his account of the history.[281] Hübbe's religious humility[282] or Torrens' ambitious and authoritative character[283] would be a poor explanation for this. Furthermore, as distinct from Forster and Andrews, Hübbe could not expect a political favour in return from Torrens. It is true that Hübbe expected a position in the land titles office at first, but immediately after the establishment of the system it was clear that these expectation would not be fulfilled.[284] Hence, at first glance there was no reason for Hübbe to keep silent for so many years.

A starting point for an explanation may be found in the last months before the first reading of the Act. At this time of high political agitation, the final drafting of the bill was kept a strict secret.[285] The opponents of law reform were not supposed to be given an opportunity to come up with arguments against the proposal before it was submitted to

---

279 Hübbe, *Letters to a Countryman V*, (Advertiser Office, Adelaide) 1873, p. 13.
280 Henning, South Australian Parliamentary Debates 1884, p.1025.
281 Official Statement 1884, SA-Archives, D 5257 (T).
282 *Australische Zeitung*, 10 February 1892.
283 Geyer, *The Creation of a Myth,* p. 29.
284 Official Statement 1884, SA-Archives, D 5257 (T).
285 Pike, "The introduction of the Real Property Act in South Australia" (1960 - 1962) 1 *ALR* 180 citing a letter of C. Fenn of 29 June 1858.

parliament.[286] Without knowing about the single provisions of the bill, the opposition members of parliament were forced to wait until the bill was introduced.

Yet the mere provisions of the Act could have not been the only reason for keeping the drafting a secret, otherwise the draftsmen would have had revealed the drafting process after the bill had become public. But even after the first readings the silence was kept. In the second reading Torrens even thanked a "member of the legal profession from whom he had received great assistance, but whose name he was not at liberty to mention".[287] Already in November 1856 he had referred to such a helper without giving the name.[288] Thus, the concealment of the drafting process even after the publication of the draft poses the question as to what other aspect of the drafting it was sensible to withhold from the public and especially from the reform opponents. The author submits that a sound explanation can be found for this seemingly conspiratorial silence, if one believes Hübbe's and Loyau's account of the drafting taking into consideration that in 1857 there arose a discussion whether South Australia would lose its 'Britishness' as a result of increasing German immigration. Around 1853/54 German migration had taken an "unprecedented jump".[289] Accordingly, some District Councils were almost completely German[290]. Only from 1858 onwards did the immigration rates start to fall again. However, in May 1857, because of the fear of losing the British character of the colony, a proposal to exclude Germans from the land fund scheme was debated.[291] The author submits that in this situation it would not have been politically very sensible to propose an adoption of German law in South Australia. This applies especially for land law reform which was given enormous importance at the time. In order to demonstrate the prevailing public opinion in this respect a newspaper article published by the editors (Mr.

---

286 Pike, "The introduction of the Real Property Act in South Australia" (1960 - 1962) 1 *ALR* 180.

287 *The South Australian Register*, 13 November 1857.

288 *The South Australian Register*, 21 November 1856.

289 Harmsdorf, *Germans in the South Australian Parliament*, p. 9.

290 E.g. Barossa, Light, Nurioopta, Tanunda.

291 *The South Australian Register*, 16 and 22 April 1857.

Forster) of the South Australian Register on 5 May 1857 is very illustrative:[292]

> "This question as to whether the Land Fund of this colony shall be employed in bringing out foreign immigrants is now assuming a practical form, and the public must be prepared to deal with it in a practical manner. We use, intentionally the phrase "foreign immigrants", for though the agitation refers to Germans only..."
>
> "The question really is, however, one between the British element and the foreign element..."
>
> "England itself is a free country; open to every race and tribe of mankind. But we presume that this freedom would not be conceded if any fear existed of the British character of the country being endangered."
>
> "In brief, the people of England are determined to guard the true Anglican character of their national institutions..."
>
> "...but we would also cherish its [*South Australia's*] British character, and maintain the duty of upholding the exclusively British character of its public institutions."
>
> "...and if there is a British colony, we are bound to reject every proposal which seeks to override that characteristic"
>
> "We may ask whether Germans naturalized in haste, and coming out here with their Teutonic habits and preferences entirely unchanged, would so quickly resolve themselves into loyal subjects of Queen Victoria..."
>
> "It must be also remembered that the Germans now settled in this colony- though peaceable subjects, though good cultivators, though useful members of the society- are to a very great extent isolated, living

---

292 *The South Australian Register*, 5 May 1857.

> together in the spirit of clanship, forming their own townships and villages, and generally preserving as much as they can, their German characteristics"
> "The demand sometimes made that all public Acts should be officially advertised in the German language has a tendency to destroy the exclusively British character of our institutions, and it would only be a step further to require a German Judge, and the conduct of the courts of law in the German tongue."[293]

The article evidently expresses a deep reluctance about the introduction of German institutions in South Australia at the time of the land law reform. The British colonists feared that the German community could become too powerful. Forster, who was the editor of the South Australian Register in 1857, obviously not only knew about this attitude and/or fear in the population, but he also shared this opinion, as the above article shows. The coincidence of the introduction of the Real Property Act and the discussion about German immigration becomes more apparent in June 1857. On 4 June 1857 Torrens introduced the bill in parliament for the first time.[294] The very next day, 5 June 1857, the threat of an overpopulation of Germans was on the agenda in parliament.[295] Kriechauff, the member for Mt. Barker, had handed in a resolution favouring German immigration. R. R. Torrens also participated in the debate and modestly advocated Kriechauff's motion. On 6 June 1857 the South Australian Register provided a copy of the minutes of the debate and an article written by Ulrich Hübbe that attacked the Attorney General Hanson for his proposal to limit German immigration.[296]

Hence Torrens, Hübbe, Forster and Hanson were well aware of the discussion going on about a possible "over-germanization" of South Australia. In this situation it is unlikely that these possible draftsmen would have pointed to the origins of the Real Property Act given that it

---

293 Author's emphasis.
294 South Australian Parliamentary Debates 1857, pp. 202 ff.
295 *The South Australian Register*, 6 June 1857.
296 *The South Australian Register*, 6 June 1857.

was modelled exclusively on German law. After all, during the elections the land law reform had become a matter of state and of even national importance. This interrelatedness of the two issues in the public opinion is also reflected by statements of the German population of South Australia which seemed to have been well aware of the prevailing sentiments. Some speeches on the land law reform by Germans on the Torrens celebration at Tanunda in 1862 are illustrative. The "Adelaider Deutsche Zeitung" reports what Pastor Mücke had said:[297]

> "Diese Reform ist ein deutsches Kind, das wir wohl kennen....Wie ein britischer Mann ein deutsches Kind einführte; lasset es uns geloben, alles Große der britischen Nation anzunehmen...."
>
> Translation by the author:
> "This reform is a German child that we know well... Like a British man introduced a German child let us all solemnly promise to adopt all great things of the British Nation."

On the same occasion a certain Mr. Basedow spoke. Noteworthy are his final remarks reported by the German paper in indirect speech:[298]

> "Schließlich erklärte der Redner, daß die hiesigen Deutschen keinen Anspruch auf eine bestimmte Nationalität machen wollten, sondern zufrieden seien, mit ihren anderen Mitcolonisten als Südaustralier zu leben"
>
> Translation by the author:
> "Finally, the speaker explained that the local Germans are not claiming a special nationality, but are content to live with the other colonist as South Australians."

---

297 *Adelaider Deutsche Zeitung*, 7. Nov. 1862.
298 *Adelaider Deutsche Zeitung*, 7. Nov. 1862.

Both Mücke and Basedow had spoken in the presence of Torrens, Forster and others British colonists.[299] It seems that the German speakers tried to make a point that the German community in South Australia posed no danger to the Britishness of the colony. Seemingly, still in 1862, i.e. almost five years after the beginnings of the land law reform, the fear of an increasingly German-dominated public life was still an issue.

The author, therefore, submits that given that Hübbe's latter statements were accurate, that is to say that the Real Property Act was based on an adoption of German law, it made sense for the draftsmen, in light of prevailing public opinion, to be cautious about pointing out the German origins of the system. It was likely that the opponents of the land law reform would have used the fears of a German "state within the state" to refuse a draft bill that was based on German land law. This politically motivated "cover up" might also explain why the employees of the Land Titles Office were not informed about why Dr. Hübbe had a desk in the authority after Torrens had taken it over.[300] Immediately after the enactment almost all proposals for amendments of the Act came from the Land Titles Office.[301] Hübbe's contribution to those proposals might have been kept a secret for the same reason that the actual drafting of the bill had been concealed from the public. Assuming Hübbe's account of the history to be true, the silence of the draftsmen can be explained in other ways than Torrens' authoritative character and the supposed agreements between him and the people involved. Other authors have not considered this relationship between the discussions on German immigration in 1857 and the land law reform seemingly because they did not seriously consider the Torrens System with regard to its possible exclusive German origins. For example, Geyer who inquired particularly into the motivations of a possible "cover up" presupposes that there were several sources involved equally.[302]

---

299 *Adelaider Deutsche Zeitung*, 7. Nov. 1862.

300 South Australian Parliamentary Papers 1861 No. 192 (Question No 791).

301 Whalan, *The New Zealand Torrens System Centennial Essays*, (Butterworth Wellington 1971), p. 10.

302 Geyer, *The Creation of a Myth,* pp. 29 ff.

It can be concluded, therefore, that the theory of the adoption of German law is in line with the silence on the drafting process before and after the readings in parliament. The fear of the loss of the britishness of the colony made it sensible not to stress the German origins of the draft. Nevertheless the reasons for the belief of Torrens' authorship seem to have been manifold. Favourable circumstances like the inaugural naming of the bill enabled Torrens to promote the belief in his authorship. Informed persons like Forster and Andrews seemingly collaborated with Torrens to their mutual advantage. Geyer is right, however, to distinguish yet another period in which later writers, long after the actual law reformers were dead, promulgated the belief of Torrens' authorship because they did not question the historical circumstances.[303]

2. 5. Conclusion

The evidence leaves little doubt that Hübbe was to a great extent involved in the drafting process of the Real Property Act SA (1858). Nevertheless, none of the statements or other historical sources can prove conclusively that Hübbe's assertion, that the Act was an adoption of Hanseatic law[304], is true. This result is not unexpected, however. We are dealing with the history of a complex matter and even at the time the drafting of the Real Property Act 1858 (SA) was concealed from the public.[305] In a retrospective analysis of such events one is limited in determining whether one or the other view of history is more likely to be true.

The question raised by the material analysed is therefore whether Hübbe's claim to have drafted the Real Property Act 1858 (SA) solely on the basis of the Hanseatic law is as likely or even more likely than the theory that the original system was an odd mixture from different sources, as Robinson calls it.[306] The author believes the answers to this

---

303 Geyer, *The Creation of a Myth,* pp. 48-60.

304 32 Royal Geographical Society Proceedings (SA) 112.

305 Pike, "The introduction of the Real Property Act in South Australia" (1960 - 1962) 1 *ALR* 180 citing a letter of C. Fenn of 29 June 1858.

306 Robinson, *Equity and systems of title to land by registration,* p. 112.

question to be in the affirmative. There are three aspects of the analysed material that sustain this view. Above all this theory creates a rational picture of several otherwise odd aspects of the history of South Australian land law reform. Second, the author's view is sustained because Hübbe's assertions are affirmed by several independent contemporary statements which seem considerably reliable. Third, the likelihood of the theory is also sustained because at the time of the adoption of the Hanseatic law it would have been the most suitable solution available and it appears that its adoption took place smoothly in the course of the draftsmen's search for suitable models.

With regard to the first aspect, i.e. that presupposing the adoption of Hanseatic law provides a sound explanation for several circumstances, it must be pointed out that Hübbe was regarded all his life as a very important legal advisor in respect of the Torrens System. This makes perfect sense assuming the Real Property Act 1858 (SA) was based on Hanseatic law because Hübbe, after all, was an expert on such law. If the system was, however, based on a mixture of sources, it is likely that any well-trained property lawyer in South Australia would have been a better advisor than Hübbe.

Hübbe was already treated as an important legal adviser at the time of the law reform itself. It is true that at that time hardly any lawyer wanted to support Torrens' proposal.[307] Given that German law had only been a side issue in the drafting of the Act though, it seems odd that Torrens drew so heavily on the help of a German lawyer. It is recorded, for instance, that Hübbe assisted Torrens during the second debate in parliament, i.e. the crucial debate for the enactment.[308] Hübbe sat outside the bar and was frequently consulted by Torrens.[309] Furthermore, immediately after the enactment of the Real Property Act 1858 (SA) Hübbe continued this collaboration in the Registry office. Torrens, as first Register General under the system, had furnished Hübbe with a desk

---

307 Forster to Ridley, 15 May 1892, South Australian Archives, A 792.
308 32 Royal Geographical Society Proceedings (SA) 110.
309 32 Royal Geographical Society Proceedings (SA) 110.

in the office.[310] This shows that Hübbe was regarded as an expert on the Real Property Act 1858 (SA) after the enactment of the law reform as well. This is also confirmed by Hübbe's involvement in the work of the reform commissions of 1861 and 1873, i.e. at a time when British-Australian property lawyers had mostly abandoned their opposition to the legislation.[311] The analysis shows that both commissions gave disproportionately great importance to Hübbe's advice and insight into Hanseatic law and the Real Property Act 1858 (SA). The 1861 commission, for instance, asked Dr. Hübbe to produce a treatise on the Hanseatic land law system.[312] This order has to be seen against the background of the questioning of Mr. Schuhmacher by Torrens[313] in the course of his work in the very same reform commission. In questioning Schuhmacher, Torrens tried to obtain an affirmative statement that the South Australian system was identical with the system successfully working in Hamburg. Assuming that Hübbe's account of the Real Property Act 1858 (SA) as being an adoption of Hanseatic land law was true, both aspects of the 1861 reform commission, i.e. the request for a treatise on Hanseatic law and Torrens' way of questioning Schuhmacher, fit together. If the Real Property Act 1858 (SA) was based mainly on the law of ship registration, it would have at least made more sense in 1861 to order a description of the working of ship registration instead.

The assumption that the Real Property Act 1858 (SA) was an adoption of Hanseatic land law would also explain why the 1873 commission questioned Hübbe so extensively on the interrelationship of the provisions and why papers which Hübbe submitted were accepted by the commission.[314] At that time, fifteen years after the establishment of the system, it would have made more sense to question an experienced Anglo-Australian property lawyer instead of a German lawyer who never practised in Australia and whose professional life in Germany ended well

---

310 Report of the Real Property Law Commission with Minutes of Evidence and Appendix (Adelaide, Cox, Government Printer 1861); Süd-Australische Zeitung, 12 January 1861.

311 Pike, "The introduction of the Real Property Act in South Australia" (1960 - 1962) 1 *ALR* 182.

312 South Australian Parliamentary Papers 1861, No. 212.

313 Report of the Real Property Law Commission with Minutes of Evidence and Appendix (Adelaide, Cox, Government Printer 1861), questions 1105 ff.

over 30 years earlier. Assuming that Hübbe was the main draftsmen of the original system, however, this made perfect sense.

Another aspect that would be more comprehensible if one assumes that Hübbe was the main draftsman of the Act is that Hübbe had been extraordinarily devoted to the Act for a long time. Not only had he collaborated with Torrens during the law reform, he had also worked in the registry office without remuneration.[315] As already mentioned,[316] Hübbe produced a pamphlet on Hanseatic land law in 1861 to support the refinement of the Act. For the 1873 reform commission he prepared yet another pamphlet on land law which was so elaborate that it was too expensive to be printed.[317] Furthermore, in 1875, almost fifteen years after Hübbe had been expelled from the registry office, he founded the "Verein zum Schutze des Real Property Acts" (Association for the Protection of the Real Property Act).[318] At that time Hübbe was already seventy years old and struggling to make a living.[319] Hübbe's inordinate devotion to the Real Property Act 1858 (SA) seems to be more understandable if Hübbe was one of the chief draftsman of the Bill. It would at least explain why Hübbe seemed to feel so responsible for the Act.

Furthermore, the author suggests that the likelihood of Hübbe's assertion that he modelled the Real Property Act 1858 (SA) on Hanseatic law provides an additional sound explanation for the fact that the process of the drafting was kept a secret for a long time despite the fact that people like Forster, Andrews, Hübbe and Hanson were informed. Torrens' authoritative character only partly explains this. Given that Hübbe's assertion is true, however, a sound explanation can be found in the rising fear of Germanization at the expense of the loss of the British character of South Australia in the mid-1850s. If the Real Property Act 1858 (SA)

---

314 Report of Commission appointed to inquire into the Intestacy, Real Property, and Testamentary Causes Acts (Adelaide, Cox, Government Printer 1873).

315 Report of the Real Property Law Commission with Minutes of Evidence and Appendix (Adelaide, Cox, Government Printer 1861), Question 788-791.

316 See Chapter 2 (2.3.3), pp 57 ff.

317 *Deutsche Australische Zeitung*, 2 January 1873.

318 *Australische Zeitung*, 2 Februar 1875.

319 Australian Dictionary of Biography, Vol. 4 (D-J), ed. Nairn, Serle, Ward (Melbourne University Press 1972), p. 437.

was virtually an adoption of German law, it was sensible for the draftsmen to keep silent about its German origins at a time when land law reform as well as the question of German immigration were discussed in a climate of considerable emotion.

Summing up these points, it can be established that the assumption of an adoption of Hanseatic land law in South Australia would furnish a rational explanation for several circumstances surrounding the South Australian land reform. The inference that Hübbe's intention to adopt Hanseatic law eventually gained acceptance would, however, still be rather speculative if there were not a number of independent contemporary statements that affirm Hübbe's dominant role in the drafting of the Act. The author suggests that this is a second aspect that sustains the likelihood that Hübbe's assertions are true.

The statements referred to arose mainly because of Torrens' petition for an additional pension in 1880, which was followed by a debate in parliament concerning to whom the government was indebted for the drafting of the Real Property Act 1858 (SA).[320] In the 1880 debate MP Henning's statement, "he would believe that all would agree with him that [...] Dr. Hübbe provided the ideas, the brains and the work of the measure, and that Sir R.R. Torrens merely fought the battle of the Bill in the House",[321] is striking. Four years later, in 1884, another debate followed in which a pension for Hübbe was discussed.[322] The analysis shows that the statements in the 1884 debate affirm the account given by Hübbe in his own statements[323] attached to his petition. A year later, in 1885, Loyau's collection of biographies of "Notable South Australians" was published. In his account on Hübbe, Loyau also affirmed Hübbe's view, giving additional details about the collaboration between Hübbe, Torrens and Andrews.[324] The evaluation of Hübbe's contribution as being crucial for the creation of the Act was also shared by Torrens' friend and political ally, Anthony Forster, who gave an historical sketch of the law

320 South Australian Parliamentary Debates 1880, pp. 420 ff.
321 South Australian Parliamentary Debates 1880, p. 427.
322 South Australian Parliamentary Debates 1880, pp. 1024 ff.
323 Official Statement 1884, SA-Archives, D 5257 (T); 32 Royal Geographical Society Proceedings (SA) 109-112.

reform in a private letter to his niece in 1892.[325] All these statements were independent of each other and, as the analysis shows, they are all very reliable. They all declare Hübbe to be the chief draftsman of the Real Property Act 1858 (SA). With the exception of Loyau's account, these statements, however, say little about whether Hübbe actually used the Hanseatic law as a model as he later asserted in 1884.

Nevertheless, it must be acknowledged that Hübbe intended to adopt Hanseatic law from the very beginning of his activities on land law reform. The analysis has shown that his book "Voice of Reason" of 1857[326] bears internal evidence for this. In this book Hübbe drafted certificates of title referring to South Australia's capital, Adelaide, in order to demonstrate that it was possible to adopt the Hanseatic system in South Australia.[327] The writing of a pamphlet on Hanseatic land law in 1861 to support the work of the reform commission is in line with this idea. Also, Hübbe's answers to the questioning in 1873 indicated that he was driven by the conviction that it would be sensible to adopt Hanseatic law in South Australia.[328] However, if it is accepted that Hübbe maintained persistently this proposal all the way through the law reform process, the fact that he was confirmed by his contemporaries as the major draftsman of the bill suggests that his basic idea of using use the Hanseatic land law as a model gained acceptance.

In this respect, the editors' articles of the contemporary German newpaper "Adelaider Deutsche Zeitung" (since 1873 called "Australische Zeitung") are a particularly important.[329] The author has found three articles from 1862, 1882 and 1892 in which the editors Mücke and Basedow give clear statements on the German origins of the Real Property Act 1858 (SA). In these articles they call the Torrens System a "German child"[330] of which Hübbe was the "actual father"[331] and which

---

324 Loyau, *Notable South Australians*, (Carey & Page, Adelaide), 1885, pp. 156 f.
325 Forster to Ridley, 15 May 1892, South Australian Archives, A 792.
326 Hübbe, *The Voice of Reason*, (David Gall, Adelaide 1857).
327 Hübbe, *The Voice of Reason*, (David Gall, Adelaide 1857), pp. 64 f.
328 Report of the 1873 Commission, Answer to Question 66-75; 96; 96; 115; 116; 132; 133; 140; 160 and 1725.
329 Editions of 1862, 1882 and 1892.
330 *Adelaider Deutsche Zeitung*, 7 November 1862.
331 *Australische Zeitung*, 10 February 1892.

was "introduced from Germany as a whole"[332]. It is striking that the authors of the articles do not see a need to justify these statements. Rather, they express the assumption that the readers are already familiar with these circumstances. In this respect the German articles resemble MP Henning's statements in the 1880 debate, which expressed a similar attitude.

Aside from the aspects mentioned above, the author submits a general argument that supports the likelihood that the Real Property Act 1858 (SA) was an adoption of Hanseatic law. This argument is that, at the time of law reform in 1857, the adoption of the Hanseatic land law system seems retrospectively to have been the most suitable and easy solution in the course of the draftsmen's search for a model. Whereas the law reports[333] and the series of articles by Foster[334] merely pointed to the desirable goals of the reform, the Hanseatic land law system provided a system of land registration already in operation. The most important principles which the commissioners and reformers sought to install were therefore found in the already operational Hanseatic land law. The system has been working successfully in Hamburg for centuries,[335] so the risk in adopting it seemed to be quite limited. Furthermore, there was a German lawyer at hand who was willing to collaborate with Torrens and to adopt the system in the provisions of a British statute. The alternatives to adopting Hanseatic land law seemed much less attractive under the political pressure for reform. The law of ship registration, for instance, which was first considered as a model, would have caused difficulties since ships were movable property and thus raised different problems to those of immovable property.[336] Furthermore, instead of taking Hamburg's land law as a model, Torrens could have tried to develop a brand new system. In order to do that, however, he would have needed the help of well-trained lawyers and enough time to work on the matter.

---

332 *Australische Zeitung*, 28 March 1882.

333 Reports of the Real Property Commissions (appointed to inquire into the law of England respective land) of 1830 and 1850.

334 *The South Australian Register*, 3, 4, 5, 9, 11, 12, 15, 29, 23, 29 and 31 July 1856; 4 and 5 July 1856.

335 Torrens himself pointed out to the situation in Hamburg in his speech during the second reading of the Bill: Parliamentary Debates 1857, p. 205.

336 32 Royal Geographical Society Proceedings (SA) 112.

Both time and eager lawyers were in short supply at the time of the law reform.

Summing up the arguments for assuming that the South Australian land law reform was based on Hanseatic law, three important aspects can be recognised. First, the assumption explains numerous circumstances of the reform history that otherwise would be hard to comprehend. Secondly, Hübbe's account is affirmed by trustworthy contemporary statements that declare him to have been the crucial draftsman. Thirdly, it seems that under the given pressure for reform it was a suitable solution to adopt the Hanseatic land law as a consistent whole instead of working out a brand new system. The author submits that because of these three aspects the theory of an adoption of Hanseatic law is at least as if not more plausible than the assumption that the inaugural system started out as a mixture of different sources and ideas, i.e. as a system of its own.

What conclusion can be drawn from such an inference? The author submits that although one cannot establish truth on the basis of probabilities, the establishment of the probability of a certain course of history of the Real Property Act 1858 (SA) is still important. Even though one will never be sure what Torrens, Hübbe and Andrews exactly did some 140 years ago, the approach to further research is affected if one accepts as highly probable that the reformers tried to adopt Hanseatic law in the form of a British statute. It is suggested that since there are considerable arguments to sustain this view, it is a compelling step to examine the Torrens System as a possible legal transplant. It is suggested that this has not yet been done and Hübbe's claim to have adopted the Hanseatic law in South Australia has not been seriously considered until now. From the evaluation of the material of Hübbe's contribution, there follows a need to compensate for this lack of research.

Examining the Torrens' system as a legal transplant is promising on several levels. Above all, it is interesting to ascertain if a comparison between the systems confirms the conclusions drawn from the historical sources. Further, it would be challenging to establish what changes the

Hanseatic law would have had to go through in order to be adopted in the provisions of a British statute. Could perhaps the numerous amendments that the system had to undergo immediately after its enactment be explained by a lack of adaptation of the inaugural transplant? Can the most outstanding difficulty within the system, i.e. its handling of equitable rights, be explained by the fact that the overall Hanseatic law did not differentiate between equitable and legal rights and therefore did not provide a solution for this? These and other questions belonging to the hypothesis that the Real Property Act 1858 (SA) was a legal transplant open up a wide field of research and new ways of looking at problems associated with the South Australian land titles system.

Chapter 3: Comparative legal approach: Analysing the Torrens System as a legal transplant

3. 1. Introduction: Purpose of a comparative legal analysis

Historical analysis supports the hypothesis that the Australian Torrens System might be an adopted form of Hamburg's land law. The interpretation of historical facts, however, can only provide so much probative weight. It is therefore advisable to supplement the historical analysis by a comparative legal analysis. Comparing the South Australian Torrens System with Hamburg's land law in the 19th century should reveal the extent to which the rules and regulations show parallels. If the Torrens System was modelled on Hamburg's law, the resemblances should be substantial. In this case the hypothesis would be proven. If the resemblances are limited, the hypothesis would be weakened and the deviating rules would suggest yet other origins. In any case an analysis would remain incomplete if it failed to include the comparison of the Torrens System with its suggested origin.

