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Cancel that hamburger (the Torrens System was not German)

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Articles

Cancel that hamburger (the Torrens System was not German)

Greg Taylor*

The view that the Torrens system was merely an adaptation of Hamburg's mid-nineteenth century system of lands titles registration has lost ground rapidly over the last few years and appears to have been silently abandoned, or at least heavily qualified, even by its former proponents. Now the author has discovered a letter from the supposed German source for the Torrens system which explicitly states that he had nothing to do with its invention — a statement which is corroborated by numerous facts unearthed previously. The view that the Torrens system was merely a German import is therefore finally destroyed. This does not for a moment contradict the well-known fact that Torrens had numerous helpers, of both British and German origin, during his development of the Torrens system.

Introduction

Recently, the two principal proponents of the thesis that the Torrens system was merely a transplant of the Hamburg system of lands titles registration current in the middle of the nineteenth century, as explained to Torrens by South Australian resident Dr Ulrich Hübbe, formerly of Hamburg, seem to have heavily qualified their claims. Dr Antonio Esposito has documented the contribution of Anthony Forster, the editor of the 'South Australian Register' and in no way associated with the law of Hamburg, to the conception of the Torrens system.¹ The other principal proponent of the Hamburg hypothesis is Professor Murray Raff, who has always acknowledged that that the credit is due to Torrens for having 'pressed the Real Property Bill through the popular chamber, the Legislative Assembly' — that has however never been the name of any part of the South Australian Parliament — but now calls Dr Hübbe only a 'very influential' advisor and his contribution 'significant input',² implying, to my mind, a qualification, if not abandonment of the hypothesis of a transplant or reception.

If those brief quotations correctly represent Professor Raff's view now, then we are more or less agreed, and the controversy should be put to rest. I raise it for what I hope will be one last time for two related reasons. The first is that

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1 A Esposito, 'A New Look at Anthony Forster's Contribution to the Development of the Torrens System' (2007) 33 *UWALR* 251; see G Taylor, 'Is the Torrens System German?' (2008) 29 *Jo Leg Hist* 253 at 280ff, an article which received the somewhat overwhelming honour of being cited in a judgment of the Privy Council: *Louisien v Jacob* [2009] UKPC 3 at [2].

2 M Raff, 'Characteristics of the International Model of Land Title Registration Illuminated by Comparative Study of the German and Torrens Systems' (2012) 1 *Eur Prop Law Jo* 54 at 57.

Professor Raff, in an earlier piece, attributed to me the view that there had been ‘a transplantation of Hamburg legal principle, if not a reception to a greater or a lesser extent’ on the ground that I had failed to deal with the literature on receptions and transplants.³ It requires no close reading of my earlier contributions to indicate that I do not hold the view attributed to me, but have shown, rather, that such similarity in principle between the Torrens and Hamburg systems as existed was wholly coincidental. I have shown⁴ that Torrens did not meet Dr Hübbe until all the Torrens principles⁵ had been conceived and published to the world, starting with the crucial proposition of title by registration.⁶ The fact that time does not run backwards, and once principles have been conceived no-one who comes on the scene later can claim any credit for their conception, is the reason why it is unnecessary to consider literature on transplantations or receptions in this case. It is therefore correct to refer to Hübbe as a ‘very influential’ advisor, and a source of ‘significant input’, as Professor Raff now does, but not as playing any part in the conception of the principles of the system, which was clearly not a transplant or reception.

My second reason for raising this topic again is that my narrative of events as just sketched — involving Hübbe coming on to the scene after the Torrens principles had been conceived, fine-tuning them as one of Torrens’s wide circle of advisors and lending some aid to their acceptance in the community as a result of his knowledge of the Hamburg system — has been strikingly confirmed by a letter that, thanks to the wonders of digitisation, I recently unearthed in the ‘Bunyip, Gawler Times, Northern Times and Gold Fields Reporter’ of 17 April 1874,⁷ a local weekly newspaper that had previously, and understandably, not been seen as a source for information on the genesis of the Torrens system.

The letter runs, in full, as follows:

3 M Raff, ‘Torrens, Hübbe, Stewardship and the Globalisation of Property Law Systems’ (2009) 30 *Adel LR* 245 at 271.

4 Principally in Taylor, above n 1, at 258–63.

5 Bar one — the Assurance Fund — which confessedly cannot come from Hamburg, as the Hamburg system did not include anything remotely comparable.

6 Which, as I have also stated before now, Torrens was not the first person in the world to conceive; it would have been absurd for him to claim that no-one before him had done so, and as far as I am aware he never did so. My point is, rather, that the principle did not come from Hamburg. Compare Lücke, (2009) 30 *Adel LR* 213 at 242 n 123; by ‘original’, I meant original to Torrens, not in the world as a whole. See further, on this question of originality, Taylor, above n 1, at 282. Professor Murray Raff also misstates my aim in (2009) 30 *Adel LR* 245 at 271. I am not engaged in some jingoistic exercise in puffing up South Australia’s importance. As he rightly says, both Dr Hübbe and Torrens had claims to be South Australians at this very early stage in the Province’s history. I am merely correcting an excessive degree of attribution of the reform to the German element of South Australia, and through it to German law. Nor do I deny that the Merchant Shipping Act 1854 was itself influenced to some unascertained extent by various Continental systems of law, in the sort of mutual cross-fertilisation process that has happened throughout legal history; what I deny is the hypothesis of an out-and-out reception or transplant within a few months in 1857 of the whole (or nearly the whole) Hamburg system.

7 Page 3. Gawler is a town now on the fringes of the metropolitan area of Adelaide.

THE REAL PROPERTY ACT

Palman qui meruit ferat

TO THE EDITOR

Sir — I beg to disclaim the measure of praise which you have, no doubt *bona fide*, bestowed on me by stating (in your leader of the 10th inst) ‘that we owe the originating of the great Law Reform, known as Torrens’ Act, to Dr Hübbe, of Hamburg’, &c. I modestly disclaim as a matter of fact the honour of having originated that Act, and I can do so although other facts (which you state immediately afterwards) are true — at least, in one sense, that before ever the Real Property Act was thought of I drew attention to ‘the very objectionable features of the English mode of conveyancing, and to the honest, unsophisticated mode of transfer practised in Germany’. This I have certainly done by often explaining the subject to men of influence and more publicly [sic] in Building Societies and similar gatherings before ever there was an elective element in the Legislature [1851].

The facts pointed out and the ideas thus kindled in the minds of clear-sighted, practical men, who were afterwards seen in the front rank of the contest, were no doubt farther circulated, and with increasing influence, as is the case when deep reforms spring from deep sources.

I was not, however, at the time aware of it, having left Adelaide and engaged in rural pursuits during those years when Torrens first laid down his scheme of legal reform, formed his private committee, and prepared the public mind for the contemplated change by a series of telling articles in the public journals. Of all this I knew nothing, nor was I at that period known to Mr Torrens; and on returning to Adelaide in 1856 I was perfectly surprised on finding the reform campaign in full operation, and the papers bristling with leading articles and letters on the subject, and the men of law on the heights of indignation — not then from any great apprehension of danger, but at the unprecedented boldness and comprehensiveness of Torrens’ assault. Well may you say that his is a ‘master-mind’. He perfectly understood the situation. He brought, besides his own intellectual powers, tact, and brilliant eloquence, the landowners, large and small, the commercial men, the tradesmen, and the intelligence of the South Australian people as a whole, to bear on the subject all at once, so as almost to overwhelm the opponents of reform. Perceiving, however, that he was likely to be outflanked by adroit opponents on some intricate points of permanent consequence both in the foundation and practical working of the new system, I ran, unasked by Mr Torrens and unknown to him, into the breach. My letters signed ‘Sincerus’ arrested Mr Torrens’ attention directly. He came to look for me in my humble abode in Freeman-street, and we have ever since been firmly allied. I and other Germans, led on by Bayer, Voss and many others, gave him whatever assistance we were able to contribute; and he, finding me well up in the judicial and historical aspects of the matter, encouraged me to write ‘The Voice of Reason and History on Conveyancing’ (not yet wholly forgotten), and he got Mr G F Angas, in his own generous way, to bear the whole costs of publishing. I also lent Mr Torrens some amount of industrious and persevering aid in privately discussing the principles of his first scheme, and I had a share — a very humble share — in re-settling the draft of the first Act before its second reading. I claim, therefore, no more than a share in this useful work, in which I have been — and am proud that I have been — an aider and abettor; but, as you will now see, I have not been its originator.

May I request, therefore, that you will give publicity to these lines, for it were unjust to Sir Robert Torrens to withhold a single leaf of the crown of laurel which belongs to him, and to him alone, as the originator of his great Act. But if, under

present circumstances (he being absent), my fellow-colonists will allow me to advise them they will find me a thoroughly sound and expert, as well as firm, defender of the Act.

Yours,
ULRICH HUBBE [sic], LLD

This important source on the early history of the Torrens system, lost until now, so greatly coincides with and confirms every detail of my earlier reconstruction of events that I feel it almost an offence against due modesty on my part to publish it. From the horse's own mouth we now have confirmation of what I had previously deduced from numerous individual items of evidence, namely that Torrens did not meet Dr Hübbe or even know of the Hamburg system of lands titles registration until well into the battle for land titles reform — not, indeed, until the principles of Torrens's proposed system were settled, for they were published to the world in the newspaper in mid-April 1857, whereas the 'Sincerus' letters did not conclude until the end of that same month. Dr Hübbe makes no claim to having written any other series of letters, thus finally disproving what the proponents of the Hamburg thesis, also embarrassed by the fact that time does not run backwards and the late date of the 'Sincerus' letters compared to the publication of Torrens' principles, have been compelled to postulate; even more than that: Dr Hübbe specifically states why he did not write any earlier letters or make any earlier contribution at all, namely, that he was unaware of the coming reform, which was being conceived without even his knowledge, because he was living in the countryside (the only detail I did not have in my earlier reconstruction of events).⁸ Nor does Dr Hübbe make any claim even remotely as far-reaching as that Torrens's original draft was thrown overboard and a new start made, based on the law of Hamburg, once he had explained its system to Torrens.

The conclusion is thus inevitable, both because time runs only forwards and not backwards and because he himself says so: Dr Hübbe, who met Torrens in May 1857, cannot possibly be the source of the Torrens system's principles as revealed to the world in mid-April 1857 and enacted in January of the

⁸ But see H K Lücke, 'Ulrich Hübbe and the Torrens System: Hubbe's German Background, His Life in Australia and His Contribution to the Creation of the Torrens System' (2009) 30 *Adel LR* 213 at 231. Dr Hübbe does not tell us in what month of 1856 he returned, and it was actually 1855 according to the *Australian Dictionary of Biography*; but Dr Hübbe may be right in the letter quoted, and see F J H Blaess, 'One Hundred and Twenty-Five Years Ago — The "Taglione"' [1968] *Lutheran Almanac* 28 at 28ff, according to which his school in Buchfelde closed in 1855, but he then looked for another position in the school at Hoffnungsthal, near Lyndoch, which may have taken him into 1856. But in the end this detail does not matter. What matters is the time at which Dr Hübbe came into contact with Torrens, and the historian of the Torrens system, as distinct from the biographer of Dr Hübbe, does not need to explain the gap between his return at some time in (presumably) 1856 and the end of the *Sincerus* letters in April of the following year given that Dr Hübbe in his *Bunyip* letter confirms that he did not meet Torrens before the last *Sincerus* letter, which was after the principles of the system had been published.