There is yet another reason to undertake such a comparative legal analysis. The Torrens System has never been looked at as a legal transplant, thus leaving a gap in the research. The reason for this may be that the theory of an adoption of German law has not been widely known and/or acknowledged until recently. Furthermore, the fact that such analysis requires knowledge of both systems, i.e. of Australian and German law, has probably contributed to this gap. The author submits, however, that at first glance one notices major structural differences between the systems, which may have discouraged researchers from pursuing this theory any further. The most considerable structural difference is that the transfer of real property rights under the Hanseatic system incorporated an additional stage in court which the Torrens System did not have. It is tempting to take the view that this considerable difference in the structure of the two systems shows that the Torrens System did not evolve exclusively out of Hamburg's law and that, in any case, one cannot trace the history of the various rules anymore. If Hamburg's law was the exclusive model, the additional court stage should also be found in the Torrens System.

Such an opinion, however, omits to examine whether differences between the two systems can be explained by the adaptation processes

involved in the transplantation of a legal system to that of a different country. In comparing the two legal systems, i.e. the Torrens System embodied in the Real Property Act 1858 (SA) and the Hanseatic land law system in the mid nineteenth century, one has to keep in mind that the hypothesis underlying this comparison is that a whole legal system relating to real property has been transferred. It is evident that a transfer of an entire legal system from one country to another is not simply a task of translation. Rather, the process of transplanting a whole legal system is likely to go hand in hand with an adaptation process. The adaptation processes which might accompany the adoption of legal systems requires further explanation. In order to function, a legal system must become a living part of the overall body of law into which it is transplanted. The main task is therefore to adapt the transplanted system as well as possible so that it operates as smoothly as it did in its original home. Since the comparative legal analysis attempts to trace the possible transfer of Hamburg's land law system into that of South Australia, such an adaptation process should be taken into account. When comparing the regulations of the South Australian Torrens System to Hamburg's law, the question of whether one rule emerged out of the other via an adaptation process must be also addressed.

For the purpose of this analysis, therefore, the Torrens System must in part be regarded as the possible product of an adaptation process. The task of analysis cannot merely be to elaborate the identical and/or completely corresponding rules of both systems. The analysis has to go beyond that and examine to what extent the rules of the inaugural 'Torrens System' which deviated from the Hamburg model could be adapted forms of Hanseatic law. Moreover, as the transfer of the 'Torrens System', assuming that it took place, was not between two common law countries, but a transplanted from a civil law to a common law system, this would have inevitably demanded an even greater need for adaptation.

In order to take the adoption process into consideration, the groundrules for a comparative analysis of a legal transplant will first be laid out (in 3.2.); then the major structural difference between the Torrens System and Hamburg's land registration system, i.e. the involvement of courts, will be analysed to determine whether it can be explained as a process of adaptation (in 3.3). After this groundwork is provided, the principles and institutions of the two entire systems are compared with a view to ascertaining whether an adoption process occurred (3.4.).

3. 2. Basics for a comparative analysis of a legal transplant

In order to analyse the law on aspects of possible adaptation, it is useful first to set out some basic adaptation processes that may have taken place. The author has endeavoured to select the most obvious examples to demonstrate such adaptations and make clear that the necessary alteration of systems in the course of their adoption must not be overlooked.

3. 2. 1. General implications of a possible adaptation process

An obvious reason for an adaptation of law lies in possible contradictions and hindrances caused by the general legal concepts of the adopting country. If the adopted system does not fit into the legal framework of the new legal environment, the system inevitably has to change to eradicate such contradictions. If, for instance, Australian contract law provided different links than Hamburg's contract law, the adopted form of Hamburg's land law would have to adjust its links to this field of law. Of course, such adaptation only makes sense as long as the basic functioning of the system is not affected.

A further reason for adaptation may also be a lack of appropriate legal terminology in the adopting country. In order to transfer a concept it is necessary that precise terminology be available. If this is not the case it must be created or some equivalent concept invented, in order to achieve the same effect in the adopting country. Since common law and civil law countries have quite different concepts of land law, the terminology is accordingly very different. Even the word "land" itself might be understood differently.[337] This must be taken into consideration when comparing the South Australian Torrens System with Hamburg's land law. It is likely that certain aspects of the system were adapted to meet such differences in legal terminology.

In addition to terminology, different underlying concepts of land law are also likely to have required yet further adaptations. For the purpose of this chapter, it is sufficient to point out the most outstanding conceptual differences between traditional British and German land law. That is to say, that common law and civil law countries have different concepts regarding the structure of real property rights. Whereas common law is

---

337 See for the definition of the term in the original Torrens System: s. 3 Real Property Act 1858 (SA).

marked by the doctrine of estates, civil law countries have the notion of absolute ownership[338]. The author submits that it would have necessitated considerable adaptations to implement Hamburg's system in an overall system based on the common law notion of estates.

Furthermore, common law furnishes real property law with the general concept of the division between legal and equitable rights.[339] This division can only be understood historically as two parallel jurisdictions and thereby two bodies of law which evolved in England in the Middle Ages.[340] Civil law countries do not share this unique British history, thereby creating no distinction between legal and equitable rights. The concepts of land rights in general are therefore considerably different. A transfer of a land registration system from Hamburg to South Australia would have had to accommodate this fundamental difference. It would not have been possible to implement a continental land law system without being aware of what legal and equitable principles would have applied to it.

Another largely historical difference between common law and civil law countries is the partition of rules in different areas of law. What may be found as a property law rule in a civil law country, may be governed traditionally by contract law in common law countries.[341] Essentially, all of these different legal fields are artificial constructions, since a system may always be reduced to the legal reality of its rules. In transferring the Hanseatic land registration system, however, rules would have had to be put into the right categories of the common law system in order for the intergration to be smooth.

Yet another adaptation of the transferred system would have been neccessary because of the different relationship of statute and case law in common law and civil law countries. Since the Torrens System was implemented in statute these differences have to be considered. Civil law gives statutes central importance due to the notion of codification which is a basic characteristic of the civil law system. A codification is designed to incorporate the whole law of the area in question in one

---

338 Westermann, *Sachenrecht* (Müller, Karlsruhe 1973), § 61, p. 293.

339 Bradbrook, MacCallum and Moore, *Australian Real Property Law*, (The Law Book Company Ltd., Sydney, 2nd ed. 1997), Chap. 2, pp. 76 f.

340 The separation between equitable and legal jurisdiction was removed in SA in 1853 by the Supreme Court Procedure Act. In England this only occurred in the 1870s.

341 The landlord and tenant law for instance is traditionally governed by contract law in Germany.

statute.[342] Thus statutory law usually outweighs the importance of case law in civil law countries. Case law is thereby reduced to a merely supplementary function. Notwithstanding the fact that statute law has steadily increased in common law countries, in the mid 19th century, case law was still predominant in real estate law. Statute law was regarded as being supplementary. This different understanding affects not only the features of the statutes but also the manner in which they are applied by courts. Common law judges did not regard statutes as the source of the *entire body of law* which governs a specific area, i.e. they did not start from the concept of a codification. In conveying Hanseatic law into the sections of a common law statute, i.e. into the Real Property Act 1858 (SA), this different understanding would have required adjustment, so that the law was eventually applied by the courts in the manner intended.

Of course the above is not an exhaustive list of the implications which the differences between common and civil law would yield in the process of adapting one system to another. However, the above examples do provide an indication as to what impact different terminology, different links to other fields of law, different underlying concepts and above all a different understanding of the law itself might have on the adoption of a foreign legal system. If Hamburg's land law was adopted in South Australia, these aspects are likely to have played an important role and must therefore be taken into consideration when comparing the two land law systems to reconstruct a possible adoption process. What particular implications the adaptation process eventually would have had depends, however, on the respective regulations and will have to be discussed in context separately.

3. 2. 2. Specific implications of the adaptation process relating to Hamburg's law and the Torrens System

In addition to the general implications which an adaptation process within the transfer of a system from a civil law country to a common law country would have had, aspects particular to the specific adoption of Hanseatic land law in South Australia should be recognized. As these specific implications prove to be important for the understanding of the method of the following comparative analysis, they will be discussed briefly first.

---

342 Morris, Cook, Creyke and Geddes, *Laying Down the Law* (Butterworth, Sydney 1988), Chap. 8, p. 130.

The imperfect state of the first version of the Real Property Act (SA) 1858.

It must be realised that the inaugural Torrens System was a legal transplant only partially adapted to South Australia's legal system. This notion must be carefully balanced with the assumption of adaptations described above. A glance at the early history of the Torrens System shows that it was subject to numerous changes and amendments. This process of steady amendments continued until 1862, which is why some authors regard only the statute of 1862 as the real 'Torrens system.'[343] This continuous process of amendment suggests that the inaugural form of the system was imperfect and needed refinement. Of course this is quite natural for a brand new system which is the product of a reform debate. The author submits, however, that the great need for refinement may partly have been because the adopted system did not incorporate all of the necessary adaptations. The transfer of a whole legal system such as a land law system from a civil law country to a common law country is a complicated process. It is likely that not all possible complications and necessary adaptations are foreseeable during the first drafting of the bill. This would have especially applied to the political situation in South Australia which put pressure of time on the reformers. Robert Torrens had promised a bill producing a sound system long before the first draft had been completed. His opponents blamed him for not fulfilling this promise when he was unable to produce a draft in time.[344] Working under such time pressure would not have enabled the reformers to undertake an extensive comparative legal analysis before drafting the first sections to present to the public. Additionally, few common law lawyers in South Australia were willing to help reform the land law at all.[345] Given that the reformers themselves undertook the transfer of Hamburg's system to South Australia, they would have been a small group acting on their own. This would be very different to a well-equipped commission set up by the government as would usually be the case for such a complicated process. Under these conditions, it is unlikely that the first draft was a perfectly adapted form of the transferred system.

---

343 Whalan, "The Origins of the Torrens System and its Introduction into New Zealand" in *The New Zealand Torrens System Centennial Essays* (Butterworth Wellington 1971), p.4.

344 *South Australian Register*, 28 August; 3. September 1857.

345 Bradbrook, MacCallum and Moore, Chap. 5, p. 129.

Given that one is dealing with a legal transplant, it must be acknowledged that the numerous changes to the Torrens System immediately after its enactment and the vehement criticism which the system encountered, was partly the result of a lack of adaptation to the overall system of English law. The amendments may have compensated for possible shortcomings in the adaptation process. The author, therefore, submits that for the purpose of this analysis, the first version of the Real Property Act 1858 (SA) should be regarded as an incomplete adapted transplant. The implication is that a comparison of the Torrens System to the Hanseatic land law might reveal resemblances which do point to the assumed adoption history, but are not in line with the expected adaptations. Looking for conceivable adaptation processes resulting from the transfer of Hamburg's system to the South Australian Torrens System is therefore of limited scope as the inaugural Torrens System was not a perfectly adapted form of Hamburg's law, and not every aspect of the two systems will be in accordance with a comprehensible process of adaptation.

Lack of a consolidating act in Hamburg's land law at the time of South Australia's land law reform in 1858.

In establishing the possible need for adaptations it has to be taken into consideration that Hamburg's land law lacked a consolidating act. Whalan's assertion[346] that there was a Hanseatic code which could have been translated is therefore incorrect. It is obvious that a comparative analysis cannot ignore the difference in the forms in which the law was incorporated in Hamburg and South Australia. Whereas the Torrens System was enacted in a single statute (Real Property Act 1858 (SA)), Hamburg's land law system was not. Hamburg's land law system was a conglomerate of ordinances ("Rath- und Bürgerbeschlüsse") and city council decisions ("conclusum")[347] accompanied by customary law which went back as late as the beginning of the 17th Century. Hamburg's land law in the mid 19th Century was therefore not governed by precise statutory provisions.

This has considerable impact when comparing Hamburg's law with the Torrens System as one cannot compare the Australian statute with

---

346 Whalan, *The New Zealand Torrens System Centennial Essays*, (Butterworth Wellington 1971), p.7.

347 Anderson, *Anleitung für diejenigen welche sich oder anderen in Hamburg oder dem Hamburgischen Gebiete Grundstücke oder darin versicherte Gelder zuschreiben lassen wollen* (Nestler, Hamburg 1810), § 26, p. 70.

another single statute. Rather one finds Hamburg's law described in textbooks of the time. The 'ordinances' and 'city council' decisions were far too numerous to give an overview of the law in question.[348] If people at the time wanted to know something about Hamburg's land law they were obliged to consult either a professional lawyer or at least a contemporary textbook. Of course, old German textbooks did not have the same structure as a South Australian statute. The purpose of a textbook on law is to explain and reflect expert opinions and is not a genuine source of law in the manner of a statute. These aspects have to be taken in consideration when comparing the law as stated in a textbook with the law in the Real Property Act 1858 (SA). A textbook does not present the rules consecutively, i.e. one after another but presents rules in context. A textbook describes and explains functions and principles of respective laws. It deals with how the law functions and is oriented towards practical needs. When using old textbooks to analyse Hamburg's law, it is appropriate to make individual topics of land law the basis of the comparison. Instead of looking for single rules, it is more suitable to describe institutions, structures and principles. The question should therefore not be whether Hamburg's land law contained the same regulations as the sections of the Real Property Act 1858 (SA). Rather, it is sensible to examine whether the sections of the Real Property Act created law which corresponded to the law described in the textbooks on Hamburg's land law.

Yet another reason for using textbooks to examine Hamburg's land law should be briefly stated. Textbooks usually do not furnish the reader with a mere description of law. Authors often add their own personal opinion of the legal problems with which the book deals. In addition, they also give a description of likely future developments in the law. Comparing Hamburg's law with the Torrens System on the basis of textbooks, one must differentiate between the law itself, mere customs and the opinion of the writer.

The choice of material for the examination of Hamburg's law

It seems that using a textbook inevitably involves relying on the personal views of its author. This is important when considering the material for the intended comparison and also affects the choice of the textbook to be

348 See for a collection: Wulff, *Hamburgische Gesetze und Verordnungen*, 4 Volumes (Hamburg 1891/1897); Lappenberg, *Sammlung der Verordnungen der Freien und Hansestadt Hamburg*, 34 Volumes (Hamburg 1774/1865).

used as a reference. As the comparative analysis is concerned with a possible adoption of law in South Australia in the mid 19th Century, it seems best to use textbooks actually present in South Australia at the time concerned. If the adoption of Hamburg's law really took place it is certain that the reformers would have based their work on material at hand.

Dr. Ulrich Hübbe is said to have gathered a lot of material on Hamburg's land law in the course of the reform debate. His descendants, however, report that most of that material was destroyed in a flood which damaged his whole house and in particular the cellar where his material was stored.[349] The only reference to textbooks on Hamburg's law present in South Australia at the time can be found in the Parliamentary Papers in which a pamphlet by Hübbe on Hanseatic law was printed in 1861 by the order of the Legislative council.[350] In that paper Hübbe refers to two books on Hanseatic law:

> 1. Christian D. Anderson, Anleitung für diejenigen welche sich oder anderen in Hamburg Grundstücke oder darin versicherte Gelder zuschreiben lassen wollen, Hamburg 1810.
> Translation as given by Hübbe:[351]
> Christian D. Anderson, Advice to all persons desirous of transcribing land, or moneys secured thereon, in Hamburg and its dependencies, Hamburg 1810
>
> 2. Georg Lührsen, Das Stadterbe- und Rentenbuch der Stadt Hamburg, 1860
> Translation as given by Hübbe:[352]
> Georg Lührsen, The book of the city of Hamburg, of heridaments and rents, Hamburg 1860.

Searching in German libraries and archives, the author did not find Lührsen's book on Hamburg's land law. Lührsen's book, might not have been stored in the public libraries as it was more of a pamphlet than a book, being only about 35 pages in length.

---

349 Interview with Hübbe's great-grandson, Mr. Simpson (Adelaide, Stonyfell), 1 November 1996.

350 1862 *S.A. Parliamentary Papers* No 212.

351 Translation of title as given in 1862 *S.A. Parliamentary Papers* No. 212, p. 5.

352 Translation of title as given in 1862 *S.A. Parliamentary Papers* No. 212, p. 5.

Anderson's textbook was written in the style of a manual and was addressed chiefly to laymen. In 147 pages the book described all important aspects of Hamburg's land law at the beginning of the 19th Century. The 43 chapters of Anderson's book attempted to elucidate every possible form of transfer of rights in land, explaining the respective procedures with a set of authentic examples taken out of Hamburg's city book (Stadterbebuch). The author has decided to make Anderson's book the principal basis for the following comparative analysis. Other textbooks are used only as supplements. This is partly because Anderson's book was present at the time of the law reform and it is likely that Dr. Hübbe made it the basis for his work; indeed, three-quarters of the references given in Hübbe's pamphlet refer to Anderson's description of land law. In addition, Anderson's book proved suitable as the basis for the following comparative work due to its straightforward approach to the law and the fact that it focuses on explaining how the law works in practice instead of discussing it in an abstract and academic manner. Any comparative analysis draws heavily on establishing what effect foreign legal concepts have in practice.[353] Further, Anderson's book is well suited for a comparison because it is intended to advise laymen about the risks and problems they might encounter in Hamburg's land law. In this way, the book also indicates defects in the system. The comparison will show that acknowledging the defects in legal systems plays an important role in the course of any adoption of those systems.

The foregoing description of the general and specific implications of the adaptation process provides a framework for the following comparison. If the theory of a possible adoption of Hamburg's land law is supported, a process of adaptation of the transferred system to South Australia's overall system has to be considered. The comparison can therefore not be limited to locating the differences between the systems. Rather, it has to be determined whether such deviations result from an adaptation process or simply exist because the respective rules are unrelated. On the other hand, this search for possible adaptations is limited because the Torrens System required refinements immediately after its enactment which indicates that the initial system was in an incompletely adapted state. Since there was no consolidating act in Hamburg in the mid 19th century, lawyers in Australia would have been forced to use textbooks in order to gain an insight into Hamburg's land law. The following comparative legal analysis relates to Hanseatic land law as it was

353 Constantinesco, *Rechtsvergleichung*, Vol. II, Die rechtsvergleichende Methode, (Köln 1972), pp. 137 ff.

described in textbooks present in South Australia at the time of the land law reform.

3. 3. Why it was necessary to leave out court participation in the course of a possible adoption of Hamburg's land law.

As mentioned earlier, when comparing the two systems one immediately notices that the transfer of land in Hamburg at the time of the South Australian land law reform involved the participation of the courts.[354] The Torrens System, on the other hand, made no provision for the courts to play a role in the mere process of dealing with land. This seems to be a fundamental difference which arguably shows that the Torrens System is not or at least not only modelled on Hanseatic land law. The author submits, however, that the difference can be explained by a natural modification process which goes hand in hand with the adoption of law. That is to say that in the course of the adoption of a legal system, the reformer will always endeavour to free the system of its evident defects first.

The following analysis will show that the court stage in Hanseatic law was known to be defective and superfluous in the working of the system. Assuming that South Australia adopted Hanseatic law, it would have made perfect sense to leave out the court stage. This would especially apply to a vast state like South Australia in which the courts were not as closely concentrated as they were in Hamburg. It is also worth noting that the court stage was abolished in Hamburg in 1868 and that after German unification in 1871 German federal law did not provide for court involvement either.

The comparative analysis of the court stage is central to the question of whether the Torrens system might have evolved out of Hanseatic law. It is important to understand why the issue of the court involvement is dealt with at the forefront of this comparative analysis. The author submits that if one omits the court stage from Hanseatic land law what essentially remains is the Torrens System. The comparison of the basic institutions, principles and underlying concepts of the two systems in the following chapters will show this. The eradication of the court stage is therefore the key to understanding the following comparative issues.

---

354 Baumeister, *Das Privatrecht der freien und Hansestadt Hamburg* (Hamburg 1856) p. 125.

3. 3. 1. An overview of Hanseatic land law

Nineteenth-Century Hanseatic land law is almost certainly unknown to the bulk of readers whether they come from the common law countries or from Germany itself.[355] In order to appreciate the differences between the Hanseatic System and the Torrens System, and in turn to be able to understand how they may be explained, some basics of the Hanseatic law have to be explained. In addition, a general overview of the transfer of land in 19th Century Hamburg will lay the groundwork for the subsequent comparative analysis of basic institutions and principles.

3. 3. 1. (a) The Hanseatic Court stage and its part in a three-stage process of transfer of land rights

Under the Torrens System the parties to a dealing in land were able register the dealing immediately after having made the contract and executed the memorandum of sale.[356] Thus the transfer of land comprised two stages: the first stage, which was only between the parties (contract/memorandum of sale), and the second stage, which was the registration of the transfer in the land register. This two-stage process was and still is the basic frame of the Torrens System. This was different under old Hanseatic law. Between making the contract and the registering the dealing there was an act in court, called the "Verlassung"[357]. One can therefore distinguish three stages of a dealing in land under the Hanseatic law. The first stage was the mere contract between the parties;[358] the second stage was the procedure in court, i.e. the "Verlassung"; and finally the third stage, which was the registration, which concluded the process and validated the transfer. Since the stages in the procedure in Hamburg and South Australia differed because of the court stage, the following description is mainly concerned with that stage.

The court stage ("Verlassung") in Hamburg's law

The court stage, i.e. the second stage of land transfer under Hamburg's law, took place in an inferior court. Anderson listed the specific courts and their areas of competence relative to the respective districts of

---

355 A different system was chosen for Germany after the unification in 1871.

356 Real Property Act 1858 (SA), ss. 35 and 36.

357 Anderson, *Anleitung*, § 2, p. 6.

358 The contract is substituted by other acts in the case of transmission of death and/or marriage.

Hamburg.[359] These courts dealt with the "Verlassungen" (court stage) only at certain times during the year as determined by a Hamburg statute of 1605.[360] According to this statute the "Verlassungen" had to be held once a month except in February, June, August and November.[361] The "Verlassungen" had to be scheduled for a Friday following a declared religious holiday.[362] After having made a contract relating to the transfer of rights in land, the parties therefore had to wait for the next scheduled "Verlassung" in the court of their district. It was thus hardly possible to agree a dealing and then get it registered the very next day.

The fact that the statute regulating the times of the "Verlassungen" (court stage) was dated 1605 shows that the concept was very old. The word is archaic and means, literally translated, "abandonment". The term derives from the fact that the original proprietor leaves his or her land symbolically to the new proprietor.[363] According to its old heritage the "Verlassung" (court stage) was subject to a set of traditional formal rules that regulated the procedure. In order to have a valid "Verlassung" (court stage) a distinct number of members of the city council ("Stadtrat") had to be present,[364] including the mayor to represent the city community.[365] Only when the required number of members of the city council were present did the court session start. Notwithstanding that the sessions were all scheduled for 10 a.m., the public were admitted to the locality only if the constitution of the necessary number of city council members had been formally established.[366] Not only were the parties involved in the dealings allowed to participate in these court sessions, but also everybody who was interested in land dealings in general or just curious could do so.[367] The unlimited access of the public was a basic feature of all court involvement in the transfer of land in 19th Century Germany.[368]

---

359 Anderson, *Anleitung*, § 4 - § 6, pp. 8 -13.

360 Anderson, *Anleitung*, § 3, p. 6.

361 Anderson, *Anleitung*, § 3, pp. 6 f.

362 Baumeister, *Privatrecht* (1856), pp. 131, 202.

363 Schalk, *Einführung in die Geschichte des Liegenschaftsrecht der Freien und Hansestadt Hamburg* (Scholl, Leipzig 1931), pp. 14 f with reference to the related term "Auflassung" which is still in use in the German civil code (§ 925 BGB).

364 Anderson, *Anleitung*, § 7, p. 17.

365 Anderson, *Anleitung*, § 7, p. 18.

366 Anderson, *Anleitung*, § 7, p. 17.

367 Anderson, *Anleitung*, § 7, p. 17.

368 Hedemann, *Die Fortschritte des Zivilrechts im XIX. Jahrhundert*, 2. Teil, 2. Hälfte: "Die Entwicklung des formellen Bodenrechts" (Heymann, Berlin 1935), p. 194.

After the public were admitted, the court servant ("Schenke"[369]) opened the session. The parties involved in the dealing had to come forward, announce the intended transfer of land rights and ask the court for confirmation.[370] This was the main act of the "Verlassung" (court stage) and was called "Ausrufung", i.e. the proclamation/declaration of the intended land dealing in court. Whereas the stage previous to the court stage (the contract) required a mutual declaration between the parties involved in a dealing to agree the intended transfer of property rights, the "Ausrufung" (proclamation/declaration) meant a declaration of the intended transfer to the public, thus accommodating the public interest in knowing the identity of the proprietor of the land. The contract and the "Verlassung" (court stage) therefore supplemented each other.

The court stage regulations did not furnish the parties with an exact set of words for the proclamations ("Ausrufung"), although the latter did have to contain some basic words to make the dealings valid.[371] Anderson pointed out that, in every proclamation of a transfer of property rights, there had to appear the words "verläßt" (he/she leaves) or "verlassen" (they leave). If these words did not appear at some point the proclamation and thereby the transfer would not have been valid. Anderson, therefore, gave examples of the right wording for the most important dealings, e.g. for the transfer of the absolute ownership (i.e. the fee simple absolute)[372] :

> "N.N. verläßt sein Erbe (Kathen, Garten usw.) an N.N. der bittet um Friede und Bann"
> Author's translation: "N.N. leaves his heritage (buildings, gardens etc.) to N.N. who asks for quiet enjoyment thereof"

Minutes of procedure ("Verlassungs-Protocolle") and the right of objection (Widerspruchsrecht)

After the parties had made their respective "Ausrufung" (proclamation/declaration) in the prescribed way, it was recorded on so called "Protocolle".[373] The "Protocolle" were the minutes of the procedure which recorded the proclamations in writing. These

369 German archaism for servant.
370 Anderson, *Anleitung*, § 7, p. 18.
371 Anderson, *Anleitung*, § 10, p. 21.
372 Anderson, *Anleitung*, § 9, p. 18.
373 Anderson, *Anleitung*, § 6, p. 15.

"Protocolle" (minutes) were of central importance to the whole "Verlassung" (court stage) since they were the basis for the later registration.[374] They established conclusively what had been proclaimed by the parties in the "Verlassung". Only what had been recorded in those "Protocolle" was eventually allowed to be registered.[375] Thus the "Protocolle" were the binding link to the third stage of the transfer of land, i.e. the registration of the intended dealing. At the very end of the "Verlassung", when no more parties came up to have any transfer proclaimed and the "Protocolle" had been drawn up for all the proclaimed dealings, the court servant ("Schenke") came up to announce the closing of the "Verlassung" (court stage). Before the "Verlassung" (court stage) could be closed, however, the court servant had to ask formally if there was anyone else who wanted to proclaim anything.[376] If no one else presented her/himself, the mayor of the city concluded the court session by repeating all the proclaimed dealings briefly.[377] Only then was the "Verlassung" (court stage) complete and the court session could be closed.