It is also true that Dr Hübbe does not say in so many words that he met Torrens after the last *Sincerus* letter, although this is certainly the most natural reading of what he has to say, and it would be odd if he had continued writing to the public press after he had been taken into the charmed circle of advisors to Torrens. The first *Sincerus* letter appeared on 18 February 1857; but in the end this also does not matter, for the reasons given in Taylor, above n 1, at 259ff.

following year, and the argument that they could be a reception or transplant of Hanseatic law is therefore once and for all disproved.

Context and background

Although this letter is unequivocal in its denial, and confirmed by all the numerous facts I cited in my earlier study in ignorance of its existence, we must still ask in what context it was written.

As can be seen from the letter, it was written in response to a leader, that of the previous week's edition of the weekly 'Bunyip', in which the leader writer — probably the editor himself, E L Grundy — opined that:

[i]t may not be generally known that we owe the originating of the great Law Reform, known as Torrens's Act, to Doctor Hubbe, of Hamburgh, who with that enthusiasm which is so necessary to overcome deep-rooted prejudices and self-interest, first drew attention to the very objectionable features of the English mode of conveyancing — and to the honest, unsophisticated mode of transfer practiced in Germany.

The learned doctor, however, [...] could probably never have succeeded in introducing and establishing the system [...] had he not fortunately drawn the attention to it of a master mind [...] in the person of Sir Robert Torrens, whose labors and perseverance in framing the Bill for introducing the reform, in gaining the support of the colonial press, in converting the Parliament into its advocates, and in surmounting the deep-seated prejudices and virulent antagonism of the legal profession to a reform so damaging to their interests, are entitled to the gratitude not only of this community, but of all others that may herein follow our example.⁹

Mr Grundy (if it was he) does not state what the source of his claim was, although it is important, given the course of the debate so far, to notice for later discussion that he makes no claim to be recording any sort of general knowledge in the community, but rather something that few people knew.

Mr Grundy had been a member of Parliament from 1860 to 1862,¹⁰ and will thus have caught the debates about the refinement of the first version of the Torrens system that culminated in the Real Property Act 1861 — not the period during which its principles were conceived and the original version of the Act passed, which concluded with Royal assent on 27 January 1858, but rather the period during which the original Act was refined by amendment and suggestions of detail, from Dr Hübbe and from many others, were more prominent. This experience may be the basis of his claim. The narrative reads as though, for Mr Grundy, the story of the Torrens system started with Hübbe's pamphlet, *The Voice of Reason and History Brought to Bear against the Present Absurd and Expensive Method of Transferring and Encumbering Immoveable Property*.¹¹ This is a perspective that may indeed have seemed right to someone who joined Parliament only in 1860 and had had little to no involvement in the matter earlier; but as that pamphlet was published after the Bill had not only been drafted, but introduced into the Parliament it is clearly erroneous to see its publication as the first event in chronological order.

⁹ *Bunyip*, 10 April 1874, p 2. All spellings as in original.

¹⁰ There is an obituary of Mr Grundy in *Register*, 30 January 1875, supplement, p 6; see also G E Loyau, *Notable South Australians*, George Loyau, Adelaide, 1885, p 145.

¹¹ David Gall, Adelaide 1857.

At all events, Mr Grundy unhesitatingly accepted Dr Hübbe's denial of credit by appending the following comment to his letter:

We are of course obliged by Dr Hübbe's modest disclaimer of the merit attached by us to his name as the originator of the *Real Property Act*. This he appears not to have been; but we think that he may fairly claim merit as an originator of the consideration and agitation that led to our adoption of Teutonic good sense, honesty and economy *in re*.

That last claim only confirms the hypothesis that from Mr Grundy's Johnny-come-lately perspective Dr Hübbe's *Voice of Reason* was the start of the story rather than an event occurring long after the agitation had been initiated. This is also false, because the reform of land conveyancing law had been a major issue in the parliamentary elections of March 1857.

It can also be seen from Mr Grundy's leader that Dr Hübbe's letter in reply does not consist solely in a denial of any credit, but also adds a claim that he, as well as Torrens, had a hand in framing the Bill, although Dr Hübbe is at pains to state that his contribution was 'a very humble share'. This, as will emerge, is also in accordance with the rest of the historical record.

The leader just quoted was embellished by a long extract from Dr Hübbe's speech at a well-attended meeting in Greenock, 15 miles north-east of Gawler, on Tuesday 7 April 1874. According to South Australia's principal newspaper, the 'Register',¹² Dr Hübbe said at the meeting that the Torrens system 'had been passed to a great extent by the help of the Germans', and the 'Australische Deutsche Zeitung'¹³ virtually repeated this in German ('zum großen Theile mit Hilfe der Deutschen eingeführt sei'). On the other hand, the 'Südaustralische Zeitung'¹⁴ had Dr Hübbe adding that the Act's 'essence was taken from the old German law'. Whether he actually said this or not — for the reports of his speech, while similar in outline and general thrust, differ in detail — the version which he wished to leave to history in 1874 runs as was reproduced above.

The meeting of Tuesday 7 April 1874, in turn, was held owing to the danger which Dr Hübbe and others perceived to the Act as a result of recent decisions by the Supreme Court of South Australia and proposed reactions to them. Greatest alarm was caused by the court's unanimous decision in *Lange v Ruwoldt*,¹⁵ which held that equitable interests could not be recognised under the Torrens system; this in turn implied that specific performance could not be granted of contracts of sale, and the buyer was without remedy until registered. While the Chief Justice, Sir Richard Hanson, who concurred in this decision, could hardly be plausibly accused of any attempt to sabotage the Act, it was widely thought that dislike of the Act on the part of Mr Justice Gwynne, the second Judge, was at the root of his view.

The natural reaction to this was to pass a clarifying amendment to the Act

¹² 9 April 1874, p 6.

¹³ 23 April 1874, p 5.

¹⁴ 14 April 1874, p 8 ('dessen Wesen dem alten deutschen Rechte entnommen sei'). See further on Hübbe's love of the 'old German', ie, pre-Roman Germanic law my 'Ulrich Hübbe's Doctoral Thesis — A Note on the Major Work of an Unusual Figure in Australian Legal History' (2009) 8 *Leg Hist* 123.

¹⁵ (1872) 7 SALR 1. Other cases also caused unease, such as *Manning v Crossman* (1871) 5 SALR 130.

— something which did eventually occur as late as 1878,¹⁶ but only just after *Lange* had been overruled anyway.¹⁷ The period of 6 years intervening between *Lange* and the amendment, during which Dr Hübbe's letter quoted at the outset fell, was occupied by a debate that sometimes verged on the hysterical and paranoid about whether the existing Act should merely be amended by another Act, or rather repealed and re-enacted with all necessary amendments — ie, consolidated. While the more elegant and sensible path to take, given the volume of amendments that had become necessary by this time, was the latter, and consolidation would also benefit those wishing to conduct their own transactions under the Act as it would make finding the law simpler, the fear was that lawyers, in the interests of reinstating their income from conveyancing fees, might use consolidation as a means of re-inserting ambiguities and thus themselves into the system of lands titles registration which had been so effectively cleansed of their technicalities by Torrens. It was also difficult to draft a provision that confirmed the efficacy of unregistered transactions such as contracts without opening the door to a possible informal parallel system of transferring Torrens land mimicking the old system of chain of title and deeds off the register. Torrens himself had moved to England, but on being consulted by South Australians placed himself at the head of the anti-consolidation forces — as, to use the words of one of his prominent opponents, 'author of the scheme'¹⁸ — through a series of published letters.¹⁹ One of the local leaders of the anti-consolidation forces in the 1870s was Dr Ulrich Hübbe.

Dr Hübbe as seen by contemporaries

Dr Hübbe already had a score to settle with lawyers. Early in 1861 they had had him expelled from his desk in the Lands Titles Office where he was expected to be the first of many land brokers to conduct business there.²⁰ But his disrespectful comments on the South Australian Bench at about the same time as *Lange* in a pamphlet²¹ dealing mostly with their Honours' supposed disregard of the Intestate Real Estates Distribution Act 1867 (SA) seemed to the 'Register' to involve his laying:

such stress upon his role of an alarmist that he has altogether forgotten to exercise that judicial faculty which is required for a fair statement of his case. Extravagant

16 Real Property Act Amendment Act 1878 s 68.

17 *Cuthbertson v Swan* (1877) 11 SALR 102.

18 South Australian Parliamentary Paper 42/1875, p 2 (per Henry Gawler, Counsel to the Lands Titles Commissioners).

19 *Register*, 4 February 1874, pp 5ff; *Advertiser*, 21 September 1874, p 2; South Australian Parliamentary Paper 42/1875; *Chronicle and Weekly Mail*, 26 June 1875, p 4 (see further below, n 36); South Australian Parliamentary Debates, Legislative Council, 7 November 1878, coll 1520ff; *Register*, 23 March 1878, supplement, pp 1ff.

20 'Südaustralische Zeitung', 4 January 1861, p 5. Dr Esposito, in his LLM thesis at the University of Adelaide entitled *The History of the Torrens System of Land Registration with Special Reference to its German Origins*, pp 55–7, is clearly unaware of this report and states that Hübbe may have been Torrens's legal advisor. It is also interesting, although irrelevant, to find two reports at about the same time according to which Hübbe was a victim of domestic violence: *Advertiser*, 4 December 1861, p 3; *Register*, 20 March 1862, p 3.

21 *Letters to a Countryman on Intestate Estates, Acts, Judges and Things in General* (David Gall, Adelaide 1872).

laudations of the present unworkable Act, combined with offensive imputations against the Judges of the Supreme Court, constitute the bulk of his matter, while his manner varies from fluent invective to a ponderous jocosity which is not the least painful part of his pamphlet.²²

When Hübbe wrote to the editor in reply to this denunciation, the editor appended a note to his letter calling him a 'railing charlatan'.²³ The same pamphlet was referred to in Parliament by Mr (later Mr Justice) William Bundeley as 'one of the worst articles that ever appeared in the colony, because it tended to bring the administration of justice in the colony into contempt. [. . .]no dispassionate man could read the pamphlet without throwing it from him with a feeling of disgust.'²⁴

In a further effort to defend the Torrens system from what he saw as the menace of consolidation, Dr Hübbe was instrumental in organising the 'South Australian Lands Titles Association' of which he became secretary; but it dissolved rapidly amid public allegations that Dr Hübbe and his employer, a land broker, had distributed a deliberately falsified report of its resolutions.²⁵

References were also frequently made to Dr Hübbe's 'peculiar style'²⁶ of English and to the difficulty of understanding him. In Parliament, the Attorney-General, Charles Mann, referred to the fact that he could not make out what Dr Hübbe meant in his evidence to an inquiry into the Act's operation.²⁷ When Dr Hübbe stood for Parliament in 1875 — three times — without success, the defence of the Real Property Act against the danger it was supposedly in being one of his main points, it was said that 'he labo[u]rs under a great disadvantage in being unable to express himself in good English, and renders his speeches rather prosy in endeavo[u]ring to make himself understood'.²⁸ Another frequently occurring criticism was indeed his verbosity. One major newspaper welcomed one of Dr Hübbe's election defeats in 1875, stating bluntly, if not rudely that 'he would have been a terrible bore if he had got into the House'.²⁹

The impression is conveyed, on reading all these reports about him that digitisation has now made so easy to find, that Dr Hübbe was seen by his

22 14 October 1872, p 4.

23 *Register*, 22 October 1872, p 3.

24 South Australian Parliamentary Debates, House of Assembly, 30 October 1872, col 2494. There is a half-hearted defence of Hübbe involving the statement that he had helped Torrens in *ibid*, 8 November 1872, col 2600.