The purpose of the "Ausrufungen", i.e. the proclamations of the intended land dealings as well as the consequent repetition by the mayor was not only to give general notice to the public. These devices also were designed to inform persons with specific estates or interests in land about dealings taking place, so that they might have the chance to object before those dealings became valid. Hamburg's law provided an appropriate legal institution, called the "Widerspruch" (objection) for such possible objections.[378] Often the latin term "Inhibitorium" was used as a scholarly term.[379] According to the "Widerspruch" (objection) a person had the right to object to a dealing if it endangered his or her property rights. In any case the "Widerspruch" (objection) was only valid if it was noted on the respective "Protocoll" (minute).[380] If the objection did not appear on the "Protocoll", registration could take place and validate the dealing.[381] In order to get a "Widerspruch" (objection) recorded on the "Protocolle" (minutes) the 'objector' had to get an order from the "Obergericht"

374 Anderson, *Anleitung*, § 14, p. 40.
375 Anderson, *Anleitung*, § 6, pp. 15 ff with special reference to names and details recorded in the "Protocolle" (minutes).
376 Anderson, *Anleitung*, § 7 , p.18.
377 Anderson, *Anleitung*, § 7, p. 18.
378 Anderson, *Anleitung*, § 12, p. 39.
379 Baumeister, *Privatrecht* (1856), p. 134.
380 Anderson, *Anleitung*, § 12, p. 39.
381 Anderson, *Anleitung*, § 12, p. 40.

(Supreme Court).[382] This order was called a "Commissorium" and ordered the registration to be suspended.[383] The "Commissorium", however, was only granted if the 'objector' could reasonably explain that he had a right to object ("Widerspruchsrecht").[384]

The procedure of obtaining a court order took time and Hamburg's law therefore provided that all registrations were to be suspended until the following Monday after the "Verlassung" (court stage).[385] This time frame enabled a person to obtain a court order and get their objection ("Widerspruch") noted on the "Protocoll" (minutes). The requirement of suspending registration during the initial period after the "Verlassung" (court stage) was based on a 'city ordinance' of 1619 ("Bürger-Convent vom 28. Januar 1619").[386] The eventual effect of a recorded Widerspruch" (objection) was that the "Commissorium" (order) hindered the registration of an intended dealing.[387]

It can be seen that, in contrast to the two-stage Torrens System, the transfer of land in Hamburg provided an additional intermediate stage in court. After having made the contract the parties had to proclaim their dealings in a court open to public. Those proclamations were recorded on the minutes of procedure of the court session ("Verlassungs-Protocolle"). According to these minutes the registration took place after a certain period of time unless no objection had been noted in the relevant minutes. The registration then validated the intended transfer of rights. This basic compulsory procedure, however, was supplemented by a set of optional customary rules which seem to have been designed to mitigate some disadvantages of the procedure. These customs are described in the following paragraphs.

---

382 In a decision of 31 January 1817 Hamburg's Supreme Court declared its exclusive competence for such court orders: cited by Baumeister, *Privatrecht* (1856), p. 134.

383 Anderson, *Anleitung*, § 12, p. 39.

384 Anderson, *Anleitung*, § 12, p. 39.

385 Schlüter, *Historischer und rechtsbegründeter Traktat von unbeweglichen Gütern*, (Hamburg 1709), Part 4, Chap.2, p. 673.

386 Anderson, *Anleitung*, § 12, p. 39.

387 Anderson, *Anleitung*, § 12, p. 40.

3. 3. 1. (b) The customary use of "list" from the registry office (Stadtschreiberey)[388] in connection with the court stage ("Verlassung")

In order to describe the law of the transfer of land rights it is usually sufficient to explain the basic compulsory procedure. In order to obtain a complete picture of Hamburg's law, though, one must also be aware of the customs which had developed to supplement the essential procedure. The customs attached to the transfer of rights were important to Hamburg's land law because it was not only based on statutory law but also on the steady transfer of customs into enforceable rules of customary law. Of course, this was a long process, which unfolded throughout the centuries. In any case, in the absence of a consolidating statute, customs played an important role. A considerable part of the procedure described above is based on such established customary law and not statutory law, i.e. ordinances or decrees of the city council. The author submits that an important custom which was about to turn into enforceable law at the beginning of the 19th Century was the optional use of 'lists' in connection with the court stage.

The said lists were drawn up by the registry office (Stadtschreiberey) before the "Verlassung" took place.[389] They were intended to facilitate the "Ausrufung" (proclamation/declaration) by establishing the most important details of the future proclamations beforehand. Immediately after having made a contract the party to the dealing who wanted to dispose of land could go to the "Stadtschreiber" (city secretary) and make him write down the essentials of the latter proclamation in court in the list provided for the forthcoming "Verlassung". Since the city secretary could copy the particulars of the land/land rights in question out of the "Stadterbebuch" (City heritage book, i.e. Hamburg's register book) mistakes were almost excluded.[390] The list therefore precisely reflected the dealings as they were intended by the parties.

After a certain time had elapsed the lists drawn up in the registry office were given to a special civil servant at the court, called the "Pronotarius".[391] Since the "Pronotarius" (secretary of minutes[392]) had all the details of the upcoming proclamations already written on the said list,

---

388 Archaic German term.
389 Anderson, *Anleitung*, § 6, p.14.
390 Anderson, *Anleitung*, § 6, p. 16.
391 Anderson, *Anleitung*, § 6, p. 15.
392 This translation has been chosen for the purpose of this discussion only.

he was able to draw up the "Protocolle" (minutes of procedure) before the "Verlassung" had even started.[393] The use of the 'lists' affected the whole procedure in court. When the parties to the dealings had chosen to make use of the lists of the registry office, they had to make their proclamation in court by reading out of the "Protocolle" (minutes) which had been made according to the list.[394] This rule reversed the "normal" relationship between the "Ausrufung" (proclamations/declarations) and the "Protocolle" completely. Originally the "Protcolle" were meant to merely record what had been officially proclaimed. Using the 'lists' of the registry office, however, the pre-drawn "Protocolle" determined the content of the "Ausrufungen" (proclamations/declarations).

Thus the parties whose transfers had been drawn up in "Protocolle" beforehand were bound to those pre-drawn "Protocolle", when they made the "Ausrufung" (proclamations/declarations) in court. In this way the council could be assured that the "Protocolle" corresponded to what was eventually proclaimed in court. This correspondence was important since it was in line with the original sense of the "Protocolle" (minutes), which was merely to reflect what had been proclaimed in court. The drawing up of the "Protocolle" beforehand increased the importance of the work of the "Pronotarius" (secretary of minutes) enormously. Following this procedure the "Pronotarius" did not merely put the proclamations in writing. He actually drafted the bases for the proclamations and thereby the bases of the latter registrations. That explains why Anderson as a "Pronotarius" (secretary of minutes) had such a good insight into the overall procedure of transfer of real property rights.

Notwithstanding that the use of the lists and their conversion into "Protocolle" before the Ausrufung was merely optional to effect a valid transfer of land rights, this procedure was chosen by the bulk of the parties. Using lists had become a very common and established custom.[395] This is underlined by the fact that the registry office had introduced a separate fee for entry on the list.[396] The strong advice in Anderson's Handbook[397] to make use of these lists also shows that they were widely acknowledged. Even though the use of lists was not obligatory in Hamburg's law at the beginning of the 19th Century, the

393 Anderson, *Anleitung*, § 6, p. 15.
394 Anderson, *Anleitung*, § 7, p. 18.
395 Anderson, *Anleitung*, § 6, pp. 14 ff.
396 Anderson, *Anleitung*, § 6, p. 15.
397 Anderson, *Anleitung*, § 6, pp. 15 ff.

author submits that there were mechanisms which almost amounted to their enforced use. It was the rule that all parties who were not entered in the lists and therefore could not produce a 'pre-drawn' "Protocoll" (minute) had to wait until the very end of the court session before they were allowed to proclaim their dealings.[398] On the other hand, all parties who could produce a 'pre-drawn' "Protocoll" were allowed to make their "Ausrufungen" (proclamations) at the beginning of the "Verlassung" (court stage).[399] Requiring people to wait until the very end of the "Verlassung" (court stage) because they did not comply with the custom of using lists came close to inflicting punishment and shows that the use of lists was about to become an enforceable part of Hamburg's law at the beginning of the 19th Century. It also proves that the custom of using lists was very much the rule at that time, while conducting the court stage without the preliminary participation of the registry office had become the exception.

3. 3. 1. (c) The customary assignment of "Procuratoren" within the court stage

Another custom which was about to become part of the enforceable law of the city state was the assignment of special public servants in the course of the "Verlassung" (court stage). These special public servants were called "Procuratoren"[400] and their main function in the transfer of real property rights was to act on behalf of the parties involved in the dealing by making the "Ausrufung" (proclamation/declaration) for them. Instead of appearing in court themselves the parties were allowed to empower a "Procurator" (official representative[401]) to do so.[402] It was up to the parties whether or not to employ a "Procurator" but they were not at liberty to empower anyone to act on their behalf. The "Procurator" had to be an officially appointed public servant for these matters.[403] The "Procuratoren" (official representatives) were therefore a distinct professional group of public servants who maintained an exclusive right to act on behalf of parties in the transfer of real property rights at the court stage.

---

398 Anderson, *Anleitung*, § 6, p. 15.
399 Anderson, *Anleitung*, § 7, p. 18.
400 Anderson, *Anleitung*, § 4, p.8.
401 This translation has been chosen for the purpose of this discussion only. The word "Procurator" derives from the latin verb 'procurare', i.e. to look after or to take care of.
402 Anderson, *Anleitung*, § 6, p. 12.
403 Anderson, *Anleitung*, § 6, p. 14.

This limitation on the choice of representatives applied only to the court stage. The first stage of the transfer of real property rights, i.e. the act of contracting, was not embraced by this rule.[404] This follows mainly from the fact that representation in court had a different function from representation in negotiations. Being represented by a "Procurator" (official representative) in court was more of an administrative help to the parties. The task of the "Procurator" (official representative) was merely to proclaim a predetermined declaration in court.[405] He might have to put the declaration in the formally correct words, but he had no influence whatsoever on its actual content. Thus the "Procurator" (official representative) is not to be mistaken for a proper agent. Anderson made no comment on the number of dealings a "Procurator" was usually responsible for. One can, however, assume that one "Procurator" took care of several dealings and thereby represented several parties as it would not have made much sense to have special public servants appointed if they could only conduct the court dealings on a one-to-one basis. Given that a "Procurator" took care of several dealings, that clearly facilitated the "Verlassung" (court stage) enormously. Instead of hundreds of laymen just a handful of professionals were present.

Once a "Procurator" (official representative) was charged with a specific dealing, he was empowered to appear in the court session and conduct the "Ausrufung" (proclamation/declaration) on behalf of the parties who had authorized him.[406] In order to authorize a "Procurator" (official representative), a party did not go straight to one of them as as one might assume. Instead of having direct contact the parties had to go to the registry office (Stadtschreiberey) and request the assignment of a "Procurator" (official representative).[407] The registry office then passed on those requests to the "Procuratoren" (official representatives). Payment of the Procuratoren (official representatives) was also via the registry office (Stadtschreiberey).[408] The parties had to deposit the fee with the city secretary (Stadtschreiber) who passed it on to the "Procuratoren" and charged them with the "Ausrufung" (proclamation/declaration) in question.

---

404 Anderson mainly left out the contracting of the parties.
405 Anderson, *Anleitung*, § 6, p. 15.
406 Anderson, *Anleitung*, § 7, p. 17.
407 Anderson, *Anleitung*, § 6, p. 14.
408 Anderson, *Anleitung*, § 6, p. 14.

It might be thought odd that the parties did not insist on charging the "Procuratoren" (official representatives) personally, especially as the "Ausrufung" was a very important element of the court stage and determined indirectly the later details of the registration. The parties, however, did not have to worry about a negligent assignment of a "Procurator" because they usually arranged an entry in the above mentioned list[409] at the same time.[410] Having the dealing recorded in the list made sure that the dealing was proclaimed as it was intended. The choice of a decent "Procurator" was therefore of minor importance, since anyone who was familiar with the proclamations in court sufficed. The custom of mutual use of lists and "Procuratoren" is emphasised by the fact that Anderson described both in the same chapter as one coherent proceeding.[411]

The assignment of a "Procurator" (official representative) on the occasion of the entry in the list at the registry office was very much at the convenience of the parties. With one visit to the registry office they made sure that the business was taken care of professionally. This spared them from going through the tiresome procedure themselves. After all they could not just go straight to the court and proclaim their dealings, but had to wait until the next court session came up. This could have meant that they would have to wait one month or even two.[412] Since there were only a few "Verlassungen" (courts stages) throughout a year, it can be assumed that every court session had to deal with a lot of single "Ausrufungen" (proclamations/declarations). These court sessions would have been quite crowded if every party appeared in person. It is understandable that the parties did not want go through all this only to speak aloud a few declaratory sentences after waiting an indefinite time until it was their turn. It is more likely that they would choose an easy way to have the matter taken care of by the registry office and thereby relieve themselves of the burden.

This also explains why the customs of making use of lists and "Procuratoren" (official representatives) arose at all. The author submits that it was born out of a need caused by the old law to have court sessions only once a month. This did not accommodate the parties' interests to have the dealings settled as soon and safely as possible. The entry in the list of the registry office mitigated this defect. The

409 See pp. 105 ff.
410 Anderson, *Anleitung*, § 6, p. 14.
411 Anderson, *Anleitung*, § 6 and § 7.
412 See pp 101 f.

assignment of the "Procuratoren" (official representatives), on the other hand, ensured that the "Ausrufung" was consequently conducted in a correct and safe way. Anderson points out that even though everyone had the right to proclaim their dealings themselves, the bulk of the parties assigned "Procuratoren" to act on their behalf.[413] Accordingly, when the city council members had gathered together and the court sessions were opened, mainly "Procuratoren" came in to do the "Ausrufungen" (proclamation/exclamations).[414]

At the beginning of the 19th Century the customary use of "Procuratoren" (official representatives) was very much about to be turned into an enforceable rule. This was indicated by the fact that it was openly discussed whether it should be forbidden altogether for laymen to do their own proclamations.[415] The reason why it had not yet become the binding law of Hamburg might have been that it would have necessitated a change of statutory law. That is to say that Hamburg's rules of court of 1711 ("Neue Gerichtsordnung von 1711 Tit.LVI, Art. 7") provided an express right for everyone to appear in court themselves.[416] Anderson pointed out, however, that there were some districts in which that old law did not apply and which had already made the rule that only "Procuratoren" were allowed in court.[417]

Following from the above discussion, the usual mode of proceedings can be summarised as follows. After having recorded the dealings of the parties in the list, the city secretary charged a "Procurator" with the specific dealings.[418] This list was then passed on to the "Pronotarius" (secretary of minutes) who turned it into pre-drawn "Protocolle" (minutes).[419] Each "Protocoll" (minute) dealt with a separate transaction. In the court sessions the pre-drawn "Protocolle" (minutes) were consequently read out by the "Procurator", who was charged with the respective dealings.[420] It can be assumed that every "Procurator" was entrusted with an equal number of dealings by the city secretary. After the "Protocolle" were proclaimed in the "Verlassung" they formed the basis for the consequent registration of the dealing.[421]

---

413 Anderson, *Anleitung*, § 6, p. 13.
414 Anderson, *Anleitung*, § 7, p. 18.
415 Anderson, *Anleitung*, § 6, p. 12.
416 Anderson, *Anleitung*, § 6, p. 13.
417 Anderson, *Anleitung*, § 6, p. 13.
418 Anderson, *Anleitung*, § 6, p. 14.
419 See pp. 105 ff.
420 Baumeister, *Privatrecht* (1856), p. 198.
421 Anderson, *Anleitung*, § 17, p. 44.

The purpose of the city secretary (Stadtschreiber) within the whole proceedings and in particular in the preparation of the "Verlassung" (court stage) was to facilitate and ensure a successful procedure. It is noteworthy that in most districts of Hamburg the eventual registration was also conducted by the city secretary of the "Pronotarius".[422] Accordingly, making customary use of lists and pre-drawn "Protocolle" (minutes) and assigning "Procuratoren" (official representatives) respectively gave a central importance to the registry office (Stadtschreiberey) and thereby to the city secretary (Stadtschreiber). The city secretary determined the "Protocolle" through the lists and thereby determined in advance the details of the registration which he consequently had to make. Even though the "Pronotarius" (secretary of minutes) was the one who drew up the determinative "Protocolle" (minutes), following this customary procedure, the city secretary controlled the whole proceedings after the contract, i.e. the first stage of the transfer of real property rights. Hence the bulk of the parties dealt merely with the registry office the whole time. They gave notice of the intended dealings to the city secretary (Stadtschreiber), paid the fees for the entry in the list and the assignment of "Procuratoren" (official representatives), and finally arranged the entry in the register book (city heritage book) there. For the parties the whole transfer of real property rights thus de facto constituted an administrative procedure which mainly took place at the registry office (Stadtschreiberey).

3. 3. 2. Compelling reasons to remove the court stage in Hamburg's land law

Having described the participation of the courts in the transfer of real property rights in Hamburg's law, the next paragraphs analyse this feature of the system, bearing in mind that Hamburg's system could have been the basis for the Torrens System. As mentioned before, there is no participation of courts under the Torrens System, and this could be put forward as a strong reason to doubt that the system emerged out of Hamburg's law. However, the following analysis will show that if the Torrens System was modelled on Hamburg's law it was compelling to leave out the court stage, since it had become superfluous in the overall system and was moreover defective. Additionally, leaving out the court stage in the Torrens System reflected a foreseeable development in

422 Anderson, *Anleitung*, § 14, p. 41.

Hamburg's law. It is therefore in line with a basic feature of every adoption of a legal system in another country, i.e. the endeavour to free the law of its evident defects before it is adopted.

3. 3. 2. (a) Leaving out the court stage because it had become superfluous

The development of Hamburg's land law until the beginning of the 19th Century has to be regarded as an evolutionary process. The meaning of the court stage at the time can only be understood from that development. On the one hand, the land law, to a great extent, was the result of customs which had developed through the centuries. On the other hand, this development of law was also responsible for the fact that some regulations, notwithstanding that they had lost their functions, were still applied because it was the tradition and/or the custom. That was the case with the "Verlassung", i.e. the court stage. The following discussion shows that, over the course of the centuries, registration had taken over the central functions of the "Verlassung" and other functions were undermined by well established customs. That Hamburg's law still adhered to the procedure in court can only be explained by its deep traditional roots and the financial interests involved.

The loss of functions of the court stage because of the evolving registration

The mutual relationship of the "Verlassung" (court stage) and the registration (third stage) in Hamburg's real property law at the beginning of the 19th Century is to be understood as the result of a steady evolutionary process. These concepts did not coexist from the very beginning of Hamburg's land law. Even though it is not within the scope of this thesis to trace back the history of Hamburg's land law to its first recorded times in the 12th Century, it is crucial to know that the concept of proclaiming dealings publicly was developed at a very early stage. The custom of registering the land dealings in separate register books, on the other hand, came later and supplemented the "Verlassung" (court stage).[423] To understand the effects which each concepts had on the other in the course of their coexistence, their original purpose/function has to be outlined.

---

[423] Schlüter, *Tractat* (1709), Part 3, Chap. 1, p. 594 referring to the first book of 1274.

The original purpose/function of the "Verlassung" (court stage) was to transfer the real property rights and simultaneously give notice of the transfer to the public.[424] That means that the property rights were conveyed to the transferee by the public proclamation/approval, so that the transfer needed no further act to be valid. Accordingly, the stage of public proclamation, i.e. the court stage, had been the final stage of the transfer of real property rights. Thus before registration supplemented the procedure, Hamburg's land law had only a two stage process. The first stage had been the contract and the second stage was the proclamation of the dealing in public. At that time the court stage was the essential part which concluded the transfer.

By the beginning of the 19th Century, however, registration was established as the essential part which concluded the transfer of real property rights. Hence registration had taken the place of the "Verlassung" in this respect.[425] The question then arising is what happened to the "Verlassung" and/or what functions were left to it after this change. Despite this change, the "Verlassung" was not dropped nor was its formal procedure adjusted according to its loss of function. Even though the "Verlassung" no longer operated so as to immediately transfer the rights in land and had degenerated to a mere preliminary stage, it was basically conducted without much alteration according to tradition. This was chiefly a matter of custom and not because the "Verlassung" was nevertheless indispensable for other reasons (for example, the making public of the dealing).

The author submits that the said lack of adaptation is clearly indicated by the formal procedure at the closure of the court sessions. Anderson referred to such traditional procedure in particular.[426] The traditional rules of procedure provided that, after all parties had proclaimed their dealings, a certain phrase had to be spoken to conclude the "Verlassung"[427]:

> "So entwältige ich allen denjenigen, die auf gegenwärtiger Verlassung Immobilien aufgerufen haben, und bestätige sie wieder an die künftigen

---

424 Baumeister, *Privatrecht* (1856), pp. 126 ff.

425 Mascher, *Das deutsche Grundbuch- und Hypothekenwesen* (Berlin 1869), p. 370.

426 Anderson, *Anleitung*, § 9, p. 18.

427 Anderson, *Anleitung*, § 9, p. 19.

> Besitzer von Erben zu Erben, und gebe Frieden und Bann zum ersten, zum anderen und dritten mal."
>
> Translation:[428]
> "So I deprive everyone, who has proclaimed land at the present "Verlassung", and confirm it again to the future possessors from heir to heir, and I give quiet enjoyment, for the first, second and third time."

The speaker had to touch a sword while speaking these words. Anderson points out that until the end of the 18th Century the sword had played a more active role. At that time the phrase had been said after every single "Ausrufung" (proclamation/declaration) whilst the sword was beaten on a table three times ("for the first, second and third time").

The symbolic wording clearly reflected the traditional function of the "Verlassung" as the concluding act for the transfer of rights. Taking away the land rights from one person ("I deprive...") and giving them to the future possessor ("and approve it again to the future possessor") described the transfer of rights vividly. The sword symbolised this act. It 'cut off' the rights at one side and protected them on the other, i.e. for the future possessor. The words "und gebe Friede und Bann" ("and I give quiet enjoyment") underlined this since they declared the approval and protection, i.e. the enforceability of the new legal situation. Furthermore, the beating of the sword on the table three times is reminiscent of the mode of procedure at auctions. At sale by auction, instead of a sword, a hammer is used symbolically. In both cases the counting of the beats ("for the first, second and third time") expresses the conclusiveness of the transfer of rights, i.e. the exclusion of any objection or alteration of it.

The fact that this traditional procedure was kept shows that the "Verlassung" did not adapt itself sufficiently to the 'new' system of transfer by registration. The procedure was conducted according to custom without breaking with tradition, even though some parts of it, as the example of the wording of the closure shows, were evidently contradictory to the new concept of a three stage process. This was chiefly because the introduction of registration as the essential part within the transfer of property rights was based on a drawn-out development of customary rules. When registration was first established

---

428 The translation tries deliberately to reflect the peculiars of the wording which may therefore sound odd.

it did not affect the transfer of rights at all, so that there was no reason to change any aspect of the "Verlassung" procedure. The "Verlassung" and Registration then coexisted for some time without competing with each other. Even though the function of registration developed throughout the decades to be the essential part of the transfer of real property rights, it remained the custom in Hamburg to have the "Verlassung" as an additional stage.

When registration first arose in addition to the "Verlassungen" in Germany its purpose was merely to evidence what had been proclaimed. Since the land rights were transferred with the "Verlassung" itself, registration only attested the particulars of the already concluded transfer. The custom of registering the "Ausrufungen" (proclamations/declarations) had evolved out of the custom of issuing deeds for every "Ausrufung". In the beginning every deed was handled separately. Later the deeds were bound into books which were the predecessors to the register books. Whereas in the beginning registration of the "Ausrufungen" (proclamation/declarations) had only evidential purposes, it eventually evolved into the essential concluding part of the transfer of real property. When there was no entry of a dealing in the register books, it followed conclusively that there was no transfer of rights at all.[429] In other words the entry in the book validated the transfer. This change in function of the registration went hand in hand with the increasing need of society for security within land dealings.[430] In order to check whether a transfer had taken place and what particulars had been agreed upon, one could easily look up the relevant registration. Once the advantages of writing down the transfer and attributing conclusiveness to such records had been acknowledged, this act came to be regarded as the crucial act in the whole process.

Thus in the course of its customary development, registration not only arose to supplement the "Verlassung" (court stage) in Hamburg's law. By the beginning of the 19th Century it had also taken over one of the main functions of the "Verlassung", i.e. being the determinative act for the transfer of real property rights. In contrast, the "Verlassung" kept its basic formal procedure still indicating its original function within the transfer of land rights. To that extent, at the beginning of the 19th Century the proceedings of the "Verlassung" (court stage) were antiquated.

---

429 Schlüter, *Tractat* (1709), Part 4, Chap. 4, p. 697.

430 Mascher, *Grundbuch- und Hypothekenwesen* (1869), p. 55.

The loss of functions of the court stage because of the established customary rules

The shift of the function of transferring rights from the "Verlassung" to the evolving system of registration seems to be quite evident. It is, however, not obvious that the optional customary rules[431], i.e. the assignment of "Procuratoren" (official representatives) and the use of lists and predrawn "Protocolle" (minutes), also contributed to the "Verlassung"'s loss of functions.

The diminishing meaning of the publicity of the "Verlassung"

Even though the "Verlassung" (court stage) was no longer the essential act within the transfer of real property rights, at the beginning of the 19th Century it still had the function as the only public event of the whole procedure. Everyone who was interested was invited to attend the "Verlassung".[432] Whereas the first stage of transfer of rights (the contracting) and the third and concluding stage (the registration) were executed in the absence of the public, the second stage (the court stage) evidently had the purpose of involving the public. In order to elaborate on the effect of the customary rules on this important function of publicity, which still seemed to be left to the "Verlassung", the participation of the public has to be examined more precisely.