25 *Register*, 21 February 1874, p 4; 28 February 1874, supplement, p 1; 3 March 1874, p 7; *Südaustralische Zeitung*, 10 March 1874, p 8; *Bunyip*, 13 March 1874, p 2; *Advertiser*, 7 July 1874, p 2; *Register*, 23 July 1874, p 5; South Australian Parliamentary Debates, 23 July 1874, col 1066; *Advertiser*, 24 July 1874, p 2; *Register*, 27 July 1874, p 5; 28 July 1874, p 6; 30 July 1874, p 3; South Australian Parliamentary Debates, House of Assembly, 22 June 1875, col 230 (Way A-G's reference to the 'printed circular', which may be the same one as was under discussion a year earlier). The State Library of South Australia also holds a pamphlet copy of the 'Rules, Regulations and By-Laws' of this association, but nothing more on any activities.

26 *Register*, 11 October 1873, p 5.

27 South Australian Parliamentary Debates, House of Assembly, 25 June 1874, col 698; response by Dr Hübbe: *Advertiser*, 30 June 1874, p 3.

28 *Bunyip*, 28 May 1875, p 2; see also 4 June 1875, p 2; 11 June 1875, p 2.

29 *Chronicle and Weekly Mail*, 19 June 1875, p 11; see also *Advertiser*, 22 September 1874, p 3.

contemporaries certainly not as an out-and-out figure of fun, but as something of a mad professor type. His tendency to eccentricity had in fact been noticed at a much earlier stage of his life, even before he had left Germany.³⁰ The 'Register's'³¹ resident humourist aptly summarised the general impression I have from reading the Adelaide newspapers: 'For Dr Hübbe indeed I have a great respect when he is in his proper place; but methinks too much learning hath made him a little mad — turned him just a shade off the balance, so that Judges and lawyers are to him what the red rag is to a bull'. Another writer also testified to Dr Hübbe's extreme distrust of lawyers and added that he 'is full of crotchets'.³²

Dr Hübbe's statement of 1884

In 1884, Dr Hübbe abandoned his claim of 1874 to a mere 'very humble share' in the drafting and the origination of the Act; he stated:

The idea of adopting the British Shipping Transfer Act [as a model for the Real Property Act] was found unworkable and dropped.

I translated the German system as used in the Hanseatic cities, of which Hamburg was one.

Mr Torrens adopted this system, and I drafted the Bill finally on those lines which Mr Torrens piloted through the House of Assembly [. . .].³³

This is the claim that has been relied upon by the proponents of the Hamburg thesis as showing the existence of a transplant or reception, given that a wholesale adoption of the Hanseatic law is claimed; but it was never necessary to consult more than the public record to show how implausible it was given that, among the vast number of statements about the genesis of the Torrens system made by witnesses to its birth, there was no other confirmation of the claim anywhere, while so much that was borrowed from the Merchant Shipping Act 1854 (Imp) is still easily visible in the Act as assented to in January 1858: the plan of using it as a base was patently not dropped in favour of any other system. Indeed, the correspondence was so close on some points that, as late as 1878 when the legislation was finally passed to confirm that contracts could be enforced under the Torrens system although not registered, the amending legislation was modelled on none other than the Merchant Shipping Act Amendment Act 1862 (Imp) s 3, for a comparable problem had been revealed in *Liverpool Borough Bank v Turner*³⁴ with the prototype for the SA legislation and in the meantime been fixed by that statute.³⁵ There are also contemporary statements too numerous to mention that the 1854 shipping legislation was indeed the model which have been adequately documented in earlier works.

30 Lücke, above n 8, at 224–6.

31 15 June 1875, p 5.

32 *Chronicle and Weekly Mail*, 19 June 1875, p 11.

33 PRG 1242/1; *Advertiser*, 19 March 1932, p 8; (1931) 32 Proc Royal Geog Soc SA 109, 112.

I assume here that this statement is indeed what it claims to be, namely, a record of something that Dr Hübbe had said. I know of no evidence external to it that that is the case.

34 (1860) 2 De G F & J 502; 45 ER 715.

35 Compare the wording of the two pieces of legislation, and see *Register*, 23 March 1878, supplement, pp 1ff.

Now a statement has been discovered by Dr Hübbe, the letter of April 1874, which flatly contradicts the statement of 1884 on which the reception/transplant hypothesis stands or falls.³⁶ Three reasons will now be suggested why the statement of 1884 was ‘published for the first time’³⁷ in the 1930s, almost 50 years after it was made and three-quarters of a century after the events which it purports to describe. This delay is all the more remarkable given that the 1884 statement was made at the same time as Dr Hübbe’s campaign for a monetary grant from the SA Parliament based upon his services to the Torrens system. Had the statement assisted that cause, no doubt it would have been published at the time. But the proponents of Dr Hübbe’s claim to a grant clearly did not think it useful, and it therefore languished unread and unused for 50 years. What was published in 1884, in a lengthy biographical sketch which could hardly have been written without the assistance of its subject, was a much more limited claim, consistent with the 1874 letter, namely, that Dr Hübbe ‘spent several days in remodelling the whole draft. He submitted his alterations to Sir Robert Torrens, and at interviews with him it was decided whether they should be accepted or not.’³⁸ This might be described, with truth as well as without excessive modesty, as a ‘very humble share’ in the drafting, as Dr Hübbe had done in the letter of 10 years earlier with which this article began.

One reason for the suppression of the broader claim to have re-drafted the whole thing and thus effected a reception of Hanseatic law is that Dr Hübbe’s less than perfect command of the English language would have made any claim by him to be the drafter of the entire Act, or a translator of the Hanseatic system into English, appear somewhat improbable to his contemporaries.³⁹ Torrens’s character is thus not the only reason why, as Professor Horst Lücke has amusingly as well as with deadly accuracy pointed out, ‘[i]t is surely fantasy to suggest that [Torrens] might have uttered a sentence such as:

36 See in particular the translation and comments by Lücke, above n 8, at 237.

37 *Advertiser*, 19 March 1932, p 8.

38 *Register*, 4 October 1884, p 6. Statements to the same effect were in Dr Hübbe’s petition, reproduced in S Robinson, *Equity and Systems of Title to Land by Registration*, PhD thesis, Monash University, Melbourne, 1973, p 80.

39 I am not, of course, overlooking Anthony Forster’s statement that ‘the provisions of the Bill were settled by Mr Torrens and a few friends and put into proper form by Dr Hübbe’. This statement also appears to have emerged on to the public record at around the same time as Dr Hübbe’s statement of 1884: *Advertiser*, 8 February 1932, p 10. There seems little reason to doubt Forster’s statement, ambiguous though it is about the division of labour between Torrens and Dr Hübbe, in so far as it assigns to the latter the credit for drafting the repeal section (s 1) of the Act of 27 January 1858, for that section was certainly verbose! Hübbe himself also claimed special credit for the repeal clause (Lücke, above n 8, at 243; *Register*, 4 October 1884, p 6), quite inconsistently with the claim by him in 1884 to be the drafter of the whole Bill. His claim to be drafter of the repeal section may well deserve credit, but it would be paradoxical, as it was the strong wording of the repeal section that the court partly relied on in *Lange* in concluding, to Dr Hübbe’s outrage, that no transactions off the register could be enforced! This contradiction is also brought out at p 1 of Dr Hübbe’s evidence in South Australian Parliamentary Paper 30/1873. See also Robinson, above n 38, p 58, who shows that the repeal section became more verbose and came to include equitable interests as the Bill took shape.

“Ulrich, I have failed, please take over the drafting under your sole responsibility”⁴⁰

A second reason for the suppression of the statement of 1884 is that many people who knew the true position, namely, that Torrens had drafted the Act with much input from his wide circle of advisors, were then still alive in South Australia.⁴¹ Even in his leader of 10 April 1874 which was quoted above and put forward Dr Hübbe as the originator, Mr Grundy agreed that the supposed origin of the Torrens system with Dr Hübbe ‘may not be generally known’.⁴² In addition to the numerous statements confirming the true position and Dr Hübbe’s disclaimer of the following week that have been unearthed previously — statements which extend up to and including the Governor of the colony⁴³ — there is a further most significant statement that I have just found and must be mentioned: in September 1858, the Premier of South Australia, (Sir) Richard Hanson A-G — who had had the most intimate involvement with the land conveyancing reform Bills in Parliament in the previous year given that he had drafted and introduced his own competing Bill into the House of Assembly which was not passed but which Torrens had made some use of⁴⁴ — referred to Torrens in Parliament as ‘the gentleman by whom the plan had been devised and the Bill prepared’.⁴⁵ Hanson CJ, as he had become, had died in 1876, but there were still plenty of others alive in 1884 who could easily have contradicted any published claim of a completely new start under a translated Hamburg system. They would have found such a claim risible, as did another country newspaper in 1874, which described Dr Hübbe as ‘a learned German — who for years has been regarded as an authority upon Mr Torrens’s Act, and who for that reason has almost worked himself up into

40 Lücke, above n 8, at 237.

41 In the research for this article two further names came up which may not have been mentioned in earlier discussions: in South Australian Parliamentary Debates, House of Assembly, 23 July 1874, col 1062, Mr William Townsend MP claimed to have been ‘one of those who was consulted by Mr (now Sir Robert) Torrens in reference to [the Act’s] passing, and attended the meetings which were held near the Union Bank on the subject’. And in *ibid*, 6 September 1876, col 1044, Mr Arthur Hardy MP claimed that ‘Mr Torrens was staying with him when the Real Property Act was projected, and he (Mr Hardy) gave Mr Torrens assistance in avoiding difficulties’ (also stated in *ibid*, 17 September 1884, col 1024). It may be that Mr Hardy was the mysterious legal helper whom Torrens referred to but stated that he was not at liberty to name, but I continue to prefer the theory that this was, in fact, the Governor (Taylor, above n 1, at 258, 269; see now also the speech of W H Maturin, his Excellency’s Aide-de-Camp, in recorded in *Register*, 6 February 1858, p 3). Another possibility is Richard Bullock Andrews, on whom see now also the speech by Mr Townsend MP just quoted, at col 1062. See further my ‘Rudolf Leberecht Reimer — A Forgotten German/Australian Lawyer’ in Hanschel et al (Eds), *Mensch und Recht: Festschrift für Eibe Riedel*, Duncker & Humblot, Berlin, 2013.

42 See above n 9.

43 Taylor, above n 1, at 265–9.

44 Numerous references might be given for this proposition, but a letter from Torrens himself dated 30 November 1857 is reprinted in the *Advertiser*, 13 November 1891, p 5, in which Torrens says that he has ‘adopted all the essential parts of the Hanson measure’. See further Robinson, above n 38, pp 38–42.

45 South Australian Parliamentary Debates, House of Assembly, 8 September 1858, col 78. This statement is all the more remarkable given that Dr Hübbe claims, through his anonymous biographer, that it was he who converted Hanson to an ally of the Torrens system: *Register*, 4 October 1884, p 6.

the belief that he is the originator of the Act itself'.⁴⁶ In fact, a most remarkable feature of debate on the granting of the pension to Dr Hübbe in 1884 from the present point of view is that a member of Parliament who had previously proclaimed Dr Hübbe to be the 'brains' of the system noticeably toned down his view and referred merely to assistance rendered by him to Torrens.⁴⁷