The public participation in the "Verlassungen" (court stages) was not homogeneous. They mainly consisted of two types- the parties themselves and people who were not parties to the dealings, but curious to attend.[433] The parties to the dealings publicly reaffirmed the consensus on the transfer of real property rights which they had agreed upon 'inter se'. By appearing in court in person they guaranteed that the dealing as proclaimed corresponded to their authentic will/agreement. In practice, however, this had changed. The bulk of the parties no longer appeared in court in person. As described before, it was very much the custom to assign "Procuratoren" (official representatives) to act on behalf of the parties.[434] One could take the view that the parties, even though they were not present in person, were present through the "Procuratoren" who represented them in court.

---

431 See pp. 105 ff, 107 ff.
432 Anderson, *Anleitung*, § 7, p. 17.
433 Anderson, *Anleitung*, § 7, p. 17.
434 See pp. 109 ff.

This viewpoint, however, overlooks the fact that the "Procuratoren" took care of more than one dealing at a time. Each "Procurator" was charged with several dealings, which he proclaimed one after the other, when it was his/her turn.[435] Reading out names of parties from a list was considerably different from the actual presence of those parties. The author submits that the public presence of the parties as it was originally intended by the concept of the "Verlassung" (court stage) meant a bodily presence which cannot be equated with the abstract presence by the mention of names. At some stage it had expressly been the law that "Verlassungen" (court stage) had to be conducted in person and not by a proxy ("Neue Gerichtsordnung von 1711, Tit. LVI, Art.7").[436] This concept had been undermined by the assignment of "Procuratoren". It is true that they ensured a more professional handling of the proclamations, but they also removed the public aspect of the parties from the court stage. Omitting the direct participation of the parties at the "Verlassung" (court stage) therefore detracted partly from the quality of a public event within the court stage. This was not only the case from the perspective of the people who attended the "Verlassung" out of curiosity and merely heard a list of names instead of seeing the parties in person, but also from the perspective of the parties themselves. Since the parties were not publicly present any more, they did not have to face the public either. From the parties' point of view they merely dealt with the registry office. After they instructed the city secretary (Stadtschreiber) to enter their names and dealings in the appropriate list and paid him the fee for the "Procuratoren", they did not bother further with the subsequent procedure. From the parties' point of view the subsequent procedure, in particular the "Verlassung" (court stage), was a mere administrative procedure in which they did not have to take part. This lack of presence of the parties meant therefore a loss of publicity of the proceedings at the "Verlassung".

One could maintain that, despite the non-participation of the parties, the basic function of publicity of the "Verlassung" (court stage) was still maintained for the people who were not parties to the dealings. After all, everyone who was curious was free to attend the court sessions. This argument, however, ignores the fact that there was no substantial reason for anyone to be present at the "Verlassung" other than mere curiosity. Whereas initially the attendance of the "Verlassung" might have enabled

435 See pp. 109 f.

436 Anderson, *Anleitung*, § 6, p. 13.

people to object to a transfer of rights, at the beginning of the 19th Century one did not have to attend the court session to do so. It sufficed that one made sure that her/his objection was noted on the respective "Protocoll" (minutes). Nevertheless, being present at a "Verlassung" could still have been useful for obtaining information about the dealings which had been proclaimed. On the other hand, it was much more convenient to look at the list of dealings or at the "Protocolle" drawn up accordingly instead of having to attend the lengthy procedure in court.

Since the predrawn "Protocolle" (minutes) mirrored exactly the content of the following proclamations, they also functioned perfectly as a device for making dealings public. Additionally, they shared the advantages of every written form of notice, for providing high accuracy and permanent record. It can therefore be concluded that the publicity of Hamburg's "Verlassung" (court stage) lost much of its meaning in the course of the introduction of "Procuratoren", predrawn "Protocolle" and the right to object after the Verlassung (but before registration).

The decay of the "Verlassung" (court stage) as a determinative stage

Besides affecting the function of publicity, the drawing up of "Protocolle" (minutes) in advance had yet another influence on the "Verlassung" (court stage). That is to say, it took away the determinative character of the proclamations in court. Before the custom of using lists and predrawn "Protocolle" (minutes) arose, the "Verlassung" (court stage) determined the particulars of the registration. Even though it no longer transferred the rights, because of this determinative effect the "Verlassung" (court stage) remained a very important act. The determinative effect of the "Verlassung" (court stage) followed from the rule that everything had to be registered as it had been proclaimed in court. The "Protocolle" (minutes) which recorded the proclamations linked the "Verlassung" (court stage) with the registration. What was written down in the "Protocolle" was to be the conclusive basis for the following registration. That is why Anderson advises that the "Verlassung" should be conducted carefully in order not to carry over errors from the oral proclamations to the latter conclusive registration.[437] Thus the oral stage determined the details of the registration.

---

437 Anderson, *Anleitung*, § 12, p.40.

This changed when the customs of using lists from the registry office and predrawn "Protocolle" (minutes) arose. Since the content of the proclamations were now fixed before the "Verlassung" (court stage) had even started, the determinative act was anticipated. Whereas the "Protocolle" (minutes) in the inaugural procedure had merely reflected the content of the oral proclamations, the use of predrawn "Protocolle" reversed this interrelatedness. According to these customs the proclamations were based on the "Protocolle" and not vice versa. The proclamations within the "Verlassung" (court stage) were accordingly downgraded to a mere oral repetition of what was already fixed. The oral repetition of the predrawn "Protocolle" (minutes) in court no longer affected the particulars of the following registration. Thus the determinative phase was shifted to a preliminary stage in writing. The "Verlassung" became an intermediate stage that did not add anything substantial. As far as content is concerned, it would not have made a difference if the "Verlassung" had been omitted from the procedure. The author submits that the "Verlassung" had therefore lost its function as a determinative stage.

The above analysis shows that the court stage in Hamburg's law at the beginning of the 19th Century had become superfluous. Its original function of transferring the rights in land had shifted to the registration, which initially had mere evidential functions. By then a system of transfer by registration had arisen. The remaining function of the court sessions, i.e. determining the particulars of the successive registration and giving publicity to the dealings, had been undermined by the established customs of assigning "Procuratoren" and using predrawn "Protocolle" (minutes). Because of this shift and loss of functions, by the beginning of the 19th Century, Hamburg's "Verlassung" (court stage) had become unnecessary.

3. 3. 2. (b) The court stage as a defect in the Hanseatic system

The fact that Hamburg's court stage was no longer indispensable to the working of the system does not necessarily mean that it had to be removed from the proceedings. A system that is based on customs and inherited rules inevitably carries to some extent redundant regulations. This is different, however, when the regulations have become a burden on the overall system. In such case any reasons to maintain the regulation out of mere tradition are likely to be outweighed by the need for change. Regulations are a burden to the system when they are not only

superfluous, but are also a defect and/or weakness in the overall system. The author submits that this was the case in Hamburg at the beginning of the 19th Century because the "Verlassung" (court stage) had become not only superfluous but also a defect in the system of transferring land rights. Anderson's book alerts us to these defects by giving advice about the risks connected to them. Every risk connected with the system reflected a defect of the system that made dealings insecure. On the very first page of his book Anderson points out that his manual purports to help the parties involved to handle the risks and the problems of the system.[438] In this way Anderson's description of Hanseatic law detected the defects of the "Verlassung" too. When Dr. Ulrich Hübbe used the book he must have been aware of this.

The risk of using inaccurate and/or wrong wording as a defect of the "Verlassung" (court stage)

A seemingly obvious defect of the court stage is described by Anderson on the first few pages of his book[439]. He draws attention to the fact that the procedure was mainly conducted orally. The problem with every oral procedure is the possible risk of inaccuracy and misunderstandings. On the one hand, a person may put the intended statement into legally incorrect or merely unclearly pronounced words. On the other hand, the person who listens might understand the correctly spoken words wrongly. Anderson displays this problem vividly with the example of the inaccurately recorded names.[440] He gave an impressive list of cases in which names of similar pronunciation had been mistaken for each other. The consequences of such inaccuracy were quite far-reaching in Hamburg's law. Once the proclamations had been recorded in the "Protocolle" (minutes) and accordingly registered the mistakes were perpetuated. The result then was either that the transfer had not taken place at all or that it took place, but not as it was intended. This followed from the strict conclusiveness of the register.

The advice Anderson gives against the risk of inaccurate proclamations is to make exclusive use of the lists held at the registry office (Stadtschreiberey).[441] In this way all the particulars, including the names, could be copied from the register book, so that the risk of mistakes

438 Anderson, *Anleitung*, § 1, p.1.
439 Anderson, *Anleitung*, § 2, p.4.
440 Anderson, *Anleitung*, § 6, pp.15 ff.
441 Anderson, *Anleitung*, § 6, p.14.

would be thoroughly minimised. The "Protocolle" were drawn up in advance according to the list made by the "Pronotarius" who made sure a second time that everything was stated correctly.[442] Even though the use of lists and predrawn "Protocolle" (minutes) was merely an optional custom, Anderson advised very strongly against opting out of this procedure. He concluded by saying that his catalogue of examples "should be enough to convince everyone of how dangerous it would be to postpone the procedure until the very last day of the Verlassung"[443].

This connection between the customs of using lists and predrawn "Procolle" on the one hand and the inaccuracy of an oral process on the other shows the interrelationship of the defects of the system and the evolution of customary rules. It may well be that these customary rules had been developed in order to mitigate the defects of the system. Indirectly the evolving use of lists and predrawn "Protocolle" (minutes) proved the defects of the system. The optional customary use of lists and predrawn "Protocolle" (minutes) also accommodated the risk of violating formal rules by choosing the wrong words. This risk was virtually removed when the legally trained "Pronotarius" prepared the "Protocolle" (minutes) and thereby the following proclamations. If the parties made no use of this optional procedure every proclamation in court involved the risk of choosing the wrong words. This appears to be an implied weakness of every oral procedure unless a written document is prepared ahead and can be read out. Anderson points out, for example, that a proclamation which intended a transfer of an estate had to incorporate the word "Verlassen" (to leave)[444]. If the parties chose different words for the proclamation the transfer was not valid, even though the intentions might have been obvious. In addition the assignment of "Procuratoren" (official representatives) mitigated the defect of the "Verlassung" that formal rules might be violated by wrong wording.[445] They assured that the correctly prepared "Protocolle" (minutes) were eventually proclaimed in accordance with the rule.

The "Verlassung" as an unnecessary time-consuming and costly stage.

A defect of the "Verlassung" (court stage) that could apparently not be mitigated by any customary rules was that it greatly prolonged the duration of the process of transferring land rights. This followed from the

442 Anderson, *Anleitung*, § 6, p. 15.
443 Anderson, *Anleitung*, § 6, p. 17.
444 Anderson, *Anleitung*, § 10, p.21.
445 Anderson, *Anleitung*, § 10, p. 20.

fact that the court sessions only took place on certain days throughout the year. At the most there was one session a month, in some months not even that.[446] That meant that the parties had to wait at least one month if they had just missed the last date. This delay in the transferring of rights did not of course meet the interests of the parties in having dealings completed as quickly as possible. If, for example a mortgage took an additional month in order to become a valid property right and be able to be security for a loan, this could have meant the loss of a business opportunity or, even worse, cause the insolvency of a would-be mortgagor.

This tension between the needs of society, on the one hand, and the rigid rules of the land law, on the other, might be explained historically by the developing needs of society. The law which governed the dates of Hamburg's court sessions dated from 1605.[447] At that time the delay in the transfer of rights perhaps did not burden Hamburg's society too much. At the beginning of the 19th Century, however, the Industrial Revolution was knocking on the door and accordingly trade steadily increased. That applied also to trade in land.[448] Hence the needs of society between 1605 and 1810 had changed significantly and necessitated a speedier procedure. Yet the rules applying to the "Verlassung", which caused the delay in the transfer, were still the same. The author submits that this non-adaptation of the law had become an increasing burden on the system. This defect could not have been cured by simply changing the law of 1605 and thereby allowing more court sessions throughout the year. It lies in the very nature of the "Verlassung" to have court sessions only within wider time frames. The "Verlassung" (court stage) indeed purported to be public, so that people could attend and if necessary object to the proclaimed dealings.[449] If the "Verlassungen" had taken place more frequently, people would have had to go to court regularly to make sure that no dealings against their interests were being executed. This would not have been practicable. In order to give people a chance to safeguard their interests effectively, one could not force them to be alert throughout the whole year. This is in line with the intention of the statute of 1605.[450] Only if people had to go a few times to court throughout the year in order to protect their rights could the law 'punish' them with the loss of rights in the case of non-

446 See pp. 101 ff.
447 Anderson, *Anleitung*, § 3, p. 6.
448 Baumeister, *Privatrecht* (1856), p. 55.
449 Hedemann, *Fortschritte des Zivilrechts* (1935), p. 193 ff.
450 Baumeister, *Privatrecht* (1856), p. 131.

attendance. Adding more dates of court sessions would have therefore undermined one important purpose of the Verlassung, which was to enable people to defend their legal positions by being present. Thus it follows that the time consuming aspect of the "Verlassung" (court stage) cannot be remedied if the system is retained.

It is noteworthy that the court stage meant not only a significant loss of time, but also a significant loss of money. All the people involved in the "Verlassung" had to be remunerated. There were the members of the city council, the city secretary for preparing the list of dealings, the "Pronotarius" who prepared the "Protocolle" (minutes) and the "Procuratoren" who proclaimed those "Protocolle" (minutes).[451] Compared with the first and third stage of the transfer, i.e. the contracting and the registration, the court stage was evidently the most expensive.

The "Verlassung" (court stage) as a stage undermining the right to object

As discussed earlier,[452] one major purpose of the "Verlassung" (court stage) was to enable people to object to the proclaimed dealings. Associating the right to object ("Widerspruchrecht") to the "Verlassung" (court stage), however, inevitably weakened the effect of any objection. That was because the objection at the "Verlassung"(court stage) by the entry in the "Protocoll" (minutes) did not guarantee a protection of the rights/interests in question for long.[453] Every objection had to be renewed with each following "Verlassung" (court stage) if the same dealing was proclaimed again. Otherwise the objection was not entered in the latest "Protocoll" (minute) and was therefore not effectual for future registrations. Thus an objection recorded in a "Protocoll" (minute) which had inhibited the registration of a dealing as intended/proclaimed by the parties had no inhibiting effect on any proclamation executed in a following (future) court session. This limitation of the objection seems to be implied by the concept of the "Verlassung" (court stage) since every court session was independent from and not connected to a prior and/or following court session. Every court session issued its own "Protocolle" (minutes) instead of adhering to the prior "Protocolle" (minutes). The "Verlassung" (court session) therefore did not share the continuity of, for

451 See list of fees in the appendix of Anderson's book.
452 See pp. 103 f.
453 Anderson, *Anleitung*, § 12, p. 39.

instance, a register book. Thus it could only have temporary effect on the particulars established in the "Protocolle".

Referring to this weakness of the "Verlassung," Anderson could only advise his readers to be alert at every following "Verlassung" (court stage) in order to get the objection recorded in every relevant "Protocoll" (minute). He pointed out that even though one could soundly justify the right to object ("Widerspruchsrecht") there was still the risk of loosing interests in land. One has to bear in mind, though, that as long as the court stage was the last and concluding stage of transferring rights, there was no other alternative to associating the right to object to this stage. After title by registration had been established, however, this was no longer compelling.

Conclusion

Hamburg's court stage at the beginning of the 19th Century had not only lost most of its original functions, it also showed considerable defects. It was the most time-consuming stage within the whole procedure of transferring rights. Its mainly oral procedure contained the risk of inaccuracies and weakened the effect of the right to object since it only gave temporary effect to the objection. Since the court stage involved the participation of a great number of civil servants it was also the most expensive part of the whole procedure. Customary rules had evolved out of the need to mitigate some of the defects of the "Verlassung" (court stage). These customs, however, could not fully compensate for the defects of the court stage, in particular because most of them were of a merely optional nature. Anderson's manual put forward this analysis, and so Dr. Ulrich Hübbe should have been aware of these weaknesses in the system.

3. 3. 2. (c) Leaving out the court stage as a foreseeable development in Hanseatic-German land law

The author submits that not only the simple analysis of the land law but also its destiny in the course of time show the need to abolish the court stage in Hamburg's law at the beginning of the 19th Century.

The omission of the court stage by Hamburg's law reform in 1868 and the later federal law

It is useful to trace the development of Hamburg's land law in the course of the second half of the 19th Century. Amendments to the law usually indicate the state of the law prior to the changes. In this respect two important reforms took place. The first was the reform of Hamburg's land law in 1868, and the second was the creation of a federal German land law after Germany's unification in 1871. The statute reforming Hamburg's land law in 1868 was called "Gesetz über Grundeigenthums und Hypotheken für Stadt und Gebiet" (Act on real property and mortgages for the city and surroundings). Its very first section abolished the "Verlassung" (the court stage).[454] By 1868 it had been recognised in Hamburg that the "Verlassung" had become a mere superfluous formality.[455] The author submits, however, that it is likely that this had been recognised much earlier in Hamburg. This assumption is also supported by the fact that it was discussed prior to the reform whether the "Verlassung" still made sense.[456] This is proved by the publication of an analysis by Kellinghusen:[457]

> "Über die Abschaffung oder Beibehaltung der öffentlichen Verlassungen bei dem Hamburgischen Hypothekenwesen", Hamburg, 1833
>
> Translation by the author:
> "About the abolition or retention of the public 'court sessions' in Hamburg's mortgage transactions", Hamburg 1833.

It might seem surprising, therefore, that Hamburg's land law maintained the concept of court participation until 1868, even though its

---

454 Gesetz von 1868 über Grundeigentum und Hypotheken, § 1.
455 Schalk, *Liegenschaftsrecht* (1931), p. 22.
456 Mascher, *Grundbuch- und Hypothekenwesen* (1869), p. 379.
457 Kellinghusen, *Über die Abschaffung oder Beibehaltung der öffentlichen Verlassungen bei dem Hamburgischen Hypothekenwesen* (Hamburg 1833).

disadvantages must have been well known long before. It has to be taken into consideration, however, that there were other interests involved in keeping the court stage in spite of the logic to the contrary. As there were many people who earned their money with the "Verlassung" (court stage), its abolition had also become a political question. After all the "Verlassung" meant extra income for the courts[458] and all the people involved.[459] These vested financial interests must have hindered the reform of Hamburg's land law.

Yet the development of Hamburg's land law was not an unbroken history. Three years after the reform, in 1871, the legislative power over the whole civil law was conferred upon the new federal parliament and Hamburg's land law was merged into federal law.[460] Hence the development of Hamburg's land law was bound with Germany's unification.[461] After extensive comparative work between the single German states a reform commission drafted a federal land law that left out the court stage. Not even the very first provisional draft in 1880 linked the underlying principles to a court participation.[462] Thus the reform commission had decided not to incorporate the "Verlassung" (court stage) as an intermediate stage in the proceedings. It thereby confirmed the prior decision of Hamburg's legislature. Instead, the emphasis had been placed on the concept of the register and all regulations associated to this institution: "ohne Eintragung kein Recht"[463] (without registration no right). Therefore the draft established a system which worked with basically two stages, that is the agreement between the parties and the registration. The fact that the new German law provided for registration does not mean that it maintained the concept of conclusive title by registration. Rather this concept had been altered and combined with the notion of the bona fide purchaser. This was regarded as a further level of abstraction making the system more sophisticated.[464]

For the purpose of this thesis it is not necessary to follow up Germany's land law history to its current stage. The important point is that court participation was dropped during the course of the history of Hamburg's and eventually Germany's land law. The decision of the reform commissions to leave out the court stage almost speaks for itself. It

458 Hedemann, *Fortschritte des Zivilrechts* (1935), pp. 193; 196.
459 See p. 123.
460 Hedemann, *Fortschritte des Zivilrechts* (1935), p. 271.
461 Hedemann, *Fortschritte des Zivilrechts* (1935), pp. 268 ff.
462 Hedemann, *Fortschritte des Zivilrechts* (1935), p. 271.
463 Hedemann, *Fortschritte des Zivilrechts* (1935), p. 271.
464 Hedemann, *Fortschritte des Zivilrechts* (1935), p. 203.

shows that the court stage was regarded as unnecessary for the transfer of real property rights. If the commissions saw any advantages in the participation of the courts they must have been convinced that its defects outweighed them.

Precedents of two-stage processes already in Hamburg's law

Even though Hamburg adhered for a long time to the concept of court participation, the new concept was not unfamiliar to the city state. Rather the concept also had some roots in Hamburg's law since some particular land was already dealt with on the basis of a two stage process leaving out the court stage. This land was exempted from the rules of the "Verlassung" (court stage) and was registered in separate books.[465] Anderson listed 4 cases of such "exempt land":[466]

1) land close to dams and dykes;
2) land which had always been public property of the city;
3) land governed by the monastery of St. Jonas and
4) land belonging to the forests of the aristocrats.

Such land was not subject to the "Verlassung" but had to be registered in the respective register books in order to validate a transfer.[467] In these cases the transfer of land consisted of basically two stages, i.e. the contract and the concluding registration. If, for instance, rights in land governed and registered in the books of the monastery of St. Jonas were to be transferred, the parties had only to get their dealing registered.[468] The registration was conducted by the secretary of the monastery and did not require any prior "Ausrufung" (declaration/exclamation) in court.[469] These exemptions in Hamburg's land law supported the idea that the concept of a two-stage process was already known in Hamburg's law at the beginning of the 19th Century, long before it was implemented in 1868 and established as part of the law of the federal Germany in 1871. Lawyers dealing with both systems, i.e. the two stage and the three stage processes must have been aware that the former meant no loss to the effectiveness of the system. The author submits that, in any case, Hübbe knew of these exceptions in Hamburg's law long before they became the rule since he was using Anderson's description of the law.

---

465 Schlüter, *Tractat* (1709), Part 4, Chap. 4, pp. 764 f.
466 Anderson, *Anleitung*, § 2, pp.4 ff.
467 Anderson, *Anleitung*, § 14, pp. 40 f.
468 Anderson, *Anleitung*, § 14, p. 41.
469 Anderson, *Anleitung*, § 14, p. 41.

The analysis of the court stage in Hamburg's land law at the beginning of the 19th Century shows that the whole system had been at a turning point at that time. It had not yet reached its final features and was still in the process of evolving. One major reason for this was the development of registration from a mere evidential instrument towards a determinative role in the transfer of land rights. At the beginning of the 19th Century this development was already completed but the overall system had not yet adjusted itself to this new mechanism. The changes affecting the "Verlassung" (court stage), however, had been considerable. In particular, the important function of transferring rights conclusively had shifted from the court to the registration stage.

Not only was it the registration itself that took away functions of the "Verlassung", but the conclusive form of registration was accompanied by a set of customary rules that detracted from the determinative effect that the court stage still enjoyed in theory. That was because in practice the customary use of lists and predrawn "Protocolle" downgraded the court stage to a mere oral repetition of what had been already established in writing. Additionally, the assignment of official representatives ("Procuratoren") replaced the personal appearance of the parties in court and thereby removed a major part of its meaning as a public stage. Thus, the evolving functions of registration and the customary rules turned the court stage into a superfluous intermediate stage that was kept chiefly because of its longstanding heritage and the financial interests of the court employees, the city council and the registry office. Having become superfluous, the defects of the court stage outweighed its advantages. The oral stage increased the risk of inaccuracy, prolonged the whole transfer of rights unnecessarily and eventually undermined the important right to object.

It is not surprising therefore that in the course of the development of Hamburg's law the court stage was eventually dropped and that the federal law in the 1880s no longer provided for it. Since the court participation had become superfluous and had some considerable defects, it eventually made sense to abolish it altogether. Moreover the concept of a two stage process was well known to Hamburg since in some exceptional cases land was already governed by it.

3. 3. 3. Consequences for a possible adoption of Hanseatic law by South Australia

It goes without saying that if South Australia had tried to adopt the Hanseatic land law system, it is very likely that the reformers would have left out those parts of the system which were superfluous and/or defective. That would have applied especially to defects already acknowledged and about to be removed in Germany itself. The above analysis of Hamburg's early 19th Century land law shows that this was the case regarding the court stage within the process of transferring rights. The author submits that it was almost inevitable that the court stage would be left out when Hamburg's land law was transferred to South Australia. This is partly because of the rules inherent in the adoption process of legal systems in general and partly because of the special situation in South Australia at the time of the reform.

3. 3. 3. (a) The omission of the court stage in the Torrens System as a process in line with the internal logic of a sensible adoption of Hanseatic law

Every process of adopting law from a different country implies adaptation processes to some extent. In these processes of adaptation, the need to improve the systems which are to be conveyed is one major consideration. Only in very few cases would there be no need to make improving alterations, either because no real defects are recognised or because amendments are not required politically. The need to improve the system whilst transferring it in the course of adoption derives from a variety of factors which might not be very obvious at the first glance. The mere wish to transfer a 'perfect' system freed of all its original drawbacks and defects is the most obvious, but not the only reason.

Reasons inherent in an adoption process in general

An adopted form of a system should be more perfect than the original one. That follows from the fact that you put the system to a very hard test when you insert it into a foreign environment, i.e. in the context of a new overall system. Whereas the original system has been completely integrated into its native legal regime, the adopted system has not. It needs to adapt and adjust. It is burdened with contradictory links and regulations from other fields of law. Only if the system and its principles are 'healthy' ones, i.e. free of evident defects, will it have a fair chance of

survival. That is different with the original system. In its old habitat the overall law fitted smoothly into the system and was therefore put to no test. Defects were tolerated since they did not have much effect. An analysis of Hamburg's law has shown, for instance, that customary law had been developed to compensate some of the defects of the court stage. Of course, South Australia did not have the same set of customary regulations. If the defects of the court stage had not been removed, the defects would have had full effect without any mitigation.

Yet another important but not so obvious reason for the need for improvement is the need to make the system acceptable politically. At least in democratic systems like in South Australia, the adoption of a legal system in the form of a statute is preceded by a parliamentary decision. In order to be adopted this parliamentary decision requires the system to be persuasive, otherwise the legislature would not vote for the bill introducing the system. A system can only be sufficiently persuasive if it is free of evident defects. In this context systems from other countries need a very high degree of perfection in order to be persuasive. People are considerably more reluctant to believe in a foreign "product", and so are parliamentarians.

Furthermore, a new adopted system needs to be in a more perfect form than the original in order to create the necessary degree of acceptance in the population. Every law needs a certain degree of acceptance by the community in order to be applied and enforced. Further, defects would not be tolerated as easily because the community is not fully aware of the advantages of the system.