A third reason for the 50 year suppression of the statement of 1884 is that Dr Hübbe's letter of 17 April 1874 was not the first time that he had publicly attributed the principal credit to Torrens, and contemporaries will have remembered not only the 'Bunyip' letter but, perhaps, other such statements as well.⁴⁸ (Again digitisation makes it now easy to uncover these; again I have found no counter-examples — the evidence is all one way.) In a public meeting in 1865 Dr Hübbe was reported as saying that 'the greatest legal reform ever effected in the colony was the work of Mr Torrens',⁴⁹ although the newspapers also record that the meeting indicated in no uncertain terms its unwillingness to hear a longer speech from Dr Hübbe in which he might have elaborated on that statement, no doubt fearing further verbosity. In a letter to the editor of the 'Advertiser'⁵⁰ in 1874 Dr Hübbe stated that 'Torrens's name has not made his Act, but his Act has made him a name'. At an election meeting in the following year, he referred to his having 'lent no small aid to Sir R R Torrens in passing the Real Property Act'.⁵¹ During the consolidate-or-amend controversy of the mid-1870s, Dr Hübbe published a letter from Torrens, referring to it as containing 'the voice of the distant Thunderer, as now sent for the third time across the ocean', and exclaiming '[w]ere but the absent giant here, how he would send his would-be consolidators flying'.⁵² (It is easy to see what is meant by contemporary comments about Dr Hübbe's slightly odd English style.) There is, finally, one

46 'Kapunda Herald and Northern Intelligencer', 28 July 1874, p 2; see also 4 May 1875, p 3. There is also an ambiguous cartoon in the *Lantern*, 31 May 1884, pp 6ff, showing the Governor of South Australia receiving news of an award for 'Sir R R Torrens c/o Dr Hübbe LLD', and asking, 'Some mistake here. Who's Dr Hübbe?'; but this may be intended to satirise Dr Hübbe along the same lines as the quotation in the text having regard to *Lantern*, 6 September 1884, p 5; 13 September 1884, p 8. On this cartoon, see also *Register*, 19 June 1884, p 5. The claim in the last-mentioned article that Dr Hübbe 'laid before Mr Torrens the Bill which that law reformer desired to pass' might also be read, with the eye of faith, as the first appearance of any claim that Dr Hübbe had drafted the whole Bill, but given the various inconsistent positions which the anonymous author takes (including calling Dr Hübbe 'coadjutor' of Torrens and provider of 'adaptations and suggestions') it is hardly an unequivocal or even clear claim — even if we wish to give credit to claims by anonymous writers.

47 Taylor, above n 1, at 267ff; see also the similar limited statements in *Register*, 29 August 1884, p 6.

48 I have previously referred to another such disclaimer, although it was not made in the public domain: Taylor, 'The Torrens System — Definitely not German' (2009) 30 *Adel LR* 195 at 207.

49 *Advertiser*, 16 February 1865, p 3; similar: *Register*, 16 February 1865, p 3.

50 22 September 1874, p 3.

51 *Register*, 27 May 1875, p 5; similar: *Bunyip*, 28 May 1875, p 2; *Advertiser*, 29 May 1875, p 6.

52 *Chronicle and Weekly Mail*, 26 June 1875, p 4; see further *Advertiser*, 26 June 1875, p 3; 1 July 1875, p 5. For the other occasions of which this is the third (or perhaps fourth), see above n 16.

occasion upon which a complimentary speech was made about Dr Hübbe — to console him after one of his three election losses — and he was referred to, in his presence, as one who had rendered assistance to Torrens.⁵³

Perhaps most prominent, and still easily available on numerous bookshelves, was the following statement in his pamphlet of 1872 that had caused such offence with its attack on the Judges:

The Real Property Act was the work of an independent member, and that member (Mr Torrens) shaped and secured, in and with the Act itself, the necessary forms and appliances for the Act, and the people stand by it, and it prospers.⁵⁴

These three reasons — Dr Hübbe's command of English, the familiarity of witnesses still alive with the truth and his own statements — make it obvious why the statement of 1884 was unpublished for 50 years. Given the popularity of the Torrens system and the veneration generally held for its true inventor, whose identity was well known, Dr Hübbe would have risked public contradiction from many sides had he not written his letter of 17 April 1874 disclaiming the honour of inventor of the system. The exaggerated claim made but unpublished in 1884 can accordingly be disregarded as a source of serious history.⁵⁵ With that now established beyond all doubt, there is literally nothing left to support the hypothesis of a reception or transplant, and vast stores of evidence against it — starting, from the publication of this article, with Dr Hübbe's own disclaimer.

The phrase 'the Torrens system'

Another claim that has been made is that the phrase 'the Torrens system' was unknown in South Australia, it being supposedly (and despite Mr Grundy's assertion to the contrary) well-known there that Torrens was not, in fact, responsible for the Real Property Act. I have exploded this claim by unearthing, even in the days before the digitisation of newspapers, evidence of the phrase in South Australia as early as May 1859.⁵⁶ It is therefore right to conclude this essay with some instances in which Dr Hübbe himself gives the lie to the claim mentioned by using the phrase 'Torrens's Act' himself.

Perhaps the most prominent of these occasions was the advertisement in the German newspapers⁵⁷ for the short-lived 'South Australian Lands Titles Association' mentioned above, which named Dr Hübbe as the Secretary and the Association's aim as 'protection and defence for Torrens' Act'.

⁵³ *Register*, 15 June 1875, p 6; *Bunyip*, 18 June 1875, p 2.

⁵⁴ Hübbe, *Letters to a Countryman*, pp 18, 20; also quoted in Lücke, above n 8, at 236.

⁵⁵ See further the insightful comments in Lücke, above n 8, at 237.

⁵⁶ Taylor, above n 1, at 263. Mention might also be made of the statement in the *Register*, 21 March 1877, p 6 that '[t]he name of Sir R R Torrens is so intimately associated with the Real Property Act that it is frequently referred to as "Torrens's Act"'.

⁵⁷ *Australische Deutsche Zeitung*, 16 April 1874, p 4; 'Südaustralische Zeitung', 30 June 1874, p 6.

**S.-A. Lands Titles-
Association,
Gesellschaft zum Schutz und Trug für
TORRENS' ACT.**

Central-Committee in Adelaide:

F. S. C. W. Krichauff, M. P., Präsident.

G. M. Cotton, Vice-Präsident.

W. S. Douglas, J. P.

H. S. Anthony, Esq.

F. Wright, Esq.

Central-Office:

Queen's Chambers, Pirie-Street.