In the course of a possible adoption of Hanseatic law in South Australia, the omission of the court stage meant an improvement to the system, and was therefore in line with the logic of the adoption process to promote improvements. Since the German law was on its way to removing the court stage in any event, the Torrens System merely foreshadowed a foreseeable development.

The situation in South Australia in 1857/58

When considering a possible adoption of Hamburg's real property law in South Australia in 1858 the particular political situation existing at that time also has to be taken into account. Besides the general mechanisms in the process of the adoption of legal systems, the author submits that

the specific political circumstances contribute to the eventual form which the adopted system acquires. Indeed, South Australia's political situation in 1858 would have promoted improvements in Hamburg's land law system by leaving out the court stage. That was mainly because the land law reform had evolved to be the main issue in the election campaign in 1857/58.[470] None of the politicians running for election could afford to ignore the topic. The pros and cons of every suggestion regarding land law were discussed in public to a degree which can hardly be imagined today. This political focus on land law in South Australia would have made it impossible to adopt a system without first freeing it from its obvious defects.

Not only were the politicians keen to analyse any suggestions vigorously, but the legal profession was almost completely opposed to any land law reform.[471] Accordingly the lawyers were ready to criticise any bill which established a new system. Leaving out the court stage from the system was therefore essential if the reformers did not want to expose the system to the risk of being proven as defective by the lawyers. In connection with these expected attacks from the legal profession and politicians, the basic aim of the intended law reform in particular gained importance. It was the very goal of South Australia's law reformers to lower the costs and shorten the time for land dealings. The court stage in Hamburg's land law, however, meant an unnecessary extension of the overall duration of the proceedings and thereby a considerable additional cost.[472] Incorporating the court stage would have therefore meant adopting the very defect to the system which the political movement in South Australia was keen to avoid. It would had been almost impossible to promote the adoption of Hamburg's land law without first removing its superfluous court stage. The political situation in South Australia at the time of the reform was therefore a further reason for the refinement of the system which was possibly to be adopted.

The Real Property Act 1858 (SA) as an improved form of Hanseatic law and an anticipation of a foreseeable development

Having set out the internal and political reasons for leaving out the court stage in the course of an adoption of Hamburg's land law, the Torrens

---

470 Pike, "The introduction of the Real Property Act in South Australia" (1960 - 1962) 1 *ALR* 178.

471 Bradbrook, MacCallum and Moore, *Australian Real Property Law*, (The Law Book Company Ltd., Sydney, 2nd ed. 1997), Chap. 5.05, p. 129.

472 See pp. 122 f.

System can be looked at from a new perspective. The Real Property Act 1858 (SA) provided a two stage process for the transfer of real property rights. In contrast to Hanseatic law, it did not incorporate court participation in the procedure. This difference can now be explained easily as being in accordance with the adoption process. The South Australian reformers reduced the three-stage process of Hamburg's law to two stages, so that the process consisted of the contracting (first stage) and the registration (third stage) only. In this way the defective and superfluous "Verlassung" (court stage) was removed from the system. This made sense as it was in line with the general goal of improving a legal system before adopting it. Moreover it also met the need of the reformers to introduce a system that could withstand the criticism which it would surely encounter in the political situation in South Australia at the time. Thus this difference between the Torrens System and 19th Century Hamburg law does not contradict the hypothesis that the latter was adopted by South Australia. Despite the difference between the systems it is possible that the former had evolved out of the latter.

By leaving out the oral court stage the Torrens System would have reduced Hamburg's law to its written part, i.e. mainly the registration, increasing the accuracy by the use of exact wording. Objections in the form of caveats, appeared on the register and did not have to be renewed as Hamburg's law had required. Transactions under South Australian law could take place immediately since there was no intermediate stage which unnecessarily prolonged the transfer of rights. Last but not least, money was saved because fewer public servants were involved. In these respects South Australia's Real Property Act can therefore be regarded as an improved form of Hamburg's law. Furthermore, the Torrens System of 1858 anticipated a foreseeable development of Hamburg's system. Hamburg's law, or rather the later unitarian German law, left out the court stage too, even though the proper occasion arose only some twenty years after the South Australian land law reform. Thus South Australia anticipated a development of the original German system when adopting it in the course of its land law reform. Since the adoption of legal systems implies a tendency to make improvements, this analysis is in line with the hypothesis that the Real Property Act 1858 (SA) was an attempt to adopt Hamburg's land law entirely.

3. 3. 3. (b) Inferences for further comparative legal analyses

It is true that it would have made sense to leave out the court stage in the course of an adoption of Hamburg's land law system in South Australia in 1858, but it does not conclusively prove that such an adoption actually took place. It does, however, support this hypothesis. It suggests that other authors[473] who did not see a need to analyse the Torrens System as a legal transplant may have been wrong. In any case, the comparative analysis has to be seen as a useful supplement to the interpretation of historical sources. In addition, this explanation of the structural difference provides an important guideline for further work.

In undertaking any further comparison of South Australian Real Property Act and Hamburg's system, it must be borne in mind that, given that an adoption of the system took place, there had been a major structural change to the system. Leaving out the court stage therefore gains in importance. It must also be noted that the court stage fulfilled functions which were absorbed by the other stages, mainly by that of registration. Comparing the Torrens System and Hamburg's law shows for instance that the right to object, i.e. the caveat, appeared on the South Australian register[474] whereas it did not appear in Hamburg's city books. In Hamburg's law the objections were recorded on the "Protocolle" (minutes) drawn up in the "Verlassung" (court stage).[475] The right to object, however, could be no longer associated with that omitted stage. The objection had to be linked to the registration since it was the only other stage left. That meant that all the rules about the objection originally applying to the court stage had to exist at the level of registration. This example shows that the regulations of Hamburg's court stage still have some importance when the remaining system is compared.

Thus, even though the author argues that the court stage would have been left out in the course of an adoption of Hamburg's land law, any further comparison still has to take the features of that stage into consideration. This is because the omission of the court stage was of structural importance. Many of the applied regulations were of overall importance and not just limited to the mere court event. The objections recorded on

---

473 Robinson is the only one who undertakes an incomplete comparison. See Robinson, *Equity and systems of title to land by registration*, (PhD-thesis, Monash University 1973), pp. 84 ff.

474 Real Property Act 1858 (SA), ss 101 ff.

475 Anderson, *Anleitung*, § 12, pp. 39 ff.

the "Protocolle" (minutes), for example, blocked the whole procedure and did not merely affect the court procedure. Leaving out the court stage did not mean that all the relevant rules could dissolve into nothing; these had to be accommodated at other stages, which inevitably affected other regulations. The shifting of rules, however, has to be examined in particular for its effect on the various institutions and principles.

3. 4. Comparison of basic institutions and principles of the Torrens System with Hamburg's land law system

The above comparative legal analysis has focused on the major structural difference between the Torrens System and Hamburg's land registration system. Whereas Hamburg's system provided a three-stage process incorporating a stage in court, the South Australian system was based on a two-stage procedure omitting the defective and superfluous stage of court participation. The analysis has shown, however, that this difference does not contradict the hypothesis that the Torrens System is an adoption of Hanseatic land law. On the basis of these results, this chapter purports to give an overview of the more remarkable similarities between the systems. These can only be fully understood when one takes into consideration the fact that the South Australian land registration system left out the court participation process. That is why it was important to analyse this difference between the systems first. It is suggested that if one removes the court-stage from Hamburg's land registration system one would virtually be left with the Torrens System.

The following description starts with the basic institutions of the system: (3.4.1.) the register book, (3.4.2.) the Registrar General, (3.4.3.) the certificates and duplicates, (3.4.4.) the forms of instruments and (3.4.5.) the use of public maps. Then the basic principles of the system are examined: (3.4.6.) the principle of title by registration and conclusiveness of the register, (3.4.7.) the exceptions of error and fraud, (3.4.8.) the basic priority rules, (3.4.9.) and the concept of "caveat". Finally (3.4.10) the mortgage and (3.4.11.) the trust are discussed in this context with the introduction of the Torrens System. It is true that this thesis is limited to the Torrens System and does not apply to the general British concepts of real property rights. However, the mortgage and the trust play a particular role with respect to the assumption that the Torrens System was an adoption of Hamburg's land law.

3. 4. 1. The register book/ Das Stadterbebuch

The Real Property Act 1858 (SA) provided a register book as the central means of land registration in the new South Australian system.[476] Grants, certificates and instruments were to be bound up in this register book.[477] Each grant and certificate was allotted a separate page on which the particulars of the land were precisely registered according to public maps.[478] Any estate or interest in existence had to appear on the respective pages. The book was to be kept by the Registrar General.[479]

Hamburg's register book was called the "Land- oder Städterbebuch" (Country or City Heritage Book).[480] Its structure and function were to a great extent identical with the register book of South Australia. Hamburg's register book also provided a separate page for every piece of land. Such a page was given the latin term "folium". Applying a separate "folium" for each independent allotment of land was regarded as an improved form of earlier register books in Germany, which referred to proprietors (so-called "Personalfolium") instead of to the land (so-called "Realfolium").[481] Hamburg's law provided that every right in land had to appear on the register book.[482] The pages in Hamburg's register book referred, like the South Australia's register book, to public maps. These maps were updated by the "Stadtschreiber" (city secretary).[483]

Aside from the "Country/City Heritage Book", Hamburg's law provided a "Rentenbuch" (book of rents), which recorded encumbrances on the land. Hence Hamburg provided two books for registration. Yet this duality had mere historical reasons and gradually disappeared.[484] Although Hamburg still had two register books at the beginning of the 19th Century, this was a mere formality and did not affect the legal situtation of the land. Accordingly, textbooks like Anderson's treated the register books as a unity and did not differentiate between the two regarding the description of the legal rules of the register. It is suggested here that dealing with just one register book meant a simplification and thereby an improvement of the system. If the drafters of the Real

---

476 Real Property Act 1858 (SA), s. 27.
477 Real Property Act 1858 (SA), ss 28, 29.
478 Real Property Act 1858 (SA), s.114.
479 Real Property Act 1858 (SA), s. 30.
480 Anderson, *Anleitung,* § 2, p. 4.
481 Hedemann, *Fortschritte des Zivilrechts* (1935), pp. 201 f.
482 Schalk, *Liegenschaftsrecht* (1931), p. 132.
483 Anderson, *Anleitung*, § 30, p.81.
484 Hedemann, *Fortschritte des Zivilrechts* (1935), p. 202.

Property Act 1858 (SA) wanted to adopt Hanseatic land law, it was sensible to substitute Hamburg's two register books by one and thereby simplify the law.

3. 4. 2. The Registrar General / Der Procurator und der Stadtschreiber

As mentioned above, the South Australian land registration system required the Registrar General to keep the register book.[485] Section 4 of the Real Property Act 1858 (SA) provides that the Registrar General superintends all dealings in land and holds the responsibility for the execution of the Act's provisions. He or she is in charge of the entries in the register and for examining the instruments and grants.[486] The Registrar General releases mortgages and encumbrances, and documents sealed by him/her are received as evidence.[487] With the sanction of the Governor, the Registrar General may even set new rules for entries in the register and issue new forms of instruments.[488] The Registrar General is therefore an office which is associated with considerable powers. That the Real Property Act 1858 (SA) gives great importance to the office of the Registrar General is also stressed by the fact that his/her functions and powers are listed among the first sections of the Act.[489]

Hamburg's law, on the other hand, since it incorporated an additional stage in court, provided for two positions: the "Niedergerichtlichen Procurator" (employee of the inferiour court)[490] and the "Stadtschreiber" (city Secretary)[491]. The former dealt with land dealings during the procedure in court (court stage),[492] while the latter took care of the dealings as regards the registration itself (registration stage). Both stages took place successively but the "Verlassung" (public procedure) took place in court and the registration took place in the "Schreibery"(city office). This necessitated two different persons in charge. The author submits, however, that the need for two persons in charge ceased when the superfluous court stage was removed from the procedure. As analysed above, that would very likely have been the case if South Australia had adopted Hanseatic land law. Hence the reduction of

485 Real Property Act 1858 (SA), s.28.
486 Real Property Act 1858 (SA), ss 9, 37.
487 Real Property Act 1858 (SA), ss 4, 5.
488 Real Property Act 1858 (SA), ss 6, 7.
489 Real Property Act 1858 (SA), ss 4 ff.
490 Anderson, *Anleitung*, § 6, p. 12.
491 Anderson, *Anleitung*, § 6, p. 14.
492 See pp. 107 ff.

Hamburg's three-stage process to a two-stage-process in the Torrens System made civil servants of the court stage superfluous. The office of the "Niedergerichtliche Procurator" would have merged into the office of the "Stadtschreiber" (city secretary) or, in other words, the Registrar General would have combined the powers of the both offices as far as necessary. The establishment of the powerful office of Registrar General can therefore be explained as a result of a structural simplification of the adopted Hanseatic land law.

3. 4. 3. Certificates of title and duplicates/ Realfolium und Extracte

According to the South Australian land registration system, all certificates of title are bound up in the register book.[493] These certificates of title are forms (Schedule A of the Act) referring to a specific allotment of land which precisely describes the estates and interest in such land. With regards to the location and boundaries of the land the certificates refer to public maps.[494] As for the legal status of the land the certificates refer to the grants and instruments leading to the indicated legal situation.[495] In this way a certificate of title shows exactly who is the proprietor of each piece of land and to what extent the land is encumbered.

The South Australian law provided that, whenever the situation regarding registered land was to be changed, it had to be noted on the certificate.[496] This ensured that the title certificates always indicated the current legal situation of the respective land. A duplicate of each certificate was then issued to the proprietor of the fee simple[497]. Under the Real Property Act 1858 (SA) this duplicate was received as evidence in courts[498] and its production was indispensable for any transaction involving the land.[499]

Hamburg's law contained an impressively similar concept to the South Australian certificate of title. Hamburg's certificates were called 'foliums' (several pages) and were also bound up in the 'Stadterbebuch' (City Heritage Book). Each separate 'folium' (original certificate) referred to a

---

493 Real Property Act 1858 (SA), s.30.
494 Real Property Act 1858 (SA), s. 114.
495 Real Property Act 1858 (SA), s. 29.
496 Real Property Act 1858 (SA), s.37.
497 Real Property Act 1858 (SA), s. 30.
498 Real Property Act 1858 (SA), s. 30.
499 Real Property Act 1858 (SA), s. 37.

specific allotment of land. The piece of land to which the 'folium' referred to was indicated by a reference to Hamburg's public maps.[500] According to Hamburg's law, the existing rights in land had to appear on such a 'folium', if those rights were to be acknowledged.[501] In this respect the Hanseatic 'folium' corresponds completely with the certificate of title under the Real Property Act 1858 (SA). Additionally, Hamburg's land law provided that each proprietor of land received a copy of the respective 'folium'.[502] Such copies were called 'Extracte'. This word derives from the fact that the copies were mere extracts from the register. The 'Extract' is therefore functionally identical to the duplicate of the inaugural Torrens System. Like the duplicate of the certificate under the Real Property Act 1858 (SA), Hamburg's "Extract" was considered evidence in court.[503] This was especially important for the court stage (the "Verlassung").[504]

Attention is drawn to a difference in the application of the rules. Even though both systems provided that the duplicate certificate/ Extract had to be returned to the register office/ Stadtschreiberey when a change was to be made to the original certificate/ folium, Hamburg's law did not enforce this rule as strictly as the South Australian land registration system.

Under the Torrens System no other certificate (duplicate) could be in circulation other than the certificate that accurately corresponded to the original in the register book. The Real Property Act 1858 (SA), s. 9 clearly established that, when the original certificate in the register book was to be changed, the old duplicate had to be returned to registry office and cancelled. No exception was allowed to this rule. Even in the case of a lost certificate, the Real Property Act provided that a provisional certificate had to issued.[505]

In Hamburg, however, the duty of returning the duplicates was not so strictly enforced. Quite often the "Stadtschreiber" executed a registration of a transfer even though the old duplicate had not been produced. Under Hanseatic law an out-of-date "Extract" could therefore be in circulation.[506] This, however, did not endanger the security of dealing.

---

500 See collection of certificates in Schalk, *Liegenschaftsrecht* (1931), appendix II.
501 Schlüter, *Tractat* (1709), *Tractat* (1709), p. 719.
502 Schlüter, *Tractat* (1709), p. 676.
503 Anderson, *Anleitung*, § 10, pp. 20 f; § 26, pp. 63 ff; § 28, p. 78.
504 Anderson, *Anleitung*, § 10, pp. 20 f.
505 Real Property Act 1858 (SA), s. 100.
506 Anderson, *Anleitung*, § 26, p. 63.

Anyone who wanted to secure the validity of dealings could ask for an up-dated "Extract" (duplicate certificate) from the "Stadtschreiber" (city secretary).[507] This seemed bearable in a small city state like Hamburg, since everyone could get a new "Extract" without much effort, unlike South Australia with its expansive areas of land. The distances to the Adelaide Register Office could be much greater than within Hamburg and surroundings. It made dealings a lot easier when colonists could negotiate relying on the information given on the duplicates of the certificates. Having only up-dated duplicates in circulation meant that parties could be sure about the content of the register book simply by examining the duplicate, regardless of their location within the colony. The duplicates therefore constituted a form of mobile register which met the needs of Australia perfectly.

By allowing no exceptions to the rules concerning duplicates, the Real Property Act 1858 (SA) considerably increased the reliability of the information given in the duplicate certificates. This meant an improvement compared to the Hanseatic law and also a necessary adaptation to the demographic and geographical peculiarities of South Australia. It is noteworthy that Anderson expressly cautioned against this defect of the Hanseatic law in his textbook.[508] Given that Dr. Hübbe made use of Anderson's textbook, he must have been well aware of the need for improvement.

3. 4. 4. Schedules of Instruments / Lateinische Modelltexte

The Real Property Act 1858 (SA) referred to several instruments that were needed for all kinds of transfers of property rights.[509] According to s. 3 an instrument is "any land grant, certificate of title, or other document in writing relating to the transfer, encumbrance or other dealing with land". For these instruments the Appendix of the Act provided 19 distinct schedules.

The most important schedules of instrument were:

Schedule A: Certificate of Title
Schedule B: Memorandum of sale
Schedule C: Lease
Schedule D: Bill of mortgage

---

507 Anderson, *Anleitung*, § 26, p. 63.
508 Anderson, *Anleitung*, § 26, p. 63.
509 See schedule A-S in the appendix of the Act.

Schedule E: Bill of encumbrance
Schedule F: Bill of trust
Schedule G: Power of Attorney
Schedule L: Caveat
Schedule O: Transfer of Mortgage, Lease, or encumbrance
Schedule P: Caveat forbidding registration of contract for dealing with estate or interest in futuro.

Each of these schedules contained a predetermined set of words which had to be used to make the execution of the instrument and thereby the intended transfer/dealing valid. The schedules left some blank spaces so that the parties could fill out the particulars of the specific dealing. Such particulars were, for instance, the location of the land, the names of proprietors/parties, the estates/interests involved, the date and so on.

The provided schedules purported to make dealings safe from using wrong or insufficiently precise terms.[510] Since the parties had to fill out only a few particulars in the prescribed schedules not much could go wrong. The predetermined set of words in the schedules was laid down and checked by lawyers[511] ensuring accordance with formal rules. The number of the supplied schedules was also sufficient for common dealings because there was only a limited number of property rights anyway.

Although Hamburg's land law had no statute with an annexed set of schedules, it provided something very similar to those forms of instruments prescribed by the Real Property Act. In Hamburg, every transfer or dealing with land also had a fixed set of words which traditionally had to be used.[512] These fixed sets of words were all in latin leaving blank spaces to be filled out in German. Similar to the schedules of the Real Property Act, only the particulars of the specific dealings were meant to be filled into those blank spaces while the basic terms where predetermined. In Hamburg, however, these sets of words had already been fixed in the 17th century.[513]

---

510 Hübbe, *The voice of reason* (David Gall, Adelaide 1857), pp. 81, 94.

511 Fisher, *The Real Property Act as passed in the Parliament of South Australia, Session 1857-8, with analytical and critical notes* (David Gall, Adelaide 1858), pp. 109 ff.

512 Schalk, *Liegenschaftsrecht* (1931), p. 55, Schlüter, *Tractat* (1709), pp. 675 f, Baumeister, *Privatrecht* (1856), p. 203.

513 Schlüter, *Tractat* (1709), pp. 675 f.

Anderson gives numerous examples for the more difficult sets of words.[514] He strongly advises the use of the correct set of words in order to validate the intended transfer or dealing. The author will now illustrate one of Anderson's examples which provided a pattern for an instrument where a proprietor wishes to transfer only part of his/her land and wishes to combine the remaining part which bordering allotment which he/she also happens to own. The transferor's name in the example is Fedder Karsten and the name of the transferee is Adolph Köncke.:

> Libro Hered. A. A. 19. St. Petri p. Franc 1784. fol. 35 (register book A 19 of St. Peters, 1789, folium 35):[515]
> "Sciendium quod pars residuae hereditatis Fedderi Karstens, sita retro hereditatem braxatoriam nunc Magni Adolphi Köncke in Magna Divitum Platea; (Pet. A. 22) dicto proprietario Karstens coram petente et praevia resignatione publica, consensu unius creditoris hypothecarii; cum hac hereditate combinata sit et ideo ad hanc hereditatem in Chono Pontis Telonii nunc spectet atque pertinea, declarato, hic sit notata. Act. p. Nat. Mar. 1796."

Apart from the fact that Hamburg's forms of instrument were written in Latin, the forms provided by the Real Property Act 1858 (SA) also differ from Hamburg's forms in another way. The Hanseatic forms were based on a sort of case law.[516] Since the system had been in force in Hamburg for centuries the Stadtschreiber (city secretary) only had to look up old instruments and copy them. Whereas the schedules of the Torrens System guaranteed the validity of the words by statutory law, Hamburg's forms had validated dealings through centuries of use. By the 19th Century those fixed Latin terms had become customary law in Hamburg.[517]

Bearing in mind the assumption that the Real Property Act 1858 (SA) was an adoption of Hamburg's land law, it can be argued that the schedules annexed to the Act substituted Hamburg's customary law that obviously did not exist in South Australia. Moreover it can be established that the introduction of Hamburg's land registration system in

514 Anderson, *Anleitung,* § 15, p. 42 ff.
515 Anderson, *Anleitung,* § 31, pp. 83 f.
516 Schalk, *Liegenschaftsrecht* (1931), p. 66.
517 Schalk, *Liegenschaftsrecht* (1931), p.67.

South Australia would have necessitated the provisions for such forms. South Australia's geographical vastness also has to be taken into consideration. Whereas it was appropriate for a city state like Hamburg to make the Stadtschreiber (city secretary) copy the relevant set of words, this was not appropriate for South Australia. In a colony of this size it was better to provide schedules and forms which could be printed in English and sold all over South Australia. In this way people living far out in the country were also able to make use of the prescribed instruments without having to get a copy prepared in Adelaide first. It is suggested that the schedules provided by the Real Property Act 1858 (SA) would have been an adapted and improved form of the fixed set of latin words that were traditionally used in Hamburg.

3. 4. 5. Public Maps and Surveryor General/ Landkarten und Landvermesser

The introduction of public maps under the Torrens System[518] does not seem to be that remarkable at first glance. Of course, it is sensible for every country to be properly mapped. It must, however, be taken into consideration that the bulk of the land in South Australia was not mapped in 1858. The existing maps did not give any notice as to the legal ownership of the land, nor could their accuracy be guaranteed. It is therefore surprising to a certain extent that, under such conditions, a colony as vast as South Australia would promote land law reform which presupposed that the entire area was to be mapped.

Nevertheless, the Real Property Act 1858 (SA) provided that certificates of title and their duplicates had to refer to official maps in order to identify the land. This is not expressly stated in the relevant sections of the Act,[519] but was implied by the respective schedules in the Appendix of the Act which left blank spaces to be filled out with references to those public maps.[520]

Similar to the Torrens System, the reference to maps was essential to Hamburg's land law. All the "foliums" (certificates) and "Extracte" (duplicates) had to refer to public maps to identify the land in question. It is true that Anderson's textbook does not stress the significance of maps expressly, but his examples of "foliums" (certificates) do all refer to such

---

518 Real Property Act 1858 (SA), s. 114.
519 Real Property Act 1858 (SA), ss 27 ff.
520 See for instance schedule A for the certificate of title.

maps by giving the index numbers of the land in question. In the example given above it is "St. Petri A. A. 19"[521], in other examples it is given in brackets e.g. "vide Hauptbuch Nicol. A. A. 272 a"[522] (See the central book Nicol. A. A. 272 a).

Hence South Australia's concept of a map ordnance was identical with the one used in Hamburg's land registration system. Whereas South Australia had to appoint the Surveyor General[523] to develop, copy and certify maps. Hamburg had been furnished with the map ordnance for a long time. The "Stadtbuchschreiber" (City secretary) administered the maps and had to make changes to them if, for instance, a subdivision of land made it necessary.[524]

For South Australia as well as for Hamburg, the reference to maps considerably increased the accuracy of the information given in the certificates/foliums and duplicates/extracte. By relating the certificates to public maps, it was precisely indicated which rights applied to which land. Thus the map ordnance helped to avoid errors caused by inaccurate legal descriptions of land. The concept is therefore in line with the overall idea of the system of predetermined schedules and forms to minimize the chance of violating formal rules in land dealings and/or invalidating dealings negligently.

3. 4. 6. Title by Registration and Conclusiveness of the Register/ Eigentumsübergang durch Eintragung

After having discussed the resemblances of the most important institutions and instruments of the inaugural Torrens System and Hamburg's land law, the legal principles applied to these institutions will now be addressed. The central principle which South Australia's and Hamburg's land registration system obviously have in common is that they are both systems of *title by registration,* which requires *conclusiveness of the register.*

A system of title by registration means that registration itself vests title in the proprietor.[525] In other words, title passes by the act of registration,

---

521 Anderson, *Anleitung*, § 31, p. 83.
522 Anderson, *Anleitung*, § 30, p. 82.
523 Real Property Act 1858 (SA), s. 114.
524 Anderson, *Anleitung*, § 30, pp. 81 f.
525 Breskvar v. Wall, (1972) 46 *ALJR* 68 at 70.

and conversely, if there is no entry in the register, no title has passed. This principle is stated in the Real Property Act 1858 (SA), ss 36, 37.

In Hamburg the notion of title by registration had developed by the 17th Century.[526] In the middle ages the transfer of rights was validated by the procedure in court, and registration was simply for proof.[527] However, Schlüter points out that as early as 1709 registration alone was the means of transfer of rights in land.[528]

The notion of title by registration corresponds to the principle of conclusiveness of the register.[529] This principle basically clarifies that no title or interest in land is in existence unless it is noted on the register. In the Real Property Act 1858 (SA) the conclusiveness of the register was established in s. 33:

> 'Every certificate of title or entry in the register book shall be conclusive, and vest the estate and interest in the lands therein mentioned in such manner and to such effect as shall be expressed in such certificate or entry valid to all intents, save and except as is hereinafter provided in the case of fraud or error.'

Sharing the principle of the conclusiveness of the register, Hamburg's law did not acknowledge any rights in land if they did not appear on the register. The entry in Hamburg's register book therefore meant "conclusive evidence against the whole world".[530] Hübbe calls it the "most important principle" of the system.[531]

Hence, Hamburg's system and the Real Property Act 1858 (SA) shared the basic notion of title by registration and the principle of the conclusiveness of the register. However, one cannot note this correspondence of principles without pointing out an important difference between the general concepts of law in the two countries. Whereas Hamburg had a homogenous concept of its law, South

---

526 Schalk, *Liegenschaftsrecht* (1931), p. 129 ff.
527 Baumeister, *Privatrecht* (1856), pp. 126 ff.
528 Schlüter, *Tractat* (1709), p. 719.
529 Sackville, Neave, Rossiter and Stone, *Property Law* (Butterworth, Melbourne, 6th ed. 1999), p. 430 f.
530 Hübbe; "Title by registration in the Hanse Towns", South Australian Parliamentary Papers No 212 (1861), p. 6.
531 Hübbe; "Title by registration in the Hanse Towns", South Australian Parliamentary Papers No 212 (1861), p. 6.

Australia, as a British colony, distinguished between legal and equitable rights.

This duality of legal and equitable rights in the British land law caused considerable tension for the principle of the conclusiveness of the register.[532] On the one hand, the conclusiveness of the register (without exception) was clearly a formal rule; on the other hand, it was the very nature of equitable rights that they purported to be independent of formalities.[533] Moreover, the concept of equitable rights purported to compensate for the harsh and unconscionable results from the strict application of formal rules. The maxim is: "Equity looks to the intent rather than to the form".[534]

Robinson regards these partly contradictory principles as the central problem of the Torrens System, which the draftsmen had not sufficiently taken into consideration.[535] It is suggested, however, that there are indications that the draftsmen had considered the problem and even thought that they had taken care of it sufficiently. It is clearly stated in the first section of the Real Property Act 1858 (SA) that concepts that interfered with the principles of the Act were to be regarded as abolished:[536]

> "All Laws, Statutes, Acts, Ordinances, rules , regulations, and practice whatsoever, relating to freehold and other interest in land, so far as inconsistent with the provisions of this Act, are hereby repealed, so far as regards their application to land under the provisions of this Act, or the bringing of land under the operation of this Act."

With regard to the contradiction of equitable rights in land with the conclusiveness of the register, equitable rights in land were no longer in existence. This implied regulation of the Act was even stated in a court decision.[537] However, the concepts of equitable rights were rooted too deeply in the Anglo-Saxon tradition so that the courts, instead of denying the existence of equitable land rights under the Real Property Act 1858

---

532 Robinson, *Equity and systems of title to land by registration*, (PhD-thesis, Monash University 1973), p. 102.
533 Ridall, p. 379.
534 Morris, Cook, Creyke and Geddes, p. 70.
535 Robinson, *Equity and systems of title to land by registration*, p. 115.
536 Hogg, *The Australian Torrens System* (Clowes & Son, London 1905), p. 23.
537 Lange v. Ruwoldt (1872) 6 SALR 65.

(SA), began to develop a sophisticated number of exceptions to the conclusiveness of the register.

3. 4. 7. Exceptions of error and fraud/ Einrede bei Irrtum und Betrug

As discussed above, the Real Property Act 1858 (SA), s. 33 provided for the conclusiveness of the register "except as is [hereinafter] provided in the case of fraud or error". These exceptions to the principle were regulated more concretely in ss 93 - 96 of the Act. According to s. 95, if registration was achieved by fraud or misrepresentation, it was at the discretion of the court to direct the Registrar General to cancel the registration and revert the estate or interest to the person to whom it originally belonged. Hamburg's land law provided exactly the same exceptions to the conclusiveness of the register:[538] it was also at the discretion of the courts in Hamburg to order the correction of the register in the case of fraud or misrepresentation.[539]

Under the Real Property Act 1858 (SA) a registered proprietor was granted indefeasibility of title even when the registration was achieved by fraud, error or misrepresentation, provided that he/she was registered "as a purchaser or mortgagee for bona fide valuable consideration, or by transfer, or transmission from or through a purchaser or mortgagee for bona fide valuable consideration."[540] Similarly under Hamburg's land law, the exception of fraud and misrepresentation did not apply when the registered person was a "bona fide possessor for valuable consideration".[541] In such a case the registered title enjoyed indefeasibility despite the fraud or misrepresentation, although the court had a discretion in such a case.[542] However, it must be noted, that under Hamburg's law, a "bona fide purchaser" was not protected when he himself had taken part in the fraud.[543]

Regarding the cases of fraud, error or misrepresentation, the South Australian system, as well as Hamburg's law, did not prevent persons deprived of estates or interests from applying for a correction of the register. As an alternative both systems also permitted actions for

---

538 Schlüter, *Tractat* (1709), p. 746.
539 Schlüter, *Tractat* (1709), p. 747.
540 Real Property Act 1858 (SA), s. 95.
541 Hübbe, "Title by registration in the Hanse Towns", South Australian Parliamentary Papers No 212 (1861), p. 25.
542 Schlüter, *Tractat* (1709), p. 747.
543 Schlüter, *Tractat* (1709), p. 751.

damages.[544] In order to prevent cases of fraud and misrepresentation relative to registration altogether, Hamburg had issued a city order as early as 1799 (7 January 1799) which instituted severe penalties in such cases.[545] Similarly, the Real Property Act 1858 (SA), s. 121 declared cases of fraud and misrepresentation relative to registration to be a felony with the possibility of up to four years imprisonment.

3. 4. 8. Priority rules/Prioritäten

The Real Property Act 1858 (SA) and Hamburg's land registration system also had very similar provisions regarding the priority of the registered estates or interests. Both systems make the priority of a right in land dependent on whether it was registered before or after a competing right. Sections 58 and 59 of the Real Property Act 1858 (SA) state that mortgages and other encumbrances have priority according to the date on which the instrument was recorded. The date of notice of the instrument is of no importance. In accordance with this priority, s. 37 establishes that estates and interests are to be registered in the order of the production of the instruments to the registry.

Hamburg's land law also provided that estates and interests had priority according to the date of their entrance in the register book.[546] This rule was affirmed by the latin supplement noted on the register book:[547]

> "cum prioritate prae sequentibus" (with priority over the following).

The author submits that these priority regulations were appropriate to a system which applied a strict conclusiveness to the register. As long as estates and interests were only recognised when they were registered, the priority was easily determined by the order of the entries. When a system begins to recognise proprietary rights outside the register, priority cannot depend on the entry. Since the South Australian courts recognised

---

544 South Australia: Real Property Act 1858 (SA), ss 93, 94
Hamburg: Baumeister, *Privatrecht* (1856), p. 128, Schlüter, *Tractat* (1709), p. 750.

545 Anderson, *Anleitung,* § 40, pp. 130 f, Hübbe, "Title by registration in the Hanse Towns", South Australian Parliamentary Papers No 212 (1861), p. 25.

546 Anderson, *Anleitung* , § 34, pp. 94 f; Hübbe, "Title by registration in the Hanse Towns", South Australian Parliamentary Papers No 212 (1861), p. 15; Schlüter, *Tractat* (1709), p. 796.

547 Schalk, *Liegenschaftsrecht* (1931), p. 81.

equitable estates and interests outside the register they had to develop an appropriate regulation for the prioritization of interests.[548]

3. 4. 9. Caveat/ Widerspruch

Since systems of title by registration only recognise estates and interests in land appearing on the register, there is a need to protect unregistered rights. Hamburg's land law system, as well as the South Australian system, provided provisions that enabled a person to suspend future registration by a notice on the register, so that the rights of that person in land which were endangered by the possible registration of the rights of another person were protected.

Under the Torrens System this device was called the caveat and its procedure was regulated in ss 101 - 113 of the Real Property Act 1858 (SA). This procedure provided that the person who wanted to protect a right had to lodge the caveat in the prescribed form, laid out by Schedule P of the Act, with the Registrar General. The form of Schedule P required that the caveator had to specify the estate or interest in land which he or she claimed to be protected.[549] After the caveat was lodged in the prescribed form, future registration was suspended. The caveat form of Schedule P reads:

> "Take notice that I [*blank space for the name*] claiming estate or interest (here state the nature of the estate or interest claimed, and the grounds on which such claim is founded) in (here describe land) forbid the registration of any memorandum of sale, or other instrument..."[550]

After the Registrar General had received the caveat, he was required to publish it in the Government Gazette and give notice to the registered proprietor of the respective land.[551] Having received notice of the lodging of a caveat, the registered proprietor was entitled to summon the caveator before the Supreme Court to establish why the caveat should not be withdrawn.[552]. However, whether the registered proprietor decided to take such action or not, the caveat had to be justified in a petition

---

548 See Sackville, Neave, Rossiter and Stone, pp. 488 ff.
549 Schedule P, appendix to the Act.
550 Italics mine.
551 Real Property Act 1858 (SA), ss 101, 102.
552 Real Property Act 1858 (SA), s. 102.

brought before the Supreme Court three months after it was lodged.[553] The judge determined a hearing in which the registered proprietor was to show cause or affidavit against the petition.[554] In this hearing the court decided whether the petition attached to the caveat should be followed or if there was need for further inquiry.[555] The court could declare the existence of the claimed estate or interest in an order, and the Registrar General would be obliged to act according to that order.[556] If the registered proprietor was not present, the court decided the case on the evidence of the caveator.[557]

Under Hamburg's land law there were originally two devices that protected unregistered rights within the register book. One was called "impugnatio"[558] and the other was called "inhibitoria".[559] Both were objections of claimants of endangered unregistered rights which were noted on the "Protocolle" (minutes of court procedure) with the effect of suspending future registration.[560] Both procedures eventually led to a final decision in court.[561] The difference between the two was that the "impugnatio" was an objection that could be achieved by a mere declaration of the objector, whereas the "inhibitoria" was an order by the court for which the objector first had to show cause.

Both modes of suspending registration were used in Hamburg until the beginning of the 19th century. However, after 1802 the "impugnatio" was no longer allowed[562] due to its increasing misuse.[563] The misuse of the device was possible because it enabled anyone to suspend the registration for at least a month without showing cause for the objection, or specifying an estate or interest in the land.[564] The simple declaration of an objection for any reason was the only requirement for an "impugnatio".[565]

---

553 Real Property Act 1858 (SA), s. 103.
554 Real Property Act 1858 (SA), s. 105.
555 Real Property Act 1858 (SA), s. 107.
556 Real Property Act 1858 (SA), s. 109.
557 Real Property Act 1858 (SA), s. 106.
558 Schalk, *Liegenschaftsrecht* (1931), p. 53.
559 Hübbe, "Title by registration in the Hanse Towns", South Australian Parliamentary Papers No 212 (1861), p. 22.
560 Anderson, *Anleitung*, § 12, p. 40, Schalk, *Liegenschaftsrecht* (1931), p. 53.
561 Schalk, *Liegenschaftsrecht* (1931), p. 53.
562 Hamburg City ordinance of 21 May 1802 cited by Baumeister, *Privatrecht* (1856), p. 134, fn. 19.
563 Anderson, *Anleitung,* § 12, p. 39.
564 Baumeister, *Privatrecht* (1856), p. 133.
565 Baumeister, *Privatrecht* (1856), p. 133 f.

Since Hamburg's law already provided an alternative method to suspend the registration, i.e. the inhibitoria (order of the city council), there was no need to change the rules applying to the impugnatio. The impugnatio could be simply abolished without taking away the possibility to object and thus suspend registration. Hence from 1802 there remained only one way to suspend future registrations, i.e. by obtaining a court order, namely the inhibitoria.[566]

With respect to the comparative legal analysis of Hamburg's law with that of South Australia, it is not enough merely to state that both systems provided means to suspend registration as a provisional protection of unregistered rights before an eventual settlement in court. It is true that this additional similarity is significant with regard to the possible adoption of Hamburg's land law in South Australia. However, a closer look at the details of the procedure shows that the South Australian caveat corresponds to an improved form of Hamburg's impugnatio, i.e. Hamburg's form of objection, which gave way to the inhibitoria in 1802. The caveat, as well as the impugnatio, did not begin in court, but rather with a simple application for suspension of future registration. The caveat, however, avoided the risk of being misused by additional provisions. Firstly, under the Real Property Act 1858 (SA) it was required that the caveator should specify his/her claimed right in land,[567] and secondly, that the registered proprietor was entitled to summon the caveator before the Supreme Court to show cause for his/her caveat.[568] Above all, because of the latter provision, a caveator hardly had a chance to push through a suspension of registration for insufficient reasons. In such a case the registered proprietor would have summoned the caveator and taken action immediately. The former requirement to specify the estate or interest in land provided additional protection against possible misuse of the caveat.

Assuming that the South Australian land registration system began as an adoption of Hanseatic land law, it would have been sensible to choose the impugnatio from the two methods developed by the Hanseatic system. There is no need to involve the courts before the actual trial on the affected rights in land. Until such a settlement takes place, it seems fair to leave the decision to the registered proprietor as to whether he/she accepts or objects to a suspension of registration and thereby a restriction

---

566 For a description of the procedure see also above.
567 Schedule P, appendix to the Real Property Act 1858 (SA).
568 Real Property Act 1858 (SA), s. 102.

of his/her right to dispose of the land. It is suggested that the fact that Hamburg's land law eventually allowed only suspension of registration by way of court orders is to be explained by a historical development of the land law, which removed the impugnatio instead of developing it. Accordingly, all 19th century textbooks on Hamburg's land law discuss the inhibitioria by explaining the history and the abolition of the impugnatio.[569] If Hamburg had not had the alternative form of the inhibitoria, it would probably have altered the impugnatio so that it could no longer be misused. After all, the inhibitoria had some considerable disadvantages. For example, in cases in which the objector applied because of reasonable cause, the court was involved even though there had been no misuse of the right to suspend the registration. In these cases the imhibitoria prolonged the procedure and made it unnecessarily expensive.

3. 4. 10. Mortgage/Hypothek

The mortgage is one of the most important interests in land. In an increasingly industrial and commercial society it is often necessary for securing credit. The importance of the mortgage often gave impetus for the development of the law of real property in general.[570] The Real Property Act 1858 (SA) brought a remarkable change to the law on mortgages in South Australia.

Before the introduction of this Act, the mortgage procedure under British law provided that the mortgagor had to transfer his or her entire title to the mortgagee.[571] The Torrens System, however, substituted this concept with the notion of a mortgage by way of a charge over land.[572] In this way, the fee simple absolute remained with the mortgagor. In order to create or transfer a mortgage, an entry in the register book was sufficient.[573] Nonetheless, the mortgaged land was subject to sale by mortgage in the case of non-repayment of the secured debt. If the debtor defaulted on the repayment, the mortgagee was empowered to sell the land by auction.[574] In such cases the sale money was used to cover the default as well as the cost of the sale.[575] As long as the land was subject

---

569 Anderson, *Anleitung,* § 12, pp. 39 ff, Baumeister, *Privatrecht* (1856), pp. 133 ff, Schalk, *Liegenschaftsrecht* (1931), pp. 53 ff.
570 Hedemann, *Fortschritte des Zivilrechts* (1935), p. 32.
571 Sappideen, Stein, Butt and Certoma, p. 389.
572 Real Property Act 1858 (SA), s. 51.
573 Real Property Act 1858 (SA), ss 51, 62.
574 Real Property Act 1858 (SA), ss 51, 53.
575 Real Property Act 1858 (SA), s. 53.

to a mortgage, the mortgagor was only allowed to dispose of the mortgaged land with the consent of the mortgagee.[576]

This new mortgage procedure in South Australia was identical to the concept of the "Hypothek" (mortgage) in Hamburg. The "Hypothek" was a mortgage by way of a charge and was introduced in Hamburg in the Middle Ages. However, until the 13th Century, a mortgage by transferring the title to the mortgagee also existed in Hamburg,[577] By the beginning of the 19th Century, the only mortgages in Hamburg were by way of charge and were created and transferred by mere registration.[578] In the case of default the debt was paid through the sale of the mortgaged land by the mortgagee.[579] If the mortgagee realized more than the default and the cost of the sale, he had to pay back the difference to the mortgagor.[580] Also under Hamburg's law, a mortgagor could only deal with his or her land with the consent of the mortgagee.[581]

It is evident that the mortgage under the Torrens System corresponded to a great extent with the mortgage under Hamburg's land law. This is again of particular significance to the hypothesis that the Real Property Act 1858 (SA) constituted an adoption of Hanseatic land law. South Australia's concept of the mortgage was assimilated to Hamburg's only with the introduction of the Torrens System. This change in the concept of the mortgage was not necessarily a result of the implementation of a system of title by registration. Such a system merely supplements existing concepts of land rights, but does not afford a special kind of concepts of rights. The South Australian land registration system would equally have functioned with a concept of a mortgage that required the mortgagee to pass the fee simple to the mortgagor. This points to an adoption of Hamburg's land law as an entire system, including the concept of land rights, instead of a mere adoption of the principle of title by registration. It may be noted that Loyau particularly stressed that the change of English law regarding the mortgage in South Australia was due to the adoption of Hanseatic law.[582]

---

576 Real Property Act 1858 (SA), ss 24, 49.
577 Baumeister, *Privatrecht* (1856), p. 168.
578 Anderson, *Anleitung,* § 33, pp. 87 ff
579 Anderson, *Anleitung,* § 28, p. 79; Baumeister, *Privatrecht* (1856), p. 174.
580 Baumeister, *Privatrecht* (1856), p. 168.
581 Baumeister, *Privatrecht* (1856), p 179.
582 Loyau, *Notable South Australians* (Carey & Page, Adelaide 1885), p. 157.

3. 4. 11. Trust/ Treuhand (*ad fidelus manus*)

The land law concept of trust is important to examine because it has been argued that it was unlikely that the Real Property Act was modelled on German law since the notion of trust is alien to German law.[583] The latter assertion is however incorrect. German law had developed a concept that was called "Treuhand",[584] which has many similarities to the Anglo-Saxon trust.

The trust concept in South Australian land law was inherited from England. The notion of trust was rooted in the development of equitable rights by the Chancery courts of Equity.[585] Originally, the trust purported to overcome the strict rules and burdens of the common law.[586] The trust concept, therefore, differentiated between legal and equitable rights in land. Since common law applied only to legal estates and interests, the creation of equitable rights in land evaded the regime of strict rules. For instance, it was impossible to dispose of an estate by will under the old common law,[587] whereas with a trust it was possible to transfer the legal title to someone and keep the equitable title for life.[588] Furthermore, common law only accepted transfers which were made publicly.[589] The trust enabled the trustee to transfer the equitable estate to another person without informing the public.[590]

While the legal estate and/or interest were vested in the trustee, the equitable estate and/or interest remained with the beneficiary. The beneficiary originally had only certain rights against the trustee (in personam), which were acknowledged by equity. These rights have developed into rights against everyone (rights in rem).[591]

The Real Property Act 1858 (SA) integrated this inherited concept of trusts into a system of title by registration. The Act provided for a pre-formed instrument for the creation of trusts which was called a "bill of

---

583 Whalan, "The orgins of the Torrens System" in: The New Zealand Torrens System Centennial Essays (Butterworth Wellington 1971), p. 7.

584 Coing, Die Treuhand als privates Rechtsgeschäft, München 1973, pp. 11 ff, 28 ff.

585 Bradbrook, MacCallum and Moore, *Australian Real Property Law*, (The Law Book Company Ltd., Sydney, 2nd. ed. 1997), pp. 73 ff

586 Bradbrook, MacCallum and Moore, p. 74.

587 Bradbrook, MacCallum and Moore, p. 74.

588 Bradbrook, MacCallum and Moore, p. 74.

589 Bradbrook, MacCallum and Moore, p. 74.

590 Bradbrook, MacCallum and Moore, p. 74.

591 Bradbrook, MacCallum and Moore, p. 74.

trust".[592] According to ss 56 and 58, on the production of such a bill of trusts, estates or interests under a trust had to be registered in the order of their production. The Real Property Act 1858 (SA) also provided regulations for the discharge of trusts.[593] Even though the basic structure of the trust was already predetermined by law prior to the Real Property Act 1858 (SA), the Act declared that the legal estate was vested in the trustee.[594]

Although there was no distinction between common law and equity in Germany, Hamburg's land law provided for the aforementioned concept of "Treuhand", which closely resembles the trust under the Real Property Act 1858 (SA). Also, Hamburg's Treuhand purported to find a way around some of the strict rules that had been developed. For example, a person could only become registered as a proprietor of land when he/she was a citizen of Hamburg.[595] Likewise, it had been the rule until the 18th century that aristocrats could not be registered as land owners.[596] However, making use of the Treuhand, a non-aristocratic citizen of Hamburg could register for the benefit of a person who was not eligible to become a registered proprietor. The Hamburg citizen who was legitimately registered held the land "ad fidelus manus" (in faithful hands) and he/she was called "fiduziar" (trustee) of the beneficiary. This basic concept of Treuhand had already developed in Hamburg by the 14th Century.[597] It could thus be said that the British land law and Hamburg's land law had developed the parallel devices of trust/Treuhand to overcome restrictions in transfer of real property. The British trust concept developed to overcome certain restrictions in the modes of transfer whereas Hamburg's law made use of the Treuhand to overcome certain restrictions as to the eligibility of ownership in land.

According to Hamburg's land law the "fiduziar" (trustee) as well as the beneficiary had to be registered.[598] The Latin term of registration was "ad fideles est A ad fideles manus et ad usum C" (*A is trustee holding in trustful hand and for the use of C*).[599] Hamburg's law regarded the beneficiary as the 'real' proprietor and allowed the "fiduziar" (trustee) to

---

592 Real Property Act 1858 (SA), appendix, schedule F.
593 Real Property Act 1858 (SA),s. 57.
594 Real Property Act 1858 (SA),s. 60.
595 Schalk, *Liegenschaftsrecht* (1931), p. 121.
596 Schalk, *Liegenschaftsrecht* (1931), pp. 120.
597 Schalk, *Liegenschaftsrecht* (1931), pp. 120 f.
598 Baumeister, *Privatrecht* (1856), pp. 205 ff.
599 Schalk, *Liegenschaftsrecht* (1931), p. 120 (translation mine).

dispose of the land only with the consent of the beneficiary.[600] A dealing in the land without the consent of the beneficiary was invalid.[601] This, however, only applied if the Treuhand had been registered according to the rules. If the entry in the register did not indicate that the registered proprietor was holding the estate or interest as "Fiduziar" (trustee), a dealing was valid without the beneficiary's consent. In such a case, the beneficiary was limited to having contractual rights of compensation against the trustee.[602]

The comparison of the English concept of trusts under the Torrens System and the Treuhand in German law shows considerable similarities. Assuming that the Real Property Act 1858 (SA) was an adoption of the Hanseatic land registration system, one could claim that the concept of trust was integrated into the adopted system. After all, it is logical to make use of existing institutions as long as they are compatible with the system to be adopted. The draftsmen of the Real Property Act 1858 (SA) might have assumed that the trust concept was interchangeable with the Hanseatic "Treuhand" without a detrimental effect on the functioning of the system. The author submits, however, that this assumption must be questioned, because the British concept of trust not only incorporates the rights of the trustee and the beneficiary, but also carries with it broader ideas of equitable rights. The latter are truly foreign to the German system, since the distinction between legal and equitable rights is a particular relic of British legal history. Whether these distinctions turn out to be purely artificial or whether they require a further amendment to the systems, as Robinson suggests,[603] would necessitate additional analysis and is not within the scope of this comparative legal overview.

Summary

In summing up the results of the above analysis, it seems safe to conclude that the Torrens System corresponds to Hamburg's land law systems in term of basic institutions and principles. The concepts of title by registration, conclusiveness of the register, priority rules, exceptions of error and fraud, the use of caveats and the use of public maps are almost identical. Those aspects in which the systems deviate can easily be explained if one recalls the argument that the court stage was removed during the course of the adoption of Hamburg's land law. In South Australia, the caveat, for instance, appeared on the register instead of

600 Schalk, *Liegenschaftsrecht* (1931), p. 120.
601 Baumeister, *Privatrecht* (1856), p. 208.
602 Baumeister, *Privatrecht* (1856), p. 208.
603 Robinson, *Equity and systems of title to land by registration*, pp. 98 ff.

within the minutes of the court procedure as in Hamburg. The office of the Registrar General was associated with more competences in South Australia. In the light of the increased importance of the stage of registration in the Torrens System, the certificates of title and the duplicates, which mirrored the register, were given concomitantly more importance. The Real Property Act 1858 (SA) therefore provided for rules which enforced the accuracy of certificates and their duplicates more strictly. In addition, the statutory incorporation of schedules for instruments in South Australia can be explained as an adoption of Hamburg's customary law regarding Latin text templates in an adapted and improved form. Apart from these similarities, it is remarkable that, with the implementation of the Torrens System, even the old notion of the mortgage was assimilated into Hamburg's concept of the mortgage by the way of charge, although the mere introduction of a land registration system did not require changes to existing interests in land as such. Despite the assumption of other authors,[604] the South Australian trust concept also corresponded to Hamburg's land law. It is submitted that the clear resemblances between the two systems, as established above, are convincing evidence that Hanseatic land law was adopted in South Australia.