Secretair: Ulrich Hübbe, Dr. juris.

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Die Statuten dieses Vereins, mit dem
Motto: „Nimmer rückwärts“, liegen zur
gefälligen Einsicht im Office dieses Blattes.

(The Real Property Act was in fact, as one of its greatest champions among the German community stated in Parliament, ‘generally known among the Germans as “Torrens’s Act”’).⁵⁸ At a public meeting in 1874 to discuss the proposed amendment/consolidation of the Real Property Act, Dr Hübbe moved a motion complaining that the Bill then before Parliament would, among other things, ‘wholly abolish some of the plainest and most beneficial portions of Torrens’s Act’.⁵⁹

Conclusion

As can be seen from the statute book of the present day, within a few short years the pro-consolidation forces achieved the enactment of the Real Property Act 1886.⁶⁰ When the Bill for that Act was introduced into Parliament, the government proposed that the short title of that Act should be ‘Torrens’ Act’; but to the ‘Register’ this was a mistake, for:

⁵⁸ South Australian Parliamentary Debates, House of Assembly, 21 October 1885, col 1229. And indeed this moniker, as distinct from ‘Torrens system’, may be found within a fortnight of assent to the Act: *Register*, 6 February 1858, p 3.

⁵⁹ *Register*, 8 October 1874, p 7.

⁶⁰ The Attorney-General was careful to state that certain land brokers had been involved in drafting the Bill for the new Act; it was not done by lawyers alone: South Australian Parliamentary Debates, House of Assembly, 9 August 1886, col 141.

to one unfamiliar with the history of South Australia it conveys no idea of the scope of the measure. On the other hand the name of Torrens is already so well identified in this colony's real property legislation that there is no need to seek to perpetuate it by an unusual and an inconvenient departure from the ordinary method of naming Acts of Parliament.⁶¹

Had it been adopted, the startling breach of convention inherent in the tribute of officially naming a statute 'Torrens' Act' — even more startling than it would be now — might, however, have saved later historians 'unfamiliar with the history of South Australia' from gross error.

One so minded could nevertheless no doubt demonstrate with ease that Dr Hübbe's express denial in April 1874 of originating the Torrens system only further confirms that the system was entirely his, passed off on the world as something else by a fraudulent Torrens. The starting point for such an argument would no doubt be the grand conspiracy to cover up the true German source which some of Dr Hübbe's acolytes have so risibly postulated.

But when such a clear denial is found, and it is confirmed by the reams of extraneous evidence brought forward before it was discovered, and in addition the single statement to the contrary made 10 years later (but not published for another 50) is exposed as the exaggeration it so clearly was, then the view that Dr Hübbe introduced Hamburg's system of lands titles registration to South Australia, and that there was a transplant or reception of that system, must henceforth be regarded as finally disposed of and outside the realm of serious historical scholarship. If such vast stores of evidence up to and including an express denial by the supposed originator himself that is corroborated by numerous other facts does not suffice to convince, then we must be dealing with a theory that is not susceptible of disproof by any evidence at all.

How far Dr Hübbe was involved in the development of the Torrens system, short — well short — of being the originator, will never be capable of precise quantification.⁶² Torrens, as we know — for he himself pointed it out⁶³ — had a large circle of advisors, which Dr Hübbe joined once his existence had been discovered in about May 1857. I suspect it is true that Dr Hübbe 'spent several days in remodelling the whole draft [of the Bill]. He submitted his alterations to Sir Robert Torrens, and at interviews with him it was decided whether they should be accepted or not.'⁶⁴ It need hardly be said that this claim does not suggest anything even remotely approaching a reception or transplant, and so much of the Merchant Shipping Act 1854 (Imp) is left in the Act of January 1858 that it is clear that that basic source was never abandoned in favour of Hamburg.

We do not know what Dr Hübbe's suggestions actually were, nor does he tell us — so perhaps nothing earth-shaking was proposed, or at least accepted;⁶⁵ we also do not know the extent to which Torrens agreed with the

61 *Register*, 28 August 1885, p 4. See further South Australia Parliamentary Debates, House of Assembly, 21 October 1885, col 1230.

62 Robinson, above n 38, p 80, comes to the same conclusion after a most impressive analysis of the detail of the Bills.

63 *Register*, 6 February 1858, p 3; Taylor, above n 1, at 273ff.

64 See above n 28. There is a much briefer and more ambiguous reference to Dr Hübbe's draughtsmanship in *Register*, 19 June 1884, p 5.

65 I have previously concluded that restoring mortgages as charges only rather than transfers of

suggestions or whether they then survived the consideration of the Bill by Parliament. To Dr Hübbe's services in commenting on the draft Bill alongside many others must also be added his public advocacy for reform based on the principles he recognised in the Bill as coincidentally similar to those of Hamburg — and his work of 1857, the *Voice of Reason*, was probably where his greater service lay. Dr Hübbe was right to give an honourable mention to that work in his letter of April 1874, but there is no evidence at all to support his further hopeful assertion in that letter that he might have sown the seeds of change in earlier conversations with unnamed people; indeed, had that been the case no-one would have started a reform campaign, as he tells us they did, without first seeking him out, and the very request to Dr Hübbe, once he had made his existence known, to write his *Voice of Reason* would scarcely have been necessary. There are, furthermore, many others who were agitating on the topic of land conveyancing reform;⁶⁶ there is no need whatsoever to look to Dr Hübbe as the sole possible source of such agitation. Certainly a transplant or reception of Hanseatic law never occurred, as we now find Dr Hübbe himself now confirming.

the fee simple is an idea that might well have come from Dr Hübbe, but that this was not an essential principle of the Act: above n 1, at 262.

⁶⁶ For example, a storekeeper by the name of Bryant is said to have suggested the idea of Torrens of making conveyancing reform a central part of his election platform: Taylor, above n 1, at 266 n 75.