---

604 Whalan, *The New Zealand Torrens System Centennial Essays*, (Butterworth Wellington 1971), p. 7.

Chapter 4: Conclusion

In 1905 James Edward Hogg published the first comprehensive textbook on the Torrens System.[605] Though he dedicated an entire chapter to the origins of the system, he did not mention Dr. Ulrich Hübbe's contribution.[606] This seems entirely inappropriate as Hogg discusses even remote potential sources such as the Land Registration System of the Island of Labuan (North Borneo).[607] In 1926 the next textbook on the Torrens System appeared, in which the author Donald Kerr proclaimed:[608]

> "I have very carefully examined the matter, and dismiss, as altogether unwarranted by a shred of evidence, the suggestion that Hübbe, and not Torrens, was the real author. Indeed after considering the diffuse nature of the production of Hübbe's pen, and contrasting the concise language of the Bill, I think the latter bears internal evidence that Dr. Hübbe could not have been the draftsman."[609]

It is hard to believe that Kerr, a South Australian Barrister, "carefully examined" Hübbe's assertion that he modelled the Torrens System on Hamburg's land law.[610] The preceding historical analysis has shown that there is an overwhelming amount of evidence which must be examined.[611] Both Kerr and Hogg handled the matter superficially, setting in motion what Geyer refers to as "The myth ... sustained by later writers".[612] This partly explains why it was not until 1973 that Robinson became the first commentator to give this potential source of the Torrens system sufficient attention.[613]

---

605 Hogg, *The Australian Torrens System* (William, Clowes and sons, London 1905).

606 Hogg, *The Australian Torrens System,* chapter III.

607 Hogg, *The Australian Torrens System,* p.17.

608 Kerr, *The principles of the Australian Land Titles* (Torrens) System (The Law Book Company, Sydney 1927).

609 Kerr (1927), p. v.

610 32 Royal Geographical Society Proceedings (SA) 112.

611 See Chapter 2, pp. 14 ff..

612 Geyer, *Robert Richard Torrens and the Real Property Act: The Creation of a Myth,* Adelaide, 1991, chap. 3, pp. 48 ff.

In contrast to the conclusion reached by Kerr, the historical sources examined above suggest that the drafting of the original Torrens System was predominantly done by Dr. Ulrich Hübbe.[614] On the subject of historical sources upon which this inference is based, the author points out that there would indeed - as Kerr had asserted - be hardly any evidence supporting Hübbe's assertion, if Torrens himself had not caused the draftmanship of the Real Property Act 1858 (SA) to be questioned in 1880.[615] Torrens had justified his petition for an additional pension in that year with the assertion that he alone had drafted the South Australian land registration system. In so doing, Torrens provoked claims to the contrary. In the parliamentary discussion on Torrens' petitions, rather than crediting Torrens, MPs drew attention to Hübbe's prominent role in the drafting of the Act,[616] while some among them wanted to extend a pension to Hübbe in place of Torrens.[617] This may have been the reason why in 1884 Hübbe submitted a petition for a pension himself,[618] which, at a time when his contemporaries were still living, in turn led to further discussion on the drafting of the system. It seems safe to suggest that even Hübbe's official statements from 1884 would probably not have been made had Torrens not been so bold as to claim an additional pension. The ensuing arguments concerning the respective pension petitions were then reason enough to draw George Loyau's attention and research labours to Hübbe when writing his book, "Notable South Australians" (1885).[619] Loyau's detailed description of the collaboration between Torrens, Hübbe and Andrews would most likely never have appeared in any publication had Torrens not acted as the inadvertent catalyst to the 1880 discussions concerning the true authorship of the Real Property Act 1858 (SA).

However, Hübbe made not only the personal claim that he had been instrumental in drafting the Act, but also asserted that he had used

---

613 Robinson, *Equity and systems of title to land by registration*, (PhD-thesis, Monash University 1973).

614 See Chapter 2 (2.5), pp. 80 ff.

615 South Australian Parliamentary Debates 1880, pp. 420 ff.

616 South Australian Parliamentary Debates 1880, p. 424 (MP Ross); p. 425 (MP Kriechauff; p. 427 (MP Henning).

617 South Australian Parliamentary Debates 1880, p. 424 (MP Ross); p. 427 (MP Henning).

618 South Australian Parliamentary Debates 1884, pp. 1024 ff.

Hamburg's land law as the Torrens System's *model*.[620] Even if the historical evidence in this regard were not merely limited to these claims of only one individual, such a proposition can only satisfactorily be tested by means of comparative legal analysis. It is true that Robinson undertakes a form of such analysis, and indicates important parallels between the Torrens System and the Hanseatic law of real property.[621] However, Robinson's comparison is flawed insofar as it fails to grasp the true extent of Hübbe's claim -- that Hamburg's land law represents the *exclusive model* for the Torrens System.[622] It is important to underscore the consequence of this view of the Torrens System: it becomes an example of the relatively rare phenomenon of a legal transplant,[623] notably, a civil law transplant in a common law system. This understanding needs to be borne in mind when examining the possible German origins of the Torrens System, while at the same time recognising that a legal system inevitably undergoes change when adopted by foreign country, as the system must be adapted to its new legal environment and freed, so to speak, of its known defects.[624]

The comparative legal analysis undertaken above[625] takes this adaptation process into consideration when examining the German origins of the Torrens System. The author suggests that the removal of court participation in the transfer of real property rights was such an adaptation made in the course of the adoption of Hamburg's land law in South Australia, as the original Torrens system corresponds in essence to the prevailing Hanseatic system with the court stage, a well-known defect of the latter, having been removed.[626] Although it is probably true that the results of the comparative legal analysis are far from a conclusive verification of Hübbe's assertion, even taken at their most modest, they resoundingly demonstrate that the Torrens System may indeed have been modelled on, and only on, Hamburg's land law.

---

619 Loyau, *Notable South Australians* (Carey & Page Adelaide 1885), p. 156 f.
620 32 Royal Geographical Society Proceedings (SA) 112.
621 Robinson, *Equity and systems of title to land by registration,* pp. 84 ff.
622 32 Royal Geographical Society Proceedings (SA) 112.
623 See for this term: Watson, Legal transplants: an approach to comparative law (Edinburgh, Scottish Academic Press 1974).
624 See Chapter 3 (3.2), pp. 91 ff.
625 See Chapter 3, pp. 99 ff.
626 See Chapter 3 (3.4), pp. 134 ff.

Whilst in the foregoing study the historical and comparative surveys of the origins of the Torrens System and its potential debt to Hamburg's land law have been made in isolation, it is now appropriate to correlate the separate findings by way of conclusion. On the basis of the respective analyses, it is submitted that it is likely that the drafting of the Real Property Act 1858 (SA) took place as follows: in 1856/57 the reform of real property law became a matter of political controversy in South Australia, and eventually became the dominant issue of the 1857 State elections.[627] From then on the development of the Torrens System was divided into three phases: first, public discussion on possible legislative proposals; second, the search for a model; and third, the eventual drafting of the system.

During the first and second phases, it was the aforementioned Anthony Forster who played a dominant role. Not only did he enjoy access to the British Royal Commission Reports of 1830 and 1850, whose appendices made proposals relating to the introduction of forms of land registration in England,[628] but as editor of the South Australian Register, was able to give his views a prominent airing. In a series of articles, Forster set out the basics of, and initiated a public debate on, various land registration systems, promoting in particular the principle of conclusiveness of the register.[629] However, most South Australian property lawyers were opposed to any kind of land law reform,[630] thus providing little hope that a capable commission would be formed with a view to drafting a bill based on Forster's suggestions.

Nevertheless, in order to facilitate the drafting process, Forster looked for a model that already applied the principles of registration and thus suggested applying the new Imperial Shipping Act 1854 to land.[631] This in turn triggered the search also for other models, such as the Share

---

627 Pike, "The introduction of the Real Property Act in South Australia" (1960 - 1962) 1 *ALR* 178.

628 From the 1830 report Forster cites whole paragraphs: South Australian Register, 5 July 1856.

629 South Australian Register 4, 5, 9, 12 and 31 July 1856.

630 Pike, "The introduction of the Real Property Act in South Australia" (1960 - 1962) 1 *ALR* 179.

Registration System.[632] At this time, Torrens ran for parliamentary elections and promised the voters a reform bill, at first championing Forster's suggestion of the shipping law model.[633] At this juncture Dr. Ulrich Hübbe joined the discussion and pointed to the long-standing Hanseatic land law system, which already incorporated the principles set out by Forster.[634] It should be noted that the consideration of Continental systems as models must already have been familiar to Forster, since the Royal Commission Reports to which he had access were partly based on a comparative legal overview of Continental systems, including Germany.[635] Torrens then began a process of collaboration with Hübbe, who explained the Hanseatic system to Torrens,[636] and Andrews, a criminal lawyer who had been in Adelaide for just two years,[637] helped to transform Hübbe's explanation of German land law into the provisions and style of an Anglo-Saxon Act.[638] The Imperial Shipping Act 1854 thus remained a model for the purposes of the wording and terminology of the draft. Hübbe made considerable changes at his discretion in revising the draft[639] that ultimately became the Real Property Act 1858 (SA).[640]

During the course of adopting Hanseatic land law, Hübbe attempted to remove the defects of Hamburg's old, partly customary, law, the most prominent of which was, as mentioned, the deletion of court participation from the process of transfer of rights in real property.[641] However, great time pressure during the election campaign and the lack of competent assistance caused him to make mistakes, especially in truly adapting the system. Thus, the original version of the Real Property Act 1858 (SA)

---

631 South Australian Register, 31 July and 4 and 5 August 1856.
632 South Australian Register, 9 July 1856.
633 South Australian Register, 17 October 1856. A summary of further provisions followed in the editions of 15 and 16 April 1857.
634 Official Statement accepted by Secretary Office, 1884, SA-Archives, D 5257 (T), pp. 1 f.
635 1830 report, appendix, pp. 440 ff; 1850 report, appendix, pp. 6 ff, 166 ff.
636 Official Statement accepted by Secretary Office, 1884, SA-Archives, D 5257 (T), p. 3.
637 Australian Dictionary of Biography, Vol. 3., ed. Nairn, Serle, Ward (Melbourne Press 1969), pp. 35 f.
638 Loyau, *Notable South Australians*, p. 157.
639 Loyau, *Notable South Australians*, p. 157.
640 Loyau, *Notable South Australians*, p. 157.
641 It might be noted that the 1850 report, p. 35 had advised against the adoption of "Judicial Registration".

still exhibited considerable defects, its greatest weakness being its inconclusive resolution of the conflicting principles of conclusiveness of the register and the notion of equitable land rights.[642] These initial defects led to numerous amendments immediately after enactment. The South Australian Reform Commissions that authored these amendments always gave due regard to Hamburg's land law before making their proposals. The first Commission of 1861 commissioned Hübbe to write a pamphlet on Hamburg's system of title by registration,[643] while the second interrogated Hübbe extensively on the same topic.[644]

The South Australian Reform Commissions endeavoured to cure the defects of the Real Property Act 1858 (SA) as originally enacted. However, it should be noted that some of its shortcomings could have been avoided if those sections of the draft giving rise to the most compelling problems of legal transplantation had been thoroughly discussed and analysed. This would have improved the relationship of the erstwhile Germanic system to its new legal environment by allowing greater thought as to the type and scope of necessary adaptations. Nevertheless, this was not the case, as the German origins of the system were seemingly quite systematically suppressed by those involved in the drafting. Their reasons were presumably two-fold. First, silence protected the draft from attacks of law reform opponents, who would have surely have sought to capitalise on contemporary public fear of "over-Germanization" in 1857/58 in order to reject a bill of such origins.[645] Second, there seemed to be an understanding between the draftsmen that it was politically prudent to allow Torrens to promulgate the fact that the Torrens bill was uniquely the child of his labours.[646] This marketing strategy, so to speak, promoted not only Torrens' authority and career, but - of significance to the other individuals involved - also the chances for the bill's enactment.

---

642 Robinson, *Equity and Systems of Title to Land by Registration*, pp. 98 ff.

643 Hübbe; "Title by registration in the Hanse Towns", South Australian Parliamentary Papers No 212 (1861)

644 Report of Commission appointed to inquire into the Intestacy, Real Property, and Testamentary Causes Acts (Adelaide, Cox, Government Printer 1873), Minutes of evidence, pp 1 ff.

645 See Chapter 2 (2.4), pp. 70 ff, 74 ff.

Even though this misrepresentation of facts may initially have helped in launching the Torrens System, it hindered a comprehensive understanding of the system in the following years. The courts in particular had difficulty applying the provisions of the Act, as they were not aware of their actual origin. Most judges attempted to preserve old land law principles regardless of whether or not they were in concord with the new system.[647] Parliamentary amendments then attempted to balance these contradictions detected by the courts.[648] This balancing of old British land law principles and the new system of title by registration led to the development of a system of its own when statutory development reached an end in the Consolidating Act of 1886.[649]

The system eventually manifesting itself as the "modern" Torrens System is therefore not identical to the system of Hanseatic land law which had served as the inaugural model. Although the Torrens System may have begun its life as a legal transplant, it had become a system of its own. It was especially shaped by the numerous exceptions to the conclusiveness of the register, that made the system distinctly different from the Hanseatic land law. Meanwhile the original Hanseatic land law system, for its part, was superseded by new federal laws in Germany when the German Civil Code was introduced in 1900.[650]

The realization that the Torrens System had distanced itself from its models, should not be reason to disregard the importance of the fact that the Torrens System is likely to have begun as a legal transplant. In addition to the possibility of better appreciating the current system and its roots, this view creates a new perspective for historical legal research. The series of amendments and judicial adjustments to the Torrens System may be understood as the adaptation of a civil law system in a common law environment. Such an analysis could provide the basis of

---

646 See Chapter 2 (2.4), pp. 71 ff.

647 Pike, "The introduction of the Real Property Act in South Australia" (1960 - 1962) 1 *ALR* 184 f.

648 Pike, "The introduction of the Real Property Act in South Australia" (1960 - 1962) 1 *ALR* 185 f.

649 Real Property Act 1886 (SA).

650 Hedemann, *Die Fortschritte des Zivilrechts im XIX. Jahrhundert*, 2. Teil, 2. Hälfte: "Die Entwicklung des formellen Bodenrechts" (Heymann, Berlin 1935), pp. 271 ff.

recognizing difficulties in adopting foreign law, and how those difficulties came to be overcome in this case. This is increasingly important as the trend towards globalisation of the world's economy inevitably has repercussions for the world's legal systems, particularly as they relate to commerce and property, among other areas. Analysing the development of the Torrens System might provide an answer, for instance, to the question of what role the doctrine of equitable rights might have in adopting law from countries which do not share this unique Anglo-Saxon legal tradition. This question will inevitably arise in England when the unification of private law becomes more actively promoted within the European Union.

Books

Anderson, *Anleitung für diejenigen welche sich oder anderen in Hamburg oder dem Hamburgischen Gebiete Grundstücke oder darin versicherte Gelder zuschreiben lassen wollen* (Nestler, Hamburg 1810)

Aspinall & Moore, *Abott's Law of Merchant Ships and Seamen* (Shaw & Sons, 14th ed. London 1901)

Baumeister, *Das Privatrecht der freien und Hansestadt Hamburg* (Hamburg 1856)

Beers, *The Torrens System of Realty Titles* (Lawyes Co-operative Publishing Co, New York 1907)

Bowes, *Land settlement in South Australia 1857-1890* (Libraries Board of South Australia 1968)

Bradbrook, MacCallum & Moore, *Australian Real Property Law*, (The Law Book Company Ltd., 2nd ed. Sydney 1997)

Brauer, Alfred, *Under the Southern Cross* (Lutheran Publishing House, Adelaide 1956)

Butt, *Land Law*, (The Law Book Company, 3rd ed. Sydney 1996)

Buxton, *South Australian Land Acts 1869-1885* (Libraries Board of South Australia, 1966)

Challis, *Law of Real Property* (Butterworth, 3rd. ed. London 1911)

Cheshire & Burn, *Modern Law of Real Property* (Butterwort,14th ed. London 1988)

Cocoran, "Nature and Characteristic of Companies" in *Australian Corporation Law: Principles and Practice*, Vol. 1. (Butterworth, Sydney 1991)

Coing, *Die Treuhand als privates Rechtsgeschäft* (München 1973).

Constantinesco, *Rechtsvergleichung*, Vol. II, Die rechtsvergleichende Methode, (Köln 1972)

Coxon, Playford & Reid, *Biographical Register of the South Australian Parliament, 1857-1957*, (Wakefield Press, Netley(SA) 1985)

Erdell, *Übertragung des Eigentums an Grundstücken nach englischem Recht* (PhD-thesis, Kiel 1968)

Fisher, *A sketch of three Colonial Acts* (Clowes & Sons, London 1836).

Fisher, *The Real Property Act as passed in the Parliament of South Australia, Session 1857-8, with analytical and critical notes* (David Gall, Adelaide 1858).

Forster, *South Australia: Its Progress and Prosperity* (Sampson Low, Marsden & Co., London 1866)

Geyer, *Robert Richard Torrens and the Real Property Act: The Creation of a Myth* (Adelaide, 1991).

Erler & Kaufmann (editors), Handwörterbuch zur deutschen Rechtsgeschichte, Vol.1 (Erich Schmidt, Berlin 1971)

Harmsdorf, *Germans in the South Australian Parliament, 1857-1901* (Adelaide 1959).

Hebart, Theodor, *Die vereinigte evangelisch-lutherische Kirche in Australien- ihr Werden, Wirken und Wesen, 1838 -1938* (Lutheran Book Depot, North Adelaide 1938)

Hedemann, *Die Fortschritte des Zivilrechts im XIX. Jahrhundert*, 2. Teil, 2. Hälfte: "Die Entwicklung des formellen Bodenrechts" (Heymann, Berlin 1935)

Hogg, *The Australian Torrens System* (William, Clowes & Sons, London 1905)

Holdsworth, *A History of English Law* (Methuen & Co, London 1927)

Holdsworth, *An Historical Introduction to the Land Law* (Clarendon Press, Oxford 1927)

Howell, "Constitutional and Political Development, 1857-1890", *The Flinders History of South Australia*, Jaensch Dean (ed.), (Wakefield Press, Netley 1986) pp. 95-177.

Hübbe, *Title by Registration in the Hanse towns* (abridged translation of documents, ordered by the Legislative Council) South Australian Parliamentary Papers, No. 212.

Hübbe, *The voice of reason and history brought to bear against the present absurd and expensive method of transferring and encumbering immovable property* (Gall, Adelaide 1857).

Kerr, *The principles of the Australian Land Titles (Torrens) System* (The Law Book Company, Sydney 1927).

Lappenberg, *Sammlung der Verordnungen der Freien und Hansestadt Hamburg*, 34 Volumes (Hamburg 1774/1865).

Loyau, *Notable South Australians or Colonist- Past and Present*, (Carey & Page, Adelaide 1885)

Loyau, *Representative Men of South Australia* (Howell, Adelaide 1883).

Lührsen, *Der Stadt Hamburg Erbe- und Rentenbuch oder Grund-Eigenthum- und Hypothekenbuch-Ordnung. Ein Gesetzesentwurf.* (Hamburg 1860).

Mascher, *Das deutsche Grundbuch- und Hypothekenwesen* (Berlin 1869)

Megarry & Wade, *The Law of Real Property* (Stevens & Sons, 3rd ed. London 1966)

Meikel, *Grundbuchrecht- Kommentar* (7th ed. München 1986)

Morphett, *Sir James Hurtle Fisher- his life and times* (The Griffin Press, Adelaide 1955)

Morris, Cook, Creyke and Geddes, *Laying Down the Law* (Butterworth, 2nd ed. Sydney 1988)

Niblack, *An Analysis of the Torrens System of Conveying Land* (Callaghan & Company 1912)

Opie, *Correspondence on the Real Property Act* (Collection of newspaper articles out of various newspaper from 12 December 1881 until 24 June 1882), Carey & Page Printers, Adelaide, 1882

Pemock, Roland & Chapman, John, *Ethics, economics, and the law* (New York University Press, New York 1982)

Riddall, *Introduction to Land Law* (Butterworth, London 1991)

Robinson, *Equity and systems of title to land by registration* (PhD-thesis, Monash University 1973).

Robinson, *Transfer of Land in Victoria* (The Law Book Company, Sydney 1979)

Sackville & Neave, *Property Law- Cases and Materials* (Butterworth, 4th ed. Melbourne 1981)

Sackville, Neave, Rossiter, Stone, *Property Law- Cases and Materials* (Butterworth, Sydney, 6th ed. 1999)

Sappideen, Stein, Butt & Certoma, *Real Property- Cases and Materials* (The Law Book Company Ltd., 3rd. ed. Melbourne 1990)

Schalk, *Einführung in die Geschichte des Liegenschaftsrecht der Freien und Hansestadt Hamburg* (Scholl, Leipzig 1931)

Schlüter, *Historischer und rechtsbegründeter Traktat von unbeweglichen Gütern*, (Hamburg 1709)

Shafer Robert J., *A guide to historical method* (The Dorsey Press, Homewood, Illinois, 1969)

Simpson, *An Introduction to the History of Land Law* (Oxford University Press 1961).

Stein & Stone, *Torrens Title* (Butterworth, Sydney 1991)

Tompson Paul, *The Voice of the Past, Oral History* (Oxford University Press, London 1978)

Torrens, *An Essay on the Transfer of Land by Registration under the Duplicate Method operative in British Colonies* (Cassel & Company, London 1862).

Torrens, *The South Australian System of Conveyancing by Registration of Title* (Register & Observer Printing Office, Adelaide 1859)

Watson, *Legal transplants: an approach to comparative law* (Edinburgh, Scottish Academic Press 1974)

Westermann, *Sachenrecht* (Müller, Karlsruhe 1973)

Whalan, *The Torrens System in Australia* (The Law Book Company, Sydney 1982)

Wulff, *Hamburgische Gesetze und Verordnungen*, 4 Volumes (Hamburg 1891/1897)

Journal articles

Beyerle, "Die deutschen Stadtbücher" (1910) IX *Deutsche Geschichtsblätter* 145-200.

Blaess, F.J.H., "One hundred and twenty-five years ago- the Taglione", *The Lutheran Almanac* 1967-1968, p.28-30

Borrow, "Bentham, Col. Torrens' 'Self-supporting Colonization', and the South Australian Real Property Act" (1984), 23 *South Australiana* 76 ff.

Brauer, Alfred, "Dr. Hübbe", *The Australian Lutheran Almanac*, 1934, p. 48 f

Cushman, "Torrens Title and Title Insurance" (1937), 85 *University of Pennsilvannia Law Report* 589.

Fox, "The Story behind the Torrens System", *The Australian Law Journal* (1950), Vol. 23, pp. 489 ff.

Harrison, "The transformation of the Torrens System into the Torrens System" (1962), 4 *University of Queensland Law Journal* 125.

Heinrich, "The case for Land Registration" (1955), 6 *Mercer Law Review* 320-342.

Howell, "Saints or Scoundrels ?" *Journal of the Historical Society of South Australia* (1980) No. 7, pp. 9 ff.

Jessup, "The history of the Torrens Land Title", *Proceedings of the Royal Geographical Society of Australia, South Australian Branch*, Vol. 51, Session 1949-50, pp. 39-45.

Keeley, "Torrens Title", in: *If we are so great, why aren't we better?- A critical look at six South Australian political firsts* (Old Parliament House, Adelaide 1986)

Kelly, David St. Leger, "Ulrich Hübbe", *Australian Dictionary of Biography*, Vol. 4 (D-J), ed. Nairn, Serle, Ward (Melbourne University Press 1972), p. 436 f.

Lane, "Richard Bullock Andrews", *South Australian Judges* (1912) No. 30, pp. 386 ff.

Millhouse, Robin, "Richard Bullock Andrews", *Australian Dictionary of Biography* (1851-1890), Melbourne University Press 1972, Vol. 4, p. 437 f.

Morphett, G. C., "Sir James Hurtle Fisher", *Australian Dictionary of Biography* (1788-1850), Melbourne University Press 1974, Vol. 1, p. 379 f.

O'Neil, Sally, "Friedrich Eduard Krichauff", *Australian Dictionary of Biography* (1851-1890), Melbourne University Press 1974, Vol. 5, p. 44.

Patton, "The Torrens System of Land Title Registration" (1935) 19 *Minnesota Law Review* 519-535.

Pike, "Introduction of The Real Property Act in South Australia", *The Adelaide Law Review*, 1960-1962, Vol. 1, pp. 169-189

Royal Geographical Society, "The Real Property Act", *Proceedings of the Royal Geographical Society of Australia, South Australian Branch*, Vol. 32, Session 1930-31, pp.109-112.

Sabel, "Suggestions for Amending the Torrens Act" (1936), 13 *New York University Law Review* 244-260.

Spellenberg, "Sicherheit im Grundstücksverkehr", *Festschrift für Werner Lorenz,* Tübingen 1991, pp. 779-804.

Stein, "Sir Robert Richard Torrens- letters and associated materials: a selected list" (1982), 21 *South Australiana* 2-7.

Stein, "Sir Robert Richard Torrens, 1814-1884: selected documents" (1984), 23 *South Australiana* 2-53.

Stein, "Torrens, his Chief Clerk of Customs, and the press: documents on a dispute" (1982), 21 *South Australiana* 7-79.

Tilbrook, Eric H., "The Hübbe memorial at Clare", *Proceedings of the Royal Geographical Society of Australia, South Australian Branch*, Vol. 41, 1939-1940, pp. 39-42

Whalan, "The origins of the Torrens System and its introduction in New Zealand" in: *The New Zealand Torrens System Centennial Essays*, (Butterworth, Wellington 1971)

Whalan, Douglas J., "Sir Robert Richard Torrens", *Australian Dictionary of Biography* (1851-1890), Melbourne University Press 1976, Vol. 6, p. 292 f.

Commission Reports

1829 First report made to her majesty by the Commissioners of inquiry into the Laws of England respecting Real Property (with appendix), London 1829.

1830: Second report from the Commissioners of inquiry into Law of England respecting Real Property (with appendix), Parliamentary Papers 1829/30 No. 263.

1850: Report of the Commissioners of inquiry into the Law of England respecting Real Property (with appendix), London 1857.

1857: Report of the Commissioners appointed to consider the subject of Registration of Title with Reference to the Sale of Lands, Parliamentary Papers 1857 No. 2215.

1861: South Australian Report of the Real Property Law Commission with Minutes of Evidence and Appendix (Adelaide, Cox, Government Printer 1861), South Australian Papers No 192.

1873: South Australian Report of Commission appointed to inquire into the Intestacy, Real Property, and Testamentary Causes Acts (Adelaide, Cox, Government Printer 1873), South Australian Parliamentary Papers No. 30.

Government publications:

A Bill intituled An Act to simplify the Laws relating to the transfer and encumbrance of freehold and other interests in Land, 1857 (Torrens' draft, South Australian Archives, Netley, No. GRG 1/15 N)

A Bill intituled An Act to amend the Law of Real Property and consolidate the Acts relating thererto, 1857 (Hanson's draft, South Australian Archives, Netley, No. GRG 1/15 N)

'*The Real Property Bill*', South Australian Parliamentary Debates, 4 June 1857, pp. 202-210.

'*The Real Property Amendment Bill*', South Australian Parliamentary Debates, 11 November 1857, pp. 647-649.

'*Real Property Bill*', South Australian Parliamentary Debates, 17 November 1857, pp. 677-678.

'*Real Property Bill*', South Australian Parliamentary Debates, 11 December 1857, p. 701.

'*Real Property Consolidation Bill*', South Australian Parliamentary Debates, 12 January 1857, pp. 751-753.

'*Pension to Sir R. R. Torrens*', South Australian Parliamentary Debates, 20 July 1880, p.420-428.

'*Dr. Hubbe and the Real Property Act*', South Australian Parliamentary Debates, 17 September 1884, p. 1025-1027.

Ulrich Hübbe, *Title by Registration in the Hanse towns* (abridged translation of documents, ordered by the Legislative Council 1861) South Australian Parliamentary Papers, No. 212.

Letters:

David L. Kelly to Dr. Fred. Blaess, Adelaide, 26 February 1969 (Hübbe in general), Lutheran Archives, North Adelaide

David L. Kelly to Dr. Fred. Blaess, Adelaide, 4 March 1969 (thanking for archival research on Hübbe), Lutheran Archives, North Adelaide.

Dr. Fred. Blaess to Kelly, February 1969 (Heinrich Hübbe and election of Ulrich Hübbe for Barossa), Lutheran Archives, North Adelaide.

Forster to Ridley, 15 May 1892 (Account of the history of the Real Property Act), South Australian Archives: No A 792.

Hübbe to Friedrich Voigt, 18 January 1889, South Australian Archives, D 5257 (T).

Isabella May, née Hübbe to Fredrick Johns, Adelaide, 28 February 1932 (historical account on the RPA; controversy in South Australian Press), South Australian Archives D 2258 (T).

Krichauff to Samuel Hübbe, 10 February 1892, South Australian Archives, D 5257 (T).
Torrens to Burford, 17 September 1875 (thanks for the support in parliament), South Australian Archives, PRG 1008.

Torrens to Forster, 14 November 1857 (invitation and discussion of provisions of the Real Property Act), South Australian Archives: No 1055.

Torrens to Forster, 16 May 1858 (Readiness to accept position as Registrar General), South Australian Archives: No 1055/8

Torrens to Forster, 2 March 1865 (Future plans), South Australian Archives: No 1055/9

Torrens to Forster, 2 April 1858 South Australian Archives: No 1055/7.

Torrens to Forster, 21 April 1858 (Adoption of the system in New Zealand), South Australian Archives: No 1055/7

Torrens to Wright Bros., 13 April 1863, (questions as to the working of the Real Property Act) South Australian Archives, PRG 1008.

Torrens to Wright Bros., 24 August 1864, South Australian Archives, PRG 1008.

Torrens to Wright Bros., 25 April 1864, (report on the progress of the Real Property Act in Ireland) South Australian Archives, PRG 1008.

Torrens to Wright Bros., 26 October 1865, (instructions for managing Torrens Park) South Australian Archives, PRG 1008.

Torrens to Wright Bros., 27 March 1865, (Adoption of the Real Property Act in Ireland) South Australian Archives, PRG 1008.

Torrens to Wright Bros., 27 November 1865, (sale of Torrens Park) South Australian Archives, PRG 1008.

Torrens to Wright Bros., 25 October 1866, (instructions for managing the property) South Australian Archives, PRG 1008.

Letter Summary Record: Anthony Forster, South Australian Archives, PRG 1043/8.

English Australian Newspapers:

The Advertiser:
"Real Property Act- Torrens not the sole author" by Stephen Parson (referring to a letter from Forster), 8 February 1932

"Letter to the editor" by Stephen Parson ("Real Property Act is a translation of Hamburg laws), 10 February 1932, p.18.

"Letter to the editor" by H. M. Addison (contemporary landbroker knew Forster and Hübbe), 12 February 1932, p. 22.

"Letter to the editor" by "Research" (reference to Loyau, Notable South Australians), 15 February 1932, p 12.

"Letter to the editor" by Leons and Leaders (referring to a letter by Torrens), 16 February 1932, p. 18

"Letter to the editor" by "Historicus" (referring to R. B. Andrews and Dr. Hübbe's contribution), 17 February 1932, p 18.

"Letter to the editor" by Fred. Johns, (credit to both Torrens and Hübbe), 18 February 1932, p. 12.

"Letter to the editor" by L. Manuel (passage of the Act), 19 February 1932, p. 22.

"Letter to the editor" by Frank H. Downer (Hübbe claim to authorship is too late), 22 February 1932.

"Letter to the editor" by H. Salter (supporting Torrens' claim), 24 February 1932, p. 18

"Torrens and Dr. Hübbe- authorship of the Real Property Act" by the editor (referring to earlier controversy), 19 March 1932.

"MP lashes tribute to 'rogue' SA pioneer", by Rex Jory (political editor), 3 April 1992.

"Honoured Torrens 'a swindler' says MP", by Rex Jory (political editor), 4 April 1992, p. 8

"Torrens confirmed as author of property Act", letters to the editor by George Cresswell (Former Registrar General) and Dr. Ian Harmsdorf, 13 April 1992.

"Adelaide's urban explosion" by Paul Wright, 25 May 1993, p.18

"History of the Real Estate Institute of South Australia", supplement of 20 pages, 17 October 1994, p. 2

"Torrens title "born" in SA", by Institute of Conveyancers, 1 June 1995, p. 20

"Real Credit" by Federick Kummerov (Past Archivist of the Lutheran Archives, North Adelaide), 16 June 1995, p.20.

The Observer
"The Transfer of Real Property", 5 June 1856.

"The Transfer of Real Property" (By "A Conveyancer"), 12 July 1856.

"The Transfer of Real Property", 19 July 1856.

The South Australian Register
"The Transfer of Real Property", 3 July 1856.

"The Transfer of Real Property", 4 July 1856 (proposal of indefeasibility of title).

"The Transfer of Real Property", 5 July 1856. (reference to reform commission of 1829).

"A letter of a Conveyancer", 8 July 1856 (too many title to land to be administrated in a central office).

"The Transfer of Real Property", 9 July 1856 (reference to the Imperial Shipping Act 1854).

"The Transfer of Real Property", 11 July 1856 (description of the Imperial Shipping Act 1854).

"The Transfer of Real Property", 12 July 1856 (Central Court should issue indefeasible title).

"The Transfer of Real Estate" by the 'Conveyancer', 14 July 1856 (The transfer of ships is expensive).

"The Transfer of Real Property", 15 July 1856 (Australia should have a different law than England).

"The Transfer of Real Property", 17 July 1856 (Author points to a different situation in England).

"Letter of a Layman", 19 July 1856 (Accusing the lawyer for opposition).

"Letter of a Conveyancer", 22 July 1856 (There cannot be a simple land law).

"The Transfer of Real Property", 23 July 1856 (reference to Fisher's draft).

"Letter of a Conveyancer", 29 July 1856 (Asking for a 'Commission of defective titles').

"The Transfer of Real Property", 31 July 1856 (Imperial Shipping Act should be a guideline).

"The New Shipping Act", 4 August 1856 (detailed description of the Act).

"The New Shipping Act", 5. August 1856 (continuing description of the Act)

"The Transfer of Real Property", 17 October 1856 (Description of Torrens's draft).

"The Transfer of Real Estate", 24 October 1856 (Description of an alternative draft of a lawyer- first part).

"'Parliament of South Australia- Transfer of Real Property", 21 November 1856 (Report on the debate in Parliament).

"The Transfer of Real Property", 25 November 1856 (Description of an alternative draft of a lawyer- second part).

"Fraud on the Land Fund", 6 December 1856 (people leave South Australia instead of cultivating the land)

"Fraud on the Land Fund", 12 December 1856 (letter to the editor)

"Election meeting", 26 January 1857 (report on Andrews opposing the land law reform).

"Election meeting", 2 February 1857 (report on Torrens and his reform proposal).

"Letter to the editor", 3 February 1857 ("A conveyancer" criticises Torrens's reform proposal)

"Letter to the editor", 6 February 1857 ("Omnibus" defends Torrens's reform proposal)

"The Transfer of Real Property", 7 February 1857 (report on Torrens's recent speech and the opposition of the legal profession).

"The Transfer of Real Property", 10 February 1857 (Torrens himself describes the principles of his bill).

"Letter to the editor", 10 February 1857 ("A conveyancer" says that Torrens is not capable to draft a bill)

"Letter to the editor", 10 February 1857 ("An old colonist" defending Torrens's endeavour)

"Letter to the editor", 11 February 1857 (Torrens defends himself against the attacks of "A conveyancer")

"Registration, or the old form of conveyancing", 11 February 1857 (letter to the editor by 'A reformer' alias Ulrich Hübbe defending Torrens against "A conveyancer").

"Letter to the editor", 11 February 1857 (J. Goldsack attacking "A conveyancer" and referring to Fisher's assistance)

"The Transfer of Real Property", 12 February 1857 (Forster defends Torrens's scheme and blames the legal profession).

"Letter to the editor", 12 February 1857 ("A conveyancer" attacking Torrens calling his bill unprincipled)

"Letter to the editor", 16 February 1857 ("Common sense" approves Torrens's idea but says one would need hundreds of clerks to realize it)

"The transfer of Real Property", 18 February 1857 (letter to the editor by Sincerus alias Ulrich Hübbe proposing a fresh grand system and referring to trusts)

"Letter to the editor", 26 February 1857 ("Sincerus" alias Ulrich Hübbe responding to a letter of "A lawyer")

"Letter to the editor", 27 February 1857 ("Enquirer" pointing to the difficulty of drawing the required maps)

"Letter to the editor", 27 February 1857 ("Argus" referring to English acts and drafts)

"Letter to the editor", 28 February 1857 ("Argus" referring to French law)

"Letter to the editor", 28 February 1857 (Torrens answering to the letter of "Enquirer")

"Letter to the editor", 9 March 1857 ("A Lawyer" referring to his "friend" Sincerus alias Hübbe)

"Law reform", 10 March 1857 (Forster summarises the discussion and refers to English newspapers)

"Letter to the editor", 30 March 1857 ("Enquirer" posing questions on the law reform)

"The Transfer of Real Property", 14 April 1857 (Description of the law in New Zealand).

"The Transfer of Real Property", 14 April 1857 (Description of first half of Torrens's draft).

"The Transfer of Real Property", 15 April 1857 (Description of second half of Torrens's draft).

"German Immigration", 16 April 1857 (Rudolf Reimer defending German immigration)

"German Immigration", 22 April 1857 (C. H. Barton referring to Wingfield's scheme to exclude Germans from Immigration)

"Governors speech", 24 April 1857 (Summary of Hanson's speech in which he refuses Torrens's bill)

"The transfer of Real Property", 29 April 1857 (letter to the editor by Sincerus alias Ulrich Hübbe setting out the principles of title by registration).

"German Immigration", 5 May 1857 (Forster discusses the danger for the "Britishness" of the colony)

"German Immigration", 16 May 1857 (Rudolf Reimer defending German immigration)

"Reform in the Law of Real property" , 1 June 1857 (report of a public dinner in Salisbury).

"Law Reform and the Government", 2 June 1857.

"The Real Property Act", 2 March 1882 (letter to the editor by E. A. D. Opie.)

"German Immigration", 22 April 1857 (letter by Mr. Barton).

"German Immigration", 5 May 1857 (Warning of the loss of British character).

"German Immigration", 6 June 1857 (letter to the editor by Ulrich Hübbe).

"Immigration Resolution", 6 June 1857 (report on the debate in parliament).

"Parliament of South Australia", 13 November 1857 (report of the second reading of the Real Property Act 1858 (SA).

"Petition to Parliament", 6 January 1858 (2700 colonist sign a petition favouring the law reform)

"Torrens's pension", 21 July 1880 (Report on the parliamentary debate on an additional pension to Torrens)

"Dr. Hübbe and the Real Property Act", 29 August 1884 (Report on the petition presented to the House by E. W. Hawker)

"Grant to Dr. Hübbe", 18 September 1884 (Report on the parliamentary debate on a pension to Ulrich Hübbe)

The Northern Argus

"Announcement of Sir R. R. Torrens' death", 5. September 1884

"Announcement of Mrs Hübbe's death", 31 July 1885

"Early History of Cemeteries of Clare and District" by the editor, 31 March 1939

"The Gaelic and Spring Farm Cemeteries" by the editor, 14 April 1939

"One who helped to frame the original renowned Australian System of Torrens Land Titles" by the editor (request for more information), 2 June 1939

"Torrens and Dr. Hübbe" by Malcolm Campbell (Reference to Hübbe's statement from 1884), 9 June 1939

"Doktor Hübbe and Australian System of Torrens's land titles" by the editor (diploma enclosed), 23 June 1939

"The late Doctor Ulrich Hübbe, Doctor of Laws" by the editor (translation of diploma), 14 July 1939

"Letter to the editor" by Mrs. Isabella May, Perth (giving thanks for publishing a translation of her father's diploma), 4 August 1939, p.4.

"Items of historical interest" by the editor (books on Torrens and Hübbe), 1 September 1939

German Australian Newspapers:

Deutsche Kirchen- und Missions Zeitung (German Church and Mission newspaper, monthly edition of the Lutheran Church, Lutheran Archives, North Adelaide)

"Freie Exkurse ueber das Kirchenwesen in Suedaustralien" (translation: Free excursions on the church in South Australia), February 1862, p. 10 ff by Adalbert Fiedler

"Ueber die freien Exkurse des Pastor Adalbert Fiedler" (translation: On the free excursions of Pastor Adalbert Fiedler) , April 1862, p. 30-31, by 'Sincerus'

"Freie Exkurse ueber das Kirchenwesen in Suedaustralien" (translation: Free excursions on the church in South Australia), May 1862, p. 34-36 by Adalbert Fiedler

"Fortsetzung-Ueber die freien Exkurse des Pastor Adalbert Fiedler" (translation: Continuation-On the free excursions of Pastor Adalbert Fiedler), May 1862, p.44-46 by 'Sincerus'

"Freie Exkurse ueber das Kirchenwesen in Suedaustralien" (translation: Free excursions on the church in South Australia), September 1862, p.65-67 by Adalbert Fiedler

"Fortsetzung- Ueber die freien Exkurse des Pastor Adalbert Fiedler"" (translation: Continuation-On the free excursions of Pastor Adalbert Fiedler), October 1862, p.76-77 by 'Sincerus'

"Schluss- Ueber die freien Exkurse des Pastor Adalbert Fiedler" (translation: End-On the free excursions of Pastor Adalbert Fiedler), October 1862, p. 84-85 by 'Sincerus'

Adelaider Deutsche Zeitung

"Zahlen über das Land unter dem Real Property Act" (translation: Figures on the land brought under the Real Property Act), 7 September 1860, p. 55.

"Richter folgt nicht dem Real Property Act" (translation: Judge does not comply with the Real Property Act), 30 November 1860, p. 136.

"Gouverneur beauftragt Commission zur Beseitigung der Mängel des Real Property Acts" (translation: Governor orders commission to remove the defects of the Real Property Act), 1 March 1861, p. 136.

"Wahlergebnisse" (translation: election results), Forster is elected, 5 April 1861, p. 102

"Commission des RPA will bezahlt werden" (translation: Commission of the RPA wants to be paid) by the editor, 12 April 1861, p. 111

"Richter Boothby ist gegen den Real Property Act, aber Queensland übernimmt ähnliche Massnahme" (translation: Judge Boothby is opposed to the Real Property Act, but Queensland adopts a similar measure), 28 June 1861, p. 199.

"Untersuchungsausschuss gegen Richter Boothy" (translation: Committee to inquire in the affair of Judge Boothby), 28 June 1861, p.214.

"Mac Ellister v. Fenn- Richer Boothby erklärt den Real Property Act für nicht existent" (translation: Judge Boothby declares the Real Property Act as not binding), 12 July 1861, p. 230.

"Commission gegen Boothby legt Bericht vor" (translation: Commission presents report on Boothby), 30 August 1861, p. 270/271.

"Hanson, Vorsitzender des Boothby-Ausschusses beantragt Reichsgesetz in England um Parlamentsgesetzen in SA Gesetzeskraft zu verleihen" (translation: Hanson, the chairman of the Boothby commission asks for an Imperial law to deem legislative power in the SA Parliament), 13 September 1861, p. 286

"Lesung des abgeänderten Real Property Acts" (translation: Real Property Act is read in admented form), 8 November 1861, p. 344.

"Zahlen über die Grundstücke unter dem Real Property Act" (translation: Figures on the land brought under the Real Property Act), 8 November 1861, p. 344.

"Lobenswerte Arbeit der Commission des RPA" (translation: Work of the Commission of the RPA is to praise), 22 November 1861, p.360.

"Einführung des Real Property Gesetzes in den übrigen australischen Kolonien" (translation: Introduction of the Real Property Act in the other Australian colonies), 21 February 1862, p.60.

"Einrede gegen Eigentumsansprüche sind jetzt zu erheben" (translation: Rights in land have to be claimed now), 4 Aprile 1862, p. 85.

"Einrede gegen Eigentumsansprüche sind jetzt zu erheben" (translation: Rights in land have to be claimed now), 13 June 1862.

"Ehrenrede des deutschen Committees zur Abreise des Sir R. R. Torrens" (translation: Farewell-speech of the German Committee for Sir R. R. Torrens), 31 October 1862, p. 257.

"Die Festreden zum Torrensfest" (translation: Official speeches hold at the Torrens farewell ceremony), 7 November 1862, p. 357.

"Das Torrensfest" (translation: The Torrens ceremony), 21 November 1862, p.374.

"Torrens, der Vater des Real Property Actes reist ab" (translation: Torrens, the father of the Real Property Act is leaving), 28 November 1862, p. 381

Südaustralische Zeitung

"General Staatsanwalt nutzt die Gelegenheit der Abwesenheit von Sir R. R. Torrens um Dr. Hübbe des Büros zu verweisen" (translation: Attorney General makes use of Sir R. R. Torrens's absence to expel Dr. Hübbe from the office), 12 January 1861, p.1.

"Gerichtsurteil unterhält den Real Property Act- Dank der Hauptperson Torrens" (translation: Judgement confirms the Real Property Act- thanks to the protagonist Torrens), 30 January 1861, p. 1.

"Forster bewirbt sich um Parlament und verspricht Prinzipien des Real Property Acts zu befürworten" (translation: Forster runs for parliament and promises to support the principles of the Real Property Act), 2 February 1861, p. 2.

"Probleme mit dem Real Property Act" (problems with the Real Property Act), 2 March 1861, p. 1

"Torrens geht nach Victoria, um beim Entwurf des Real Property Acts zu helfen" (Torrens is going to Victoria to help drafting a Real Property Act), 22 February 1862, p.2.

Australische Zeitung

"Besprechungen und Kritik des Herrn Dr. Hübbe über das Testament und Real Property Gesetz", (translation: Review and comment of Dr. Hübbe on the laws of succession and the Real Property Act) 2 January 1873, p. 6.

"Verein zum Schutze des Real Property Acts" (translation: Association for the protection of the Real Property Act), 2 February 1875, p. 4.

"Nachruf auf James Hurtle Fisher" (translation: obituary on James Hurtle Fisher), 2 February 1875, p.4.

"Ulrich Hübbe, Sekretär des Comittees zur Verteidigung des Real Property Acts" (translation: Ulrich Hübbe, secretary of the committee for the defence of the Real Property Act), 2 February 1875, p. 9.

"Niederträchtige Verunglimpfung des Deutsch-Amerikanertums", (translation: Dispicable disparagement of the German-Americans), 10 July 1880, p.9.

"29 Farmer legen Petition zur Verbesserung des Landesgesetze ein" (translation: 29 farmers present a petition to improve the land law), 20 July 1880, p.1.

"Bericht über die Debatten im Ober- und Unterhaus vom 20 Juli 1880" (Report of the debates in both houses of the 20 July 1880), 27 July 1880, p.1.

"Pension für die Witwe Torrens", (translation: Pension for Torrens widow), 17 September 1880, p.3.

"Antrag auf Anerkennung der von Dr. Hübbe geleisteten Dienste" (translation: petition for the recognition of Dr. Hübbe's services), 24 September 1880, p.1.

"Reform der Landesgesetze" (translation: Reform of the land law), 18 January 1881, p.1.

"Sitzung des Central Committes des Farmer Vereine", (translation: Meeting of the central committee of the farmer associations), 25 January 1881, p.2.

"Veränderung der Landesgesetze" (translation: Amendments to the land law), 19 July 1881, p.3.

"Das englische Landwesen" (translation: The English land tenures), 9 August 1881, p. 10.

"Veränderung der Landesgesetze" (translation: Amendments to the land law), 21 March 1882, p.1.

"Veränderung der Landesgesetze" (translation: Amendments to the land law), 14 March 1882, p.1.

"Die Richter und der Real Property Act" (translation: The judges and the Real Property Act), 28 March 1882, p.1.

"Zum Schutze des Real Property Actes" (translation: In order to protect the Real Property Act), 2 May 1882, p.3.

"Schutz dem Real Property Act" (translation: Real Property Act is to be protected), 9 May 1882, p.1.

"Real Property Act in Gefahr" (translation: Real Property Act in danger), 1 February 1884, p.3.

"Die Real Property Acte" (translation: The Real Property Acts) by R. Homburg, 8 February 1884, p.3.

"Parlament gewährt 200 Fund zur Anerkennung der Dienste des Dr. Hübbe" (translation: Parliament awards 200 pounds for recognition of Dr. Hübbe), 24 September 1884, p.2.

"Tod des Herrn R. Henning, M.P." (translation: Death of the R. Henning, M.P.), 26 November 1884, p.1.

"Jahrestag der Wiederaufrichtung des Deutschen Reiches- deutsches Fest am 17. und 18. Januar" (translation: Ceremony for the celebration of the re-establishment of the German empire), 24 December 1884, p.1.

"Wie sollten sich die deutschen Kolonisten zur Selbststaendigkeitsfrage Australiens stellen?" (translation: What point of view should the German colonists have regarding Australia's independence), 7 January 1885, p.1.

"Wie sollten sich die deutschen Kolonisten zur Selbststaendigkeitsfrage Australiens stellen?- Fortsetzung" (translation: What point of view should the German colonists have regarding the Australia's independence- continuation), 14 January 1885, p.13.

"Auch Süd-Australien protestiert gegen die Deutschen Annektierungen" (translation: Also South Australia protests against the German Annexations), 14 January 1885, p.14.

"Die Feier der Wiedergeburt des Deutschen Reiches", (translation: Ceremony for the rebirth of the German Empire), 21 January 1885, p.25.

"Wie sollten sich die deutschen Kolonisten zur Selbststaendigkeitsfrage Australiens stellen?- Schluss" (translation: What point of view should the German colonists have regarding the Australia's independence- closing article), 21 January 1885, p. 37.

"Die neue Real Property Bill soll in etwa einer Woche vorgelegt werden", (translation: The new Real Property Bill is to be produced in about a week), 26. August 1885, p. 418.

"Über den verstorbenen Dr. Ulrich Hübbe" (translation: On the deceased Dr. Ulrich Hübbe), 17 February 1892, p.1.

"Dr. Ulrich Hübbe" (Obituary), 10 February 1892, p. 61 f.

Other unpublished documents

"*Das grosse und das kleine Alphabet- Übersetungshilfe für altdeutsche Handschrift*" flyer, 1892 (Lutheran Archives, North Adelaide)

Blaess, F. J. H., "Taglione", research paper 1968 (Lutheran Archives, North Adelaide)

Doctorate diploma of Dr. Ulrich Hübbe from 1827 issued by the Danish University of Kiel (South Australian State Library, Mortlock, D5261)

Family Bible of Ulrich Hübbe with notes about Family events in the back (Lutheran Archives, North Adelaide)

Family-tree of Hübbe family in Australia, hand-written, in possession of Mr A. M. Simpson, Adelaide

Geyer, Mary, "Germans in South Australia" (unpublished essay; Migration Museum Adelaide 1992)

Hague, *History of South Australia* (unpublished; South Australian Archives)

Hübbe, "Bild und Leben", poem, date unknown (Lutheran Archives, North Adelaide)

Hübbe, "Memorandum of service rendered in connection with the Real Property Act, 2 October 1884. (Official Statement as accepted by State Secretary Office, South Australian State Library, Mortlock, D 5257 (T))

Hübbe, "Rettung", poem, 18 January 1885, (Lutheran Archives, North Adelaide)

Hübbe, *Letters to a Countryman -No I to IV*: "On intestate estates, Acts, and things in general", Circular in the form of five small pamphlets, printed David Gall, Adelaide 1872 (South Australian Archives)

Hübbe, *Letters to a Countryman -No V*: "On things in general", Circular in the form of five small pamphlets, printed at the Advertiser Office, Adelaide 1873 (South Australian Archives)

Jessup, "Torrens of the Torrens System" (Unpublished essay, South Australian Archives, D 3060 (T)).

Kelly, David St. Leger "Ulrich Hübbe an historical account", unpublished notes (Lutheran Archives, North Adelaide 1969)

Kelly, David St. Leger, "Ulrich Hübbe", research paper 1969 (Lutheran Archives, North Adelaide)

May, Isabella, nee Hübbe, "Notes on Dr. Ulrich Hübbe and the Torrens System", 1932 (chronological account of the history of the RPA, South Australian State Library, Mortlock, D 2558)

Interviews

Interview with Dr. Ian Harmsdorf (University of Adelaide, German Department), 20 November 1996.

Interview with Hübbe's great-grandson, Mr. Alfred Macson Simpson and Mrs. Audrey Abbey (Adelaide, Stonyfell), 1 November 1996.

Interview with Mary Geyer, 14 November 1996.

Films

Fraser, Lillias (director) and Bagnall, Frank (producer), *An account of the origins and history of the Torrens Title System of registration of Real Property transactions*, Australia: Commonwealth Film Unit, 1962, 16 mm, 18 min. (South Australian State Library Film Collection